**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

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| ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER,<br><br>Plaintiff,<br><br>v.<br><br>KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1,<br><br>Defendants. | Civ. Action No. 2:16-cv-00943-PP<br>Judge Pamela Pepper |

**APPENDIX TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT**

Pursuant to Local Rule 7(j)(2), Plaintiff submits copies of the following unpublished or unreported authorities cited in Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss Complaint [Dkt. 19]:

1. *Hively v. Ivy Tech Cmty. Coll.*, --- F.3d ----, 2016 WL 4039703 (7th Cir. July 28, 2016)

2. *Lusardi v. McHugh*, EEOC Appeal No. 012013395, 2015 WL 1607756 (EEOC Apr. 1, 2015)

3. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015)

4. *State of Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016)

In addition, the decision in *Carcaño v. McCrory*, 1:16-cv-236 (M.D.N.C. Aug. 26, 2016), was attached to Plaintiff's Memorandum of Law as Exhibit A [Dkt. 19-1].

Dated: August 26, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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** Application for admission to this Court to follow*

2016 WL 4039703
United States Court of Appeals,
Seventh Circuit.

Kimberly Hively, Plaintiff–Appellant,
v.
Ivy Tech Community College, South Bend, Defendant–Appellee.

No. 15-1720
|
Argued September 30, 2015
|
Decided July 28, 2016

**Synopsis**

**Background:** Part-time adjunct professor brought action against community college, alleging she was denied fulltime employment and promotions based on sexual orientation in violation of Title VII. The United States District Court for the Northern District of Indiana, Rudy Lozano, J., granted college's motion to dismiss. Professor appealed.

**[Holding:]** The Court of Appeals, Rovner, Circuit Judge, held that claims for sexual orientation were not cognizable under Title VII.

Affirmed.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:14-cv-1791—**Rudy Lozano**, *Judge*.

**Attorneys and Law Firms**

Gregory R. Nevins, Attorney, Lambda Legal Defense & Education Fund, Atlanta, GA, for Plaintiff–Appellant.

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Before Bauer, Ripple, and Rovner, Circuit Judges.

**Opinion**

Ripple, Circuit Judge, joins the judgment of the court and joins Parts I and IIA of the panel's opinion.

Rovner, Circuit Judge.

***1** Once again this court is asked to consider whether Title VII of the Civil Rights Act of 1964 protects employees from or offers redress for discrimination based on sexual orientation. This time, however, we do so in the shadow of a criticism from the Equal Employment Opportunity Commission (EEOC) that this court and others have continued to reflexively declare that sexual orientation is not cognizable under Title VII without due analysis or consideration of intervening case law. The EEOC's criticism has created a groundswell of questions about the rationale for denying

sexual orientation claims while allowing nearly indistinguishable gender non-conformity claims, which courts have long recognized as a form of sex-based discrimination under Title VII. After a careful analysis of our precedent, however, this court must conclude that Kimberly Hively has failed to state a claim under Title VII for sex discrimination; her claim is solely for sexual orientation discrimination which is beyond the scope of the statute. Consequently, we affirm the decision of the district court.

## I.

Hively began teaching as a part-time adjunct professor at Ivy Tech Community College in 2000. On December 13, 2013, she filed a bare bones pro se charge with the Equal Employment Opportunity Commission (EEOC) claiming that she had been "discriminated against on the basis of sexual orientation" as she had been "blocked from fulltime [sic] employment without just cause," in violation of Title VII. (Short Appendix to Appellant's Brief, 5). After exhausting the procedural requirements in the EEOC, she filed a complaint, again pro se, in the district court alleging that although she had the necessary qualifications for full-time employment and had never received a negative evaluation, the college refused even to interview her for any of the six full-time positions for which she applied between 2009 and 2014, and her part-time employment contract was not renewed in July 2014. In short, she alleged that she had been "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII, 42 U.S.C. §§ 2000e et seq.

The college's defense in both the district court and on appeal is simply that Title VII does not apply to claims of sexual orientation discrimination and therefore Hively has made a claim for which there is no legal remedy. The district court agreed and granted Ivy Tech's motion to dismiss. *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14–CV–1791, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015).

## II.

### A.

This panel could make short shrift of its task and affirm the district court opinion by referencing two cases (released two months apart), in which this court held that Title VII offers no protection from nor remedies for sexual orientation discrimination. *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000). Title VII makes it "unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e–2. This circuit, however, in both *Hamner* and *Spearman*, made clear that "harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII." *Hamner*, 224 F.3d at 704; *Spearman*, 231 F.3d at 1084 (same). Both *Hamner* and *Spearman* relied upon our 1984 holding in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) in which this court, while considering the Title VII claim of a transsexual airline pilot, stated in dicta that "homosexuals and transvestites do not enjoy Title VII protection." *Id.* at 1084. In *Ulane*, we came to this conclusion by considering the ordinary meaning of the word "sex" in Title VII, as enacted by Congress, and by determining that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Id.* at 1085. We also considered the legislative history of Title VII, explaining that it was primarily meant to remedy racial discrimination, with sex discrimination thrown in at the final hour in an attempt to thwart adoption of the Civil Rights Act as a whole. *Id.* Therefore, we concluded, "Congress had a narrow view of sex in mind when it passed the Civil Rights Act." *Id.* at 1086. In a later case describing *Ulane*, we said that at the time of *Ulane* "we were confident that Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination, and that discrimination

on the basis of sexual orientation and transsexualism, for example, did not fall within the purview of Title VII." *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997) (citing *Ulane*, 742 F.2d at 1085–86), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). [1]

1 See footnote 2 for an explanation of the abrogation by *Oncale*.

***2** Since *Hamner* and *Spearman*, our circuit has, without exception, relied on those precedents to hold that the Title VII prohibition on discrimination based on "sex" extends only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation. *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 697 (7th Cir. 2014) (citing the holding in *Spearman,* 231 F.3d at 1085); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003) ("The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual's sexual orientation."); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("Title VII does not, however, provide for a private right of action based on sexual orientation discrimination.").

The district court, relying on *Hamner* and two district court cases, thus dismissed Hively's complaint with prejudice. *Hively*, 2015 WL 926015, at *3 (citing *Hamner*, 224 F.3d at 704 ("harassment based solely upon a person's sexual preference or orientation ... is not an unlawful employment practice under Title VII."); *Wright v. Porters Restoration, Inc.*, No. 2:09–CV–163–PRC, 2010 WL 2559877, at *4 (N.D. Ind. June 23, 2010) ("To the extent the Plaintiff may be alleging discrimination based on sexual orientation, the Seventh Circuit has unequivocally held that this type of discrimination is not, under any circumstances, proscribed by Title VII."); and *Hamzah v. Woodmans Food Mkt. Inc.*, No. 13–CV–491–WMC, 2014 WL 1207428, at *2 (W.D. Wis. Mar. 24, 2014) ("[t]o the extent [plaintiff] claims harassment due to his heterosexuality—that is, his sexual orientation, not his sex—he cannot bring a Title VII claim against [the defendant] for these alleged instances of harassment, and the court will dismiss that claim with prejudice.")).

**[1]** We are presumptively bound by our own precedent in *Hamner*, *Spearman, Muhammad, Hamm, Schroeder,* and *Ulane.* "Principles of stare decisis require that we give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling." *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006). Our precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination. That holding is in line with all other circuit courts to have decided or opined about the matter. *See e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (perceived sexual orientation and sexual harassment claim); *Medina v. Income Support Div., New Mexico,* 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) (noting in a case of same-sex harassment that Title VII does not protect against discrimination based on sexual orientation); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (assuming without deciding that Title VII does not cover sexual orientation discrimination); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *but see Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (gay male employee taunted and harassed by coworkers for having feminine traits successfully pleaded claim of sex harassment under Title VII).

***3** Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. [2] Moreover, Congress has not acted to amend Title VII even in the face of an abundance of judicial opinions recognizing an emerging consensus that sexual orientation in the workplace can no longer be tolerated. *See, e.g.*, *Vickers*, 453 F.3d at 764–65 ("While the harassment alleged by [the plaintiff] reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, [the plaintiff's] claim does not fit within the prohibitions of the law"); *Bibby*, 260 F.3d at 265 ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment."); *Simonton,* 232 F.3d at 35 (harassment on the basis of sexual orientation "is

morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace" but "Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation."); *Higgins*, 194 F.3d at 259 (harassment because of sexual orientation "is a noxious practice, deserving of censure and opprobrium" but not proscribed by Title VII); *Rene*, 243 F.3d at 1209, (Hug, J., *dissenting*) (same); *Kay v. Indep. Blue Cross*, 142 Fed.Appx. 48, 51 (3d Cir. 2005) (finding sexual orientation discrimination to be "reprehensible" but not actionable under Title VII); *Silva v. Sifflard*, No. 99–1499, 215 F.3d 1312, 2000 WL 525573, *1 (1st Cir. Apr. 24, 2000) ("Although we do not condone harassment on the basis of perceived sexual orientation, it is not, without more, actionable under Title VII."); *Christiansen v. Omnicom Grp., Inc.*, No. 15 CIV. 3440, 2016 WL 951581, at *12 (S.D.N.Y. Mar. 9, 2016) (finding the conduct "reprehensible," but not cognizable under Title VII). *See also Ulane*, 742 F.2d at 1084 ("While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals, and that the district court's order on this count therefore must be reversed for lack of jurisdiction."). In short, Congress' failure to act to amend Title VII to include sexual orientation is not from want of knowledge of the problem. And as a result, our understanding in *Ulane* that Congress intended a very narrow reading of the term "sex" when it passed Title VII of the Civil Rights Act, so far, appears to be correct.

2 Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non–Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Protecting Civil Rights for all Americans Act of 2001, S. 19, 107th Cong. (2001); Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2002); Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); Employment Non–Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); see also *Ulane*, 742 F.2d at 1085–86 (listing the many failed attempts to amend Title VII to add "sexual orientation" between 1975 and 1982).

**[2]** **[3]** To overcome a motion to dismiss, Hively's complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In this case, Hively fails to thwart the motion to dismiss for the simple reason that this circuit has undeniably declared that claims for sexual orientation are not cognizable under Title VII. Nor are they, without more, cognizable as claims for sex discrimination under the same statute.

**B.**

We could end the discussion there, but we would be remiss not to consider the EEOC's recent decision in which it concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 16, 2015). The EEOC, the body charged with enforcing Title VII, came to this conclusion for three primary reasons. First, it concluded that "sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* at *5 (proffering the example of a woman who is suspended for placing a photo of her female spouse on her desk, and a man who faces no consequences for the same act). Second, it explained that "sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex," in which an employer discriminates against lesbian, gay, or bisexual employees based on who they date or marry. *Id.* at *6–7. Finally, the EEOC described sexual orientation discrimination as a form of discrimination based on gender stereotypes in which employees are harassed or punished for failing to live up to societal norms about appropriate masculine and feminine behaviors, mannerisms, and appearances. *Id.* In coming to these conclusions, the EEOC noted critically that "courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the 'borders [between the two classes] are ... imprecise.' " *Id.* at *8 (quoting *Simonton*, 232 F.3d at 35). The EEOC rejected the argument that the plain language of Title VII, along with Congressional inaction, mandated a conclusion that Title VII does not prohibit such discrimination. Instead, the EEOC noted that even the Supreme Court, when applying Title VII's prohibition on "sex" discrimination to same-sex sexual harassment, stated 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*, 523 U.S. at 79, 118 S.Ct. 998.

***4** This July 2015 EEOC decision is significant in several ways. It marks the first time that the EEOC has issued a ruling stating that claims for sexual orientation discrimination are indeed cognizable under Title VII as a form of sex discrimination. Although the holding in *Baldwin* applies only to federal government employees, its reasoning would be applicable in private employment contexts too. And although the rulings of the EEOC are not binding on this court, they are entitled to some level of deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Gibson v. Brown*, 137 F.3d 992, 995–96 (7th Cir. 1998), *vacated, W. v. Gibson*, 527 U.S. 212, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999). Based on our holding today, which is counter to the EEOC's holding in *Baldwin*, we need not delve into a discussion of the level of deference we owe to the EEOC's rulings. Whatever deference we might owe to the EEOC's adjudications, we conclude for the reasons that follow, that Title VII, as it stands, does not reach discrimination based on sexual orientation. Although we affirm our prior precedents on this point, we do so acknowledging that other federal courts are taking heed of the reasoning behind the EEOC decision in *Baldwin*. As we will discuss further below, the district courts, which are the front line experimenters in the laboratories of difficult legal questions, are beginning to question the doctrinaire distinction between gender non-conformity discrimination and sexual orientation discrimination and coming up short on rational answers.

In the process of concluding, after thorough analysis, that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex, the EEOC criticized courts—and pointed particularly to this circuit—that "simply cite earlier and dated decisions without any additional analysis" even in light of the relevant intervening Supreme Court law. *Baldwin*, 2015 WL 4397641, at *8 n.11. We take to heart the EEOC's criticism of our circuit's lack of recent analysis on the issue. Moreover, recent legal developments and changing workplace norms require a fresh look at the issue of sexual orientation discrimination under Title VII. We begin, therefore, with that intervening Supreme Court case— *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)—and discuss its implication for distinguishing between gender non-conformity claims, which are cognizable under Title VII, and sexual orientation claims, which are not. *See Hamm*, 332 F.3d at 1065 n.5.

**C.**

As far back as 1989, the Supreme Court declared that Title VII protects employees who fail to comply with typical gender stereotypes. *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775. In *Price Waterhouse*, when Ann Hopkins failed to make partner in the defendant accounting firm, the partners conducting her review advised her that her chances could be improved the next time around if she would, among other gender-based suggestions, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235, 109 S.Ct. 1775. The Supreme Court declared that this type of gender stereotyping constituted discrimination on the basis of sex in violation of Title VII, stating,

> [a]s for the legal relevance of sex stereotyping, 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.

*Id.* at 251, 109 S.Ct. 1775 (internal citations omitted).

The holding in *Price Waterhouse* has allowed many employees to marshal successfully the power of Title VII to state a claim for sex discrimination when they have been discriminated against for failing to live up to various gender norms. *See, e.g.*, *City of Belleville*, 119 F.3d at 580, 582 (finding that a worker who wore an earring and was habitually called "fag" or "queer" made a sufficient allegation of gender-based discrimination to defeat a motion for summary judgment);[3] *Bellaver v. Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000) ("the evidence suggests the employer here may have relied on impermissible stereotypes of how women should behave" by criticizing plaintiff's deficient interpersonal skills while tolerating the same deficiencies in male employees.).

3 The Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), nominally abrogated the decision in *City of Belleville*, but nothing in the Supreme Court's decision in *Oncale* called into question this circuit's holding regarding gender stereotypes and application of the *Price Waterhouse* holding. *See Bibby*, 260 F.3d at 263 n.5 ("Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question.").

***5** As a result of *Price Waterhouse*, a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity (which we also refer to, interchangeably, as sex stereotype discrimination) and not sexual orientation. But these claims tended to be successful only if those employees could carefully cull out the gender non-conformity discrimination from the sexual orientation discrimination. *See Hamm*, 332 F.3d at 1065 (upholding the grant of summary judgment in the employer's favor because the plaintiff "himself characterizes the harassment of his peers in terms of ... his sexual orientation and does not link their comments to his sex."). When trying to separate the discrimination based on sexual orientation from that based on sex stereotyping, however, courts soon learned that the distinction was elusive. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) ("the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) ("it is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these" because "the borders [between these classes] are so imprecise."); *Centola v. Potter*, 183 F.Supp.2d 403, 408 (D. Mass. 2002) ("the line between discrimination because of

sexual orientation and discrimination because of sex is hardly clear."); *Hamm*, 332 F.3d at 1065 n.5 ("We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes."); *Id.* at 1067 (Posner, J., concurring) ("Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter.").

And so for the last quarter century since *Price Waterhouse*, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination, which can form the basis of a legal claim under *Price Waterhouse's* interpretation of Title VII, and sexual orientation discrimination, which is not cognizable under Title VII. As one scholar has stated, "The challenge facing the lower courts since *Price Waterhouse* is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender." Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 726 (2014). As we will describe below, courts have gone about this task in different ways—either by disallowing any claims where sexual orientation and gender non-conformity are intertwined, (and, for some courts, by not allowing claims from lesbian, gay, or bisexual employees at all), or by trying to tease apart the two claims and focusing only on the gender stereotype allegations. In both methods, the opinions tend to turn circles around themselves because, in fact, it is exceptionally difficult to distinguish between these two types of claims. Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men. In this way, almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity. Gay men face discrimination if they fail to meet expected gender norms by dressing in a manner considered too effeminate for men, by displaying stereotypical feminine mannerisms and behaviors, by having stereotypically feminine interests, or failing to meet the stereotypes of the rough and tumble man. Co-workers and employers discriminate against lesbian women for displaying the parallel stereotypical male characteristics. But even if those employees display no physical or cosmetic signs of their sexual orientation, lesbian women and gay men nevertheless fail to conform to gender norm expectations in their attractions to partners of the same sex. Lesbian women and gay men upend our gender paradigms by their very status—causing us to question and casting into doubt antiquated and anachronistic ideas about what roles men and women should play in their relationships. Who is dominant and who is submissive? Who is charged with earning a living and who makes a home? Who is a father and who a mother? In this way the roots of sexual orientation discrimination and gender discrimination wrap around each other inextricably. In response to the new EEOC decision, one court has bluntly declared that the lines are not merely blurry, but are, in fact, un-definable. *See Videckis v. Pepperdine Univ.*, No. CV1500298, 2015 WL 8916764, at *6 (C.D. Cal. Dec. 15, 2015) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct.") Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.

***6** For example, some courts attempting to differentiate between actions which constitute discrimination on the basis of sexual orientation and those which constitute discrimination on the basis of gender non-conformity essentially throw out the baby with the bathwater. For those courts, if the lines between the two are not easily discernible, the right answer is to forego any effort to tease apart the two claims and simply dismiss the claim under the premise that "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." *See, e.g.*, *Dawson*, 398 F.3d at 218 (citing *Simonton*, 232 F.3d at 38). In *Dawson*, a lesbian hair salon assistant alleged that she was discriminated against because she did not conform to feminine stereotypes and because she was gay. *Id.* at 217. The court expressed concern that the plaintiff had "significantly conflated her claims," and because the court could not discern whether the allegedly discriminatory acts were motivated by animus toward her gender or her sexual orientation, it deemed the acts beyond the scope of Title VII and upheld the motion for summary judgment in the salon's favor. *Id.* Several other courts

likewise have thrown up their hands at the muddled lines between sexual orientation and gender non-conformity claims and simply have disallowed what they deem to be "bootstrapping" of sexual orientation claims onto gender stereotyping claims. For example, in *Vickers*, 453 F.3d at 764, the Sixth Circuit upheld the dismissal of a gender nonconformity claim brought by an employee whose co-workers perceived him to be gay, because recognition of that claim

> would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.

*Id. See also*, *Simonton*, 232 F.3d at 38 (noting that the *Price Waterhouse* theory could not allow plaintiffs to "bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."); *Spearman*, 231 F.3d at 1085–86 (ignoring the plaintiff's claim that he was discriminated against because his co-workers perceived him to be too feminine to fit into the male image of the company, and finding instead that the discriminatory comments were directed solely at the plaintiff's sexual orientation); *Magnusson v. Cty. of Suffolk*, No. 14CV3449, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) ("Sexual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here."); *Burrows v. Coll. of Cent. Florida*, No. 5:14–CV–197–OC–30, 2015 WL 4250427, at *9 (M.D. Fla. July 13, 2015) ("Plaintiff's claim, although cast as a claim for gender stereotype discrimination, is merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII."); *Evans v. Georgia Reg'l Hosp.*, No. CV415–103, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) ("Evans' allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a 'gender conformity' claim, because it rests on her sexual orientation no matter how it is otherwise characterized."), *report and recommendation adopted*, No. CV415–103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015); *Pagan v. Holder*, 741 F.Supp.2d 687, 695 (D.N.J. 2010) ("This is a hollow attempt to amend the Complaint through briefing and recast a sexual orientation claim as a gender stereotyping claim."), *aff'd, Pagan v. Gonzalez*, 430 Fed.Appx. 170 (3d Cir. 2011).

This line of cases, in which the gender non-conformity claim cannot be tainted with any hint of a claim that the employer also engaged in sexual orientation discrimination, leads to some odd results. As the concurrence in this circuit's decision in *Hamm* pointed out, "the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals." *Hamm*, 332 F.3d at 1067 (Posner, J. concurring). And the concurrence was not merely crying wolf. At least one district court has taken the anti-bootstrapping pronouncements in *Dawson* and *Simonton*, *supra* and declared that when determining whether a claim for gender nonconformity can stand, "the critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a *heterosexual*, then a gender-stereotyping claim by that individual is possible." *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., No.*, 715CV0484, 2016 WL 945350, at *8 (N.D.N.Y. Mar. 14, 2016) (internal citations omitted, emphasis in original). [4] In this circuit, however, we have made it clear that "Title VII protects persons, not classes" and that anyone can pursue a claim under Title VII no matter what her gender or sexual orientation or that of her harasser. *City of Belleville*, 119 F.3d at 574, 575, 588 ("[w]e have never made the viability of sexual harassment claims dependent upon the sexual orientation of the harasser, and we are convinced that it would be both unwise and improper to begin doing so."); *see also Prowel*, 579 F.3d at 289 ("This does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII, which plainly prohibits discrimination 'because of sex.' "). Our intuition was confirmed by the Supreme court in *Oncale*, which held that same-sex sexual harassment does not depend on the sexual orientation of the harasser. *Oncale*, 523 U.S. at 80, 118 S.Ct. 998 ("harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.") It is hard to reconcile the holding in *Oncale* with a legal theory that only non-gay plaintiffs can have a viable claim for gender non-conformity discrimination

under Title VII. And in this circuit, at least, it is clear that "we do not focus on the sexuality of the plaintiff in determining whether a Title VII violation has occurred." *Hamm*, 332 F.3d at 1065.

4 The plaintiff in *Estate of D.B. by Briggs* brought a claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, et seq., but "because a Title IX sex discrimination claim is treated in much the same way as a Title VII sex discrimination claim, Title VII jurisprudence therefore applies." *Estate of D.B.*, 2016 WL 945350, at *8 (citing *Papelino v. Albany College of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011)).

***7** Other courts address the problem of the ill-defined lines between sexual orientation and gender non-conformity claims by carefully trying to tease the two apart and looking only at those portions of the claim that appear to address cognizable gender non-conformity discrimination.[5] *See, e.g. EEOC v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 457–59 (5th Cir. 2013) (sustaining a jury verdict finding sex discrimination by emphasizing the very specific testimony isolating gender-based discrimination from sexual orientation). But because of the indeterminate boundaries, one is left to wonder whether the court has, in fact successfully separated the two claims. For example, in *Prowel*, a factory worker who described himself both as gay and effeminate succeeded in defeating summary judgment by proffering just enough evidence of harassment based on gender stereotypes, as opposed to that based on sexual orientation, to satisfy the court that the claim might succeed. *Id.* 579 F.3d 291–92. Notably, Prowel succeeded because he convinced the court that he displayed stereotypically feminine characteristics by testifying that he had a high voice, did not curse, was well-groomed, neat, filed his nails, crossed his legs, talked about art and interior design, and pushed the buttons on his factory equipment "with pizzazz." *Id.* The Third Circuit concluded that a jury could find that "Prowel was harassed because he did not conform to [his employer's] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation." *Id.* at 292. But it is not at all clear that the court successfully segregated characteristics based on sexual orientation from those based on gender, or if such a task is even possible. Having a high voice and an interest in grooming, art, interior design and civil language, are not merely attributes associated with women, but also attributes stereotypically associated with gay men. So for purposes of Title VII, should a court deem that pushing a factory button "with pizzazz" is a trait associated with gay men or straight women? It is difficult to know. We can assume that the vast majority of the stereotypes of gay men have come about particularly because they are associated with feminine attributes. The attempts to identify behaviors that are uniquely attributable to gay men and lesbians often lead to strange discussions of sexual orientation stereotypes. For example, one district court concluded that mimicking a gay co-worker with a lisp and "flamboyant" voice is discrimination based solely on sexual orientation and not gender. *Anderson v. Napolitano*, No. 09–60744–CIV, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010). "[T]he logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp. Lisping is not a stereotype associated with women. Thus, again, the coworkers' actions were not "because of sex," but because of Anderson's sexual orientation" *Id.*

5 Some of these courts go half a step further and articulate that the sexual orientation claim has no effect whatsoever on the gender non-conformity claim. *See Rene,* 305 F.3d at 1063 ("an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment."); *Centola*, 183 F.Supp.2d at 409–10 ("Centola does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment ... if Centola can demonstrate that he was discriminated against 'because of ... sex' as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.").

Nevertheless, although disentangling gender discrimination from sexual orientation discrimination may be difficult, we cannot conclude that it is impossible. There may indeed be some aspects of a worker's sexual orientation that create a target for discrimination apart from any issues related to gender. Harassment may be based on prejudicial or stereotypical ideas about particular aspects of the gay and lesbian "lifestyle," including ideas about promiscuity, religious

beliefs, spending habits, child-rearing, sexual practices, or politics. Although it seems likely that most of the causes of discrimination based on sexual orientation ultimately stem from employers' and co-workers' discomfort with a lesbian woman's or a gay man's failure to abide by gender norms, we cannot say that it must be so in all cases. Therefore we cannot conclude that the two must necessarily be coextensive unless or until either the legislature or the Supreme Court says it is so.

Because we recognize that Title VII in its current iteration does not recognize any claims for sexual orientation discrimination, this court must continue to extricate the gender nonconformity claims from the sexual orientation claims. We recognize that doing so creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination. *See, e.g.*, *Rene*, 305 F.3d at 1068 (gay male employee taunted and harassed by co-workers for having feminine traits successfully pleaded claim of sex discrimination under Title VII); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (noting that the abuse directed at plaintiff reflected a belief that he did not act as a man should act—he had feminine mannerisms, did not have sex with a female friend, and did not otherwise conform to gender-based stereotypes—and thus the discrimination was closely linked to gender and therefore actionable under Title VII); *Reed v. S. Bend Nights, Inc.*, 128 F.Supp.3d 996, 1001 (E.D. Mich. 2015) (lesbian employee "put forth sufficient evidence in support of her allegation that she was discriminated against because she did not conform to traditional gender stereotypes in terms of her appearance, behavior, or mannerisms at work," where her supervisor testified that she "dressed more like a male" and her " 'demeanor' was a 'little more mannish.' "); *Koren v. Ohio Bell Tel. Co.*, 894 F.Supp.2d 1032, 1038 (N.D. Ohio 2012) (gay man alleged sufficient facts to support a claim of sex discrimination based on his failure to comply with gender norms where he changed his last name to his husband's and his employer refused to call him by his new name); *Centola*, 183 F.Supp.2d at 410 (concluding that plaintiff's coworkers must have surmised that the plaintiff was gay because they found him to be effeminate); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1217-20 (D. Or. 2002) (holding that a jury could find that the employer repeatedly harassed, and ultimately discharged, the plaintiff because she did not conform to the employer's stereotype of how a woman ought to behave, both because she dated other women and because she wore male-styled clothing).

***8** Plaintiffs who do not look, act, or appear to be gender non-conforming but are merely known to be or perceived to be gay or lesbian do not fare as well in the federal courts. In a Sixth Circuit case, for example, the plaintiff, who was not openly gay and, in fact, even in the lawsuit "declined to reveal whether or not he [was], in fact, homosexual" could not defeat a motion to dismiss his Title VII claim because

> the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender nonconforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender non-conformity.

*Vickers*, 453 F.3d at 763.

Likewise, in *Bibby*, 260 F.3d at 264, the Third Circuit granted summary judgment against the plaintiff where he "did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers. His claim was, pure and simple, that he was discriminated against because of his sexual orientation." *Id. See also Hamm,* 332 F.3d at 1063–64 (Hamm's claim could not survive a motion for summary judgment where his claim was based on speculation by co-workers that he was gay rather than any specifically alleged gender non-conforming attributes); *Hamner*, 224 F.3d at 705 (upholding judgment as a matter of law for the employer where the plaintiff's discrimination claim was based only on the fact that his employer knew his status as a gay man and "absolutely could not handle that"); *Johnson v. Hondo, Inc.*, 125 F.3d 408, 413–14 (7th

Cir. 1997) (concluding that a slew of gay epithets could not sustain a claim of gender discrimination where there was no evidence that the plaintiff failed to conform to male stereotypes); *Simonton*, 232 F.3d at 38 (holding that a plaintiff could not defeat a motion to dismiss based on a gender non-conformity claim under Title VII where he never set forth any claim that he "behaved in a stereotypically feminine manner."); *Pambianchi v. Arkansas Tech Univ.*, 95 F.Supp.3d 1101, 1114 (E.D. Ark. 2015) ("Sexual orientation alone cannot be the alleged gender nonconforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory."). *But see Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303, 2014 WL 4794527, *2 (D. Ct. Sept. 25, 2014) (allowing claim of lesbian teacher to go forward where the only evidence of gender non-conformity was the fact that she was openly married to a woman because "[c]onstrued most broadly, she has set forth a plausible claim she was discriminated against based on her nonconforming gender behavior."); *Terveer v. Billington*, 34 F.Supp.3d 100, 116 (D.D.C. 2014) (the plaintiff defeated the summary judgment motion by alleging that the defendant denied him promotions and created a hostile work environment because of the plaintiff's failure to conform to male sex stereotypes solely because of his status as a gay man.); *Centola*, 183 F.Supp. at 410 ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do.")

***9** In sum, the distinction between gender non-conformity claims and sexual orientation claims has created an odd state of affairs in the law in which Title VII protects gay, lesbian, and bisexual people, but frequently only to the extent that those plaintiffs meet society's stereotypical norms about how gay men or lesbian women look or act—i.e. that gay men tend to behave in effeminate ways and lesbian women have masculine mannerisms. By contrast, lesbian, gay or bisexual people who otherwise conform to gender stereotyped norms in dress and mannerisms mostly lose their claims for sex discrimination under Title VII, although why this should be true is not entirely clear. It is true that "not all homosexual men are stereotypically feminine and not all heterosexual men are stereotypically masculine" as the Second Circuit explained while defending the exclusion of sexual orientation protection under Title VII. *Simonton*, 232 F.3d at 38. But it is also true, as we pointed out above, that all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.

Because courts have long held that Title VII will not support a claim for sexual orientation discrimination per se, many courts have been attempting to dress sexual orientation discrimination claims in the garb of gender nonconformity case law, with the unsatisfactory results seen in the confused hodge-podge of cases we detail above. This has led some courts toward a more blunt recognition of the difficulty of extricating sexual orientation claims from gender non-conformity claims. Thus the *Videckis* court's observation, which noted that "[s]imply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct." *Videckis*, 2015 WL 8916764, at *5. This court long ago noted the difficulty and began to grapple with it in a case involving same-sex sexual harassment:

> There is, of course, a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like "fag," for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation. Observations in this vein have led a number of scholars to conclude that anti-gay bias should, in fact, be understood as a form of sex discrimination.

*City of Belleville*, 119 F.3d at 593. We had no need to decide the matter directly in that case because we were satisfied that there was adequate proof that the harassment recounted by the plaintiff was animated by his failure to conform to stereotypic gender norms. *Id.* at 575 ("One may reasonably infer from the evidence before us that [the plaintiff] was harassed 'because of' his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, [the plaintiff] did not conform to male standards.").

Nevertheless, by noting the overlay between anti-gay bias and sex discrimination we seemed to have anticipated the EEOC's path in *Baldwin,* 2015 WL 4397641, at *10.

Likewise, the Sixth Circuit was on to something when it said, "In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Vickers*, 453 F.3d at 764. The *Vickers* court thought the solution to the inability to segregate sexual orientation from gender non-conformity claims was to deny all gender non-conformity claims where there was also a claim of sexual orientation discrimination. But the other approach could be to recognize the fact that sexual orientation discrimination is, in fact, discrimination based on the gender stereotype that men should have sex only with women and women should have sex only with men. "Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do." *Centola*, 183 F.Supp.2d at 410. As the next paragraph explains, with increasing frequency, the lower courts are beginning to see the false distinction and are turning to this latter approach.

***10** The idea that the line between gender non-conformity and sexual orientation claims is arbitrary and unhelpful has been smoldering for some time, but the EEOC's decision in *Baldwin* threw fuel on the flames. Since the EEOC released its decision in *Baldwin*, stating that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex," *Baldwin*, 2015 WL 4397641, at *10, more and more district court judges have begun to scratch their heads and wonder whether the distinction between the two claims does indeed make any sense. For example, a district court in the Southern District of New York, noting the holding of *Baldwin*, the changing legal landscape, and the arbitrariness of distinguishing between gender based discrimination and sexual orientation discrimination, stated:

> The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims. Yet the prevailing law in this Circuit—and, indeed, every Circuit to consider the question—is that such a line must be drawn. *Simonton* is still good law, and, as such, this Court is bound by its dictates.

*Christiansen*, 2016 WL 951581, at *14 ("Title VII does not proscribe discrimination because of sexual orientation") (citing *Simonton*, 232 F.3d at 36). And as we just noted above, the Eastern District of Virginia has concluded that

> the distinction [between sexual orientation discrimination and gender discrimination] is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and Title IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.

*Videckis*, 2015 WL 8916764, at *5. Likewise, several other district courts have indicated their agreement with the EEOC's decision in *Baldwin,* or, at least recognized that the blurring line between gender and sexual orientation claims might require courts to reconsider the long line of precedent distinguishing them. *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190, 1193 (M.D. Ala. 2015) ("This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII."); *Koke v. Baumgardner*, No. 15–CV–9673, 2016 WL 93094, at *2 (S.D.N.Y. Jan. 5, 2016) ("Given the door left ajar by *Simonton* for claims based on 'failure to conform to sex stereotypes,' the EEOC's recent holding that Title VII prohibits discrimination on the basis of sexual orientation, and the lack of a Supreme Court ruling on whether Title VII applies to

such claims, I cannot conclude, at least at this stage, that plaintiff's Title VII claim is 'wholly insubstantial and frivolous.' ").

In short, the district courts—the laboratories on which the Supreme Court relies to work through cutting-edge legal problems—are beginning to ask whether the sexual orientation-denying emperor of Title VII has no clothes. *See Arizona v. Evans*, 514 U.S. 1, 23, n.1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (Ginsburg, J. dissenting) (1995) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.")

While this eddy of statutory Title VII sexual orientation decisions has been turning in the lower federal courts, the Supreme Court has been expounding upon the rights of lesbian, gay, and bisexual persons in a constitutional context. Of course, these constitutional cases have no direct bearing on the outcome of litigation under Title VII of the Civil Rights Act, but they do inform the legal landscape that courts face as they interpret "because of sex" in Title VII. In 1996 in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), for example, the Court invalidated, under the Equal Protection Clause, an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Next, in *Lawrence v. Texas*, the Court determined that individuals' rights to liberty under the Due Process Clause gives them the full right to engage in private consensual sexual conduct without intervention of the government. *Id.*, 539 U.S. at 578, 123 S.Ct. 2472 (2003). Then, in 2013, the Supreme Court struck down the Defense of Marriage Act (DOMA), finding that it violated the equal protection guarantee of the Fifth Amendment. *United States v. Windsor*, —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). And finally, two years later, the Supreme Court ruled that under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples had the right to marry in every state of the Union. *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2696, 192 L.Ed.2d 609 (2015). We emphasize yet again that none of these cases directly impacts the statutory interpretations of Title VII. The Supreme Court neither created Title VII nor was required to address any issues regarding employment discrimination in considering the issues it chose to address. The role of the Supreme Court is to interpret the laws passed by Congress. And, in fact, in *Obergefell*, one amicus brief urged the Court to view the same sex marriage debate through the lens of gender discrimination arguing that the state's permission to marry depends on the gender of the participants. *Brief Amicus Curiae of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley and Ilya Somin, Obergefell v. Hodges*, 2015 WL 1048436, *4 (U.S. 2015). In oral arguments Chief Justice John Roberts delved into this realm of questioning wondering whether "if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?" Transcript of oral argument at 62:1-4 *Obergefell*, 135 S.Ct. at 2584. But despite having considered this option, the Court rejected it for a holding based in the Fourteenth Amendment. The Court did not address the issue of gender nor of workplace discrimination.

***11** The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does not reach sexual orientation discrimination, also allows employers to fire that employee for doing so. From an employee's perspective, the right to marriage might not feel like a real right if she can be fired for exercising it. Many citizens would be surprised to learn that under federal law any private employer can summon an employee into his office and state, "You are a hard-working employee and have added much value to my company, but I am firing you because you are gay." And the employee would have no recourse whatsoever—unless she happens to live in a state or locality with an anti-discrimination statute that includes sexual orientation. More than half of the United States, however, do not have such state protections: Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming. [6] Moreover, the truth of this scenario would also apply to perceived sexual orientation. And so, for example, an employer who merely has a hunch that an employee is gay can

terminate that employee for being gay whether or not she actually is. And even if the employer is wrong about the sexual orientation of the non-gay employee, the employee has no recourse under Title VII as the discharge still would be based on sexual orientation.

6 States with laws that prohibit sexual orientation discrimination in employment: *California*: Ca. Gov't. Code §§ 12920, 12940, 12926 & 12949; *Colorado*: Colo Rev. Stat. § 24–34–401, et seq.; *Connecticut*: Conn. Gen. Stat. sec. 46a–81c(1); *Delaware*: 19 Del. C. § 711; *Hawaii*: Haw. Rev. Stat. Ann. §§ 368–1, 378-2; *Illinois*: 775 ILCS 5/1–103 & 775 ILCS 5/1–102; *Iowa*: Iowa Code Ann. 216.2(14), 216.6; *Maine*: Me. Rev. Stat. Tit. 5 § 4571, § 4572, § 4553 9-C; *Maryland*: Md. Code Ann., State Gov't § 20–606; *Massachusetts*: Mass. Gen. Laws Ch. 151B, § 3(6), § 4; *Minnesota*: Minn. Stat. Ann. § 363A.02, § 363A.08; *Nevada*: Nev. Rev. Stat. Ann. §§ 613.330, 610.185, 613.340, 613.405, & 338.125; *New Hampshire*: N.H. Rev. Stat. Ann. §§ 354–A:6, 354–A:7; *New Jersey*: N.J. Stat. §§ 10:5–3, 10:5–4, 10:5–12; *New Mexico*: N.M. Stat. § 28–1–7; *New York:* N.Y. Exec. Law § 296; *Oregon*: Or. Rev. Stat. Ann. § 659A.030; *Rhode Island*: 28 R.I. Gen. Laws §§ 28–5–5, 28–5–7; *Utah*: Utah Code Ann. § 34A–5–106; *Vermont*: Vt. Stat. Ann. tit. 21, § 495; *Washington*: Wash. Rev. Code Ann. §§ 49.60.030 49.60.010, 49.60.040; *Wisconsin*: Wis. Stat. Ann. §§ 111.31, 111.36, 111.325.

The following states have sexual-orientation discrimination protections for government employees only, but not private employees: *Alaska*: Alaska Admin. Order 195; *Arizona*: Executive Order 2003-22; *Indiana*: Indiana Governor Mitch Daniel's Policy statement of 4-26-05; *Kentucky*: Kentucky Executive Order 2003-533; *Louisiana*: Executive Order No. JBE 2016–11, Governor of Louisiana, 13 April 2016; *Michigan*: Michigan Executive Directive, No. 2003-24; *Missouri:* Executive Order 10-24; *Montana*: Montana Executive Order No. 41-2008; *North Carolina:* Executive Order 93 (2016); *Ohio*: Executive Order 2011-05K; *Pennsylvania*: Executive Order No. 2003-10; *Virginia:* Executive Order 1 (2014).

In one sense, the paradox is not our concern. Our task is to interpret Title VII as drafted by Congress, and as we concluded in *Ulane*, Title VII prohibits discrimination only on the basis of gender. *Id.*, 742 F.2d at 1085. If we, and every other circuit to have considered it are wrong about the interpretation of the boundaries of gender discrimination under the "sex" prong of Title VII, perhaps it is time for the Supreme Court to step in and tell us so.

As things stand now, however, our understanding of Title VII leaves us with a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing make up—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman. We are left with a body of law that values the wearing of pants and earrings over marriage. It seems likely that neither the proponents nor the opponents of protecting employees from sexual orientation discrimination would be satisfied with a body of case law that protects "flamboyant" gay men and "butch" lesbians but not the lesbian or gay employee who act and appear straight. This type of gerrymandering to exclude some forms of gender-norm discrimination but not others leads to unsatisfying results.

**D.**

***12** In addition to the inconsistent application of Title VII to gender non-conformity, these sexual orientation cases highlight another inconsistency in courts' applications of Title VII to sex as opposed to race. As the EEOC noted in *Baldwin*, when applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race,

such as an interracial marriage or friendship. *Baldwin*, 2015 WL 4397641, at *6. But although it has long been clear that Title VII protects white workers who are discriminated against because they have close associations with African-American partners and vice versa, it has not protected women employees who are discriminated against because of their intimate associations with other women, and men with men.

Since the earliest days of Title VII, the EEOC has taken the position that Title VII, in proscribing race-based discrimination, includes a prohibition on discrimination toward employees because of their interracial associations. *See, e.g., Equal Employment Opportunity Comm'n*, EEOC Dec. No. 76-23 (1975) (Title VII claim properly alleged where job applicant not hired due to his white sister's domestic partnership with an African American). The courts that have considered this question agree: Title VII protects employees in interracial relationships. That is to say, courts have concluded that if a white employee is fired because she is dating or married to an African-American man, this constitutes discrimination on the basis of race. Had she been in a relationship with a white man, she would not have faced the same consequences. The rationale is that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (plaintiff claiming that he suffered an adverse employment action because of his interracial marriage has alleged discrimination as a result of his membership in a protected class under Title VII); *See also Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (collecting cases); *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (white woman dating African-American man), *reh'g en banc granted, opinion vacated on other grounds, Williams v. Wal–Mart Stores, Inc.*, 169 F.3d 215 (5th Cir. 1999), *and opinion reinstated on reh'g, Williams v. Wal–Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (declining to decide whether an employee who advised and counseled African-American co-workers could bring an associational race discrimination claim under Title VII, as it was conceded by the defendant, but noting that other courts have determined that such a claim is available when factually supported); *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 n. 6 (8th Cir. 1994) (agreeing with district court that claim for discrimination based on interracial relationships was cognizable under Title VII, but finding that plaintiff failed to present sufficient evidence to support the claim); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir. 1986) (white man married to African-American woman can state a claim for failure to hire under Title VII); *Whitney v. Greater N. Y. Corp. of Seventh–Day Adventists*, 401 F.Supp. 1363, 1366 (S.D.N.Y.1975) (white woman alleged viable claim of discrimination based on casual social relationship with African-American man); *Gresham v. Waffle House, Inc.*, 586 F.Supp. 1442, 1445 (N.D.Ga. 1984) (holding that plaintiff has stated a claim under Title VII by alleging that she was discharged by her employer because of her interracial marriage to a black man).

***13** The relationship in play need not be a marriage to be protected. A number of courts have found that Title VII protects those who have been discriminated against based on interracial friendships and other associations. *See, e.g.*, *Blanks v. Lockheed Martin Corp.*, 568 F.Supp.2d 740, 744 (S.D. Miss. 2007) (compiling cases in which courts have found viable claims under Title VII where plaintiffs alleged discrimination based on workplace or other associations with members of racial and national origin minority groups); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (noting that a white employee who was also targeted for discrimination was not a good comparator to plaintiff as he was targeted because of his close associations with black friends and co-workers); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 574 (6th Cir. 2000) (advocacy on behalf of women and minorities); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child"); *Drake*, 134 F.3d at 884 (advising and counseling African-American co-workers); *Stacks*, 27 F.3d at 1327 (professional relationship with African-American co-worker); *Whitney*, 401 F.Supp. at 1366 (casual social relationship with African-American).

**[4]** It is also well established that, unlike equal protection claims that apply differing levels of scrutiny depending on the nature of the class, the classifications within Title VII—race, color, religion, sex, or national origin—must all be treated equally. "The statute on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S.

at 244 n. 9, 109 S.Ct. 1775. *See also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n. 10, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment."). Consequently, if Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman, if the same discrimination would not have occurred were she sexually or romantically involved with a man. It is true that Hively has not made the express claim that she was discriminated against based on her relationship with a woman, but that is, after all, the very essence of sexual orientation discrimination. It is discrimination based on the nature of an associational relationship—in this case, one based on gender.

**E.**

**[5]** A court would not necessarily need to expand the definition of "sex discrimination" beyond the narrow understanding of "sex" we adopted in *Ulane,* to conclude that lesbian, gay, and bisexual employees who are terminated for their sexual conduct or their perceived sexual conduct have been discriminated against on the basis of sex. Yet, by failing to conform with both superficial and quintessential gender norms, gay, lesbian, and bisexual employees could be seen as facing discrimination comparable to that which Ann Hopkins faced when her supervisors insisted that she live up to the feminine stereotype the supervisors associated with women. "Congress intended to strike at the *entire* spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775 (emphasis ours). There is no reason to believe that the disparate treatment caused when employees do not live up to the stereotype of how "real" men and women act in their sexual lives should be excluded. As the Supreme Court stated in *Oncale*, "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*, 523 U.S. 75 at 79, 118 S.Ct. 998, 140 L.Ed.2d 201.

***14** Curiously, however, despite *Price Waterhouse* and *Oncale*, the Supreme Court has opted not to weigh in on the question of whether Title VII's prohibition on sex-based discrimination would extend to protect against sexual orientation discrimination. Even in the watershed case of *Obergefell*, when the Court declared that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter," it made no mention of the stigma and injury that comes from excluding lesbian, gay, and bisexual persons from the workforce or subjecting them to un-remediable harassment and discrimination. *Obergefell*, 135 S.Ct. at 2602. Perhaps the majority's statement in *Obergefell* that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society" could be read as a forecast that the Supreme Court might someday say the same thing about locking gay men and lesbians out of the workforce—another "central institution of the Nation's society." *See Id.* at 2602. But, as we noted earlier, in the same-sex marriage case, the Court was presented with the opportunity to consider the question as one of sex discrimination but declined to do so and thus far has declined to take any opportunity to weigh in on the question of sexual orientation discrimination under Title VII.

In addition to the Supreme Court's silence, Congress has time and time again said "no," to every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII. *See Bibby*, 260 F.3d at 261 (compiling rejected legislation to add sexual orientation to Title VII).

**[6]** This circuit has not remained silent on the matter, but rather, as we have described above, our own precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation. We require a compelling reason to overturn circuit precedent. *United States v. Lara–Unzueta*, 735 F.3d 954, 961 (7th Cir. 2013). Ordinarily this requires a decision of the Supreme Court or a change in legislation. *Id.* But it is also true that precedent can be overturned when "the rule has proven to be intolerable simply in defying practical workability ... whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ... or

whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). It may be that the rationale appellate courts, including this one, have used to distinguish between gender non-conformity discrimination claims and sexual orientation discrimination claims will not hold up under future rigorous analysis. It seems illogical to entertain gender non-conformity claims under Title VII where the non-conformity involves style of dress or manner of speaking, but not when the gender non-conformity involves the sine qua non of gender stereotypes—with whom a person engages in sexual relationships. And we can see no rational reason to entertain sex discrimination claims for those who defy gender norms by looking or acting stereotypically gay or lesbian (even if they are not), but not for those who are openly gay but otherwise comply with gender norms. We allow two women or two men to marry, but allow employers to terminate them for doing so. Perchance, in time, these inconsistencies will come to be seen as defying practical workability and will lead us to reconsider our precedent. *Id. See also Obergefell*, 135 S.Ct. at 2603 ("in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.")

***15** Perhaps the writing is on the wall. It seems unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry. The agency tasked with enforcing Title VII does not condone it, (*see Baldwin,* 2015 WL 4397641 at **5, 10); many of the federal courts to consider the matter have stated that they do not condone it (*see*, *e.g., Vickers*, 453 F.3d at 764–65; *Bibby*, 260 F.3d at 265; *Simonton,* 232 F.3d at 35; *Higgins*, 194 F.3d at 259; *Rene*, 243 F.3d at 1209, (Hug, J., *dissenting*); *Kay*, 142 Fed.Appx. at 51; *Silva*, 2000 WL 525573, at *1); and this court undoubtedly does not condone it (*see Ulane*, 742 F.2d at 1084). But writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent, and therefore, the decision of the district court is AFFIRMED.

**All Citations**

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EEOC DOC 0120133395 (E.E.O.C.), 2015 WL 1607756

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

TAMARA LUSARDI, COMPLAINANT,
v.
JOHN M. MCHUGH, SECRETARY, DEPARTMENT OF THE ARMY, AGENCY.

Appeal No. 0120133395
Agency No. ARREDSTON11SEP05574
April 1, 2015

## DECISION

***1** On September 23, 2013, Complainant filed an appeal from the Agency's September 5, 2013, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission accepts the appeal pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission REVERSES the Agency's final decision.

## ISSUE PRESENTED

The issue presented is whether Complainant proved that she was subjected to disparate treatment and harassment based on sex when the Agency restricted her from using the common female restroom, and a team leader (S3) intentionally and repeatedly referred to her by male pronouns and made hostile remarks.

## BACKGROUND [1]

This case concerns allegations of disparate treatment on the basis of sex in the terms and conditions of Complainant's employment and allegations that harassment based on sex subjected Complainant to a hostile work environment. Although Complainant was hired as a civilian employee with the U.S. Army Aviation and Missile Research Development and Engineering Center ("AMRDEC") at Redstone Arsenal in Huntsville, Alabama in 2004, the allegations in this complaint relate only to the period from October 2010 to August 2011 (the ""relevant time period"). Complainant was employed at the AMRDEC Software Engineering Directorate ("SED") under the supervision of S1, the Quality Division Chief. During the relevant time period, however, Complainant was co-located in a separate unit - the Project Management Office, Aircraft Survivability Equipment ("ASE") where she worked as a Software Quality Assurance Lead under the direction of S3, the Software Engineering Lead, who was in turn supervised by S2, the Technical Chief. In August 2011, Complainant returned to her primary job at SED.

*Complainant's Transition and Bathroom Access*

Complainant is a transgender woman. Although Complainant had discussed her gender identity with S1 as early as 2007, she began the process of transitioning her gender presentation/expression in 2010. In April 2010, Complainant obtained a decree from an Alabama court changing her name from one commonly associated with men to one commonly associated with women. At that time, she also requested that the government change her name and sex on all personnel records. The Office of Personnel Management ("OPM") effected those changes on October 13, 2010. This caused Complainant's work e-mail address to reflect her new name.

On October 26, 2010, at the request of S2, Complainant met with S2 and S1 to discuss the process of transitioning from presenting herself as a man to living and working, in conformance with her gender identity, as a woman. At that meeting, Complainant and her supervisors discussed how Complainant would explain her transition to colleagues and the estimated timeline for any medical procedures.

***2** As part of that meeting, they also discussed which bathrooms Complainant would use when she began presenting as a woman. The plan, written in the form of a memorandum from Complainant to management, indicated that Complainant would use a single-user restroom referred to as the "executive restroom" or the "single shot rest room" rather than the multi-user "common women's restroom" until Complainant had undergone an undefined surgery.

S2 testified that in his recollection no one "insisted" that Complainant utilize only the executive restroom but that the plan was mutually crafted by himself, S1, and Complainant. Report of Investigation (ROI), Volume (Vol.) 1, 2323; Transcript of Fact-Finding Conference (TR) 123. According to Complainant, "We agreed up front in order to allow people to become accustomed to me and not feel uncomfortable that I would use the front bathroom for a period of time." ROI Vol. 1, 2223; TR 23. She testified that she agreed to use the executive bathroom for the initial period "[b]ecause I have a good heart and I did believe there were people who might have issues with it and the ability for them to grow comfortable with who I was . . . would have provided it." ROI Vol.1, 2223-2224; TR 23-24. S1 expressed at the time that it was her belief, after consulting with Human Resources, that because Complainant was a woman, she was free to use whichever women's restroom she wanted. ROI Vol. 1, 2224, 2389; TR24, 189.

Regardless of the motivations behind the creation of the transition plan, it apparently had to be "approved" by higher level management. The Deputy Program Manager of the Program Executive Office testified that he made the final decision as to which bathroom Complainant would use. ROI Vol. 1, 2451; TR 251. He stated:

> I made the decision based on the fact that I have a significant number of women in my building who would probably be extremely uncomfortable having an individual, despite the fact that she is conducting herself as a female, is still basically a male, physically.
>
> And that would cause as many problems if more problems [sic] than having the individuals use a private bathroom. I also thought that under the circumstances, a male restroom would be inappropriate. So, that was left [sic] to use the single use bathrooms.

ROI Vol. 1, 2452; TR 252. Additionally, a Lieutenant who supervised S2 testified that Complainant's bathroom access was conditioned on a medical procedure:

[W]e all agreed back then that there was a procedure, operation that was to take place that would essentially signify a complete transformation to a female. . . And that procedure would be the point of where all the bathrooms would be on limits for or within limits for [the Complainant] to use for that point.

ROI Vol. 1, 2491; TR 291.

The transition plan was given final approval by the Deputy Program Manager in early November 2010. Complainant e-mailed the entire staff on November 22, 2010, explaining her situation and indicating that for an initial period, she would use the executive restroom. She began presenting as a woman at work following the Thanksgiving holiday. Complainant regularly used the executive restroom except on three occasions in early 2011. On one occasion, the executive restroom was out of order for several days. On another occasion, the executive restroom was being cleaned. In these incidents, Complainant felt that her only options were to leave the facility to locate a restroom off-site, use the common women's restroom, or use the common men's restroom. She chose to use the restroom associated with her gender. After each incident, Complainant was confronted by S2 who told her she'd been observed using the common women's restroom, that she was making people uncomfortable, and that she had to use the executive restroom until she could show proof of having undergone the "final surgery." ROI Vol. 1, 2245; TR 45.

***3** Complainant testified that in January 2011 when S2 confronted her about using the common women's restroom, she responded, "I am legally female. I used it." ROI Vol. 1, 2229; TR 29.

*Harassment*

During the relevant time period, S3 repeatedly referred to Complainant by her former male name, by male pronouns, and as "sir." Complainant testified that S3 referred to her using these male signifiers on at least seven occasions when he did not correct himself, on four additional occasions when he did correct himself, and, specifically, in a July 2011 e-mail exchange. Complainant stated that S3 referred to her using male signifiers during heated discussions and meetings. S3 made these comments in front of coworkers and contractors and sometimes in front of people who had no prior knowledge of her transition. Complainant did not correct S3 because she did not want to question her supervisor in front of other people. Additionally, Complainant did not correct S3 in private because she felt she "was in enough hot water" and "anything else ... would have gotten [her] kicked out of there." ROI Vol. 1, 2264; TR 64.

S3 admitted to using male signifiers in reference to Complainant even after he was aware of her gender transition, but attempted to excuse his behavior by saying it was not meant in a malicious way and was merely a "slip of the tongue." ROI Vol. 1, 2299-2300; TR 99-100. Complainant acknowledged that there were occasions when S3's usage of male signifiers was merely a "slip of the tongue," but Complainant also believes there were occasions when S3 intentionally used male pronouns to refer to Complainant in order to elicit a response from her. ROI Vol.1, 2299, 285; TR 85. Complainant testified that she could tell S3 used male signifiers during heated discussions or moments of anger because "[h]is veins were popping out of his forehead, his face was red, and he was quite agitated." ROI Vol.1, 2286; TR 86. Complainant also stated that during these exchanges S3's demeanor and body language were ""representative of a negative connotation." ROI Vol. 1, 2275; TR 75.

In July 2011 Complainant and S3 exchanged a series of e-mails regarding Complainant's belief that her team members did not treat her as an equal. In a July 26, 2011 e-mail, in response to Complainant's statement that S3 was on the side of other employees who do not treat her as an equal, S3 responded to Complainant, "Sir, not on anyone's side." ROI Vol. 1, 488. Complainant testified that S3 wrote "sir" in this e-mail out of anger because during their "verbal conversation that ensued after that e-mail ... he was fairly agitated." ROI Vol. 1, 2268; TR 68.

Witness testimony corroborates that during the relevant time period S3 intentionally referred to Complainant by her former male name and as "sir" well after Complainant's November 2010 letter notifying her colleagues of her transition. ROI Vol. 1, 2531; TR 331. Specifically, a witness stated that S3 smirked and giggled in front of others while joking, "What is this, [Complainant's former male name] or [Complainant's name]?" Vol. 1, 2534; TR 334. This witness also testified that Complainant stated she was working in a hostile or uncomfortable environment.

***4** After Complainant's e-mail address changed to reflect her name, but before she began presenting as female, curious coworkers questioned Complainant about the situation. As a result of the questions S2 asked Complainant to "hold down the chatter with people that were inquiring" about her transition. ROI Vol.1, 2222; TR 22.

Complainant testified that, although she did not inform management that she felt she was being subjected to a hostile work environment, she did tell Colonel 2 that there were "some issues." ROI Vol. 1, 2269, TR 69.

*EEO Investigation and Final Agency Decision*

Complainant initiated EEO counselor contact on September 6, 2011, and filed a formal complaint on March 14, 2012, alleging that the Agency subjected her to disparate treatment and a hostile work environment based on sex when the Agency restricted her from using the common female restroom and a team leader (S3) repeatedly referred to her by her

former male name and called her "sir." The Agency accepted the complaint and conducted an investigation, including a fact-finding conference. The Agency issued Complainant a copy of the investigative file and a notice of right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision (FAD). Complainant elected an immediate FAD, which the Agency issued on September 5, 2013.

In its final decision, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged. Specifically, the Agency concluded that it had provided legitimate, non-discriminatory reasons for its requirement that she use the executive restroom, and that Complainant failed to show that the explanations were pretext for unlawful discrimination. The Agency determined that, during a meeting with management, Complainant agreed to use the "single shot" executive restroom until she "had surgery," and that testimony and e-mails between Complainant and management reflected that management was supportive of Complainant and "committed to ensuring [Complainant] would be treated with dignity and respect." Additionally, the Agency concluded that Complainant had not shown that she was subjected to disparate treatment based on sex because Complainant did not tell management that the amenities in the executive restroom were inadequate compared to the common female restroom facility and, therefore, management did not deny her access to equal facilities.

The Agency further determined that, although S2 reminded Complainant about the bathroom access plan she had with management, the comments were not sufficiently severe or pervasive to constitute harassment.

With respect to Complainant's claim that S3 referred to her by male pronouns, names, and titles, the Agency concluded that these were isolated incidents that were not sufficiently severe or pervasive to constitute a hostile work environment.

***5** On September 23, 2013, Complainant filed this appeal of the agency's final decision.

## CONTENTIONS ON APPEAL

Complainant contends that the Agency erred when it found that she failed to show that she was subjected to sex discrimination and harassment. Complainant contends that, by restricting her to the single stall restroom because she is transgender, the Agency changed the terms and conditions of her employment solely based on her sex, in violation of Title VII. Complainant also reiterates her claim that the Agency subjected her to a hostile work environment by allowing S3 to refer to her by a male name and pronouns. Complainant contends that, although S3 claimed that his use of incorrect gender pronouns and names was a "slip of the tongue," S3 only did this in heated exchanges or group settings and in a manner that communicated a derogatory connotation. Complainant maintains that "these daily humiliations and reminders that the Agency did not accept her gender identity created a hostile work environment." Complainant's Brief, p. 10.

In its reply, the Agency requests that we affirm its final decision. The Agency maintains that, taking into account the concerns of Complainant's female co-workers who had known her as male for years, management asked Complainant to use the single-stall restroom in the executive suite, and she agreed to do so until her surgery was "complete." The Agency maintains that there is no law that mandates that agencies allow transgender individuals to use restrooms that are consistent with their gender identity. The Agency further maintains that, if it had been aware of Complainant's concerns about the restroom facilities, arrangements could have been made to accommodate her needs, but it is unclear whether her inability to use a restroom with equivalent amenities constitutes an adverse action. The Agency contends that the record reflects that it was "very supportive of the complainant's transition from male to female," and that Complainant was grateful for her managers' and co-workers' support. Agency Brief, p. 7. The Agency concludes that, in the absence of legal precedent, management worked out a "fair solution" that took into account the concerns of all employees. Id.

## STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Nov. 9, 1999) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

## ANALYSIS AND FINDINGS

*Disparate Treatment: Restroom Facilities*

***6** Title VII states that "[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex." 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1), (2) (making it unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of sex).

To establish a claim of disparate treatment on the basis of sex, a complainant must show the agency took an adverse employment action against the complainant because of the complainant's sex. This can be shown through either direct or indirect evidence.

"Direct evidence" is either written or verbal evidence that, on its face, demonstrates bias and is linked to an adverse action. Pomerantz v. Dep't of Veterans Affairs, EEOC Appeal No. 01990534 (Sept. 13, 2002). Where there is direct evidence of discrimination, there is no need to prove a prima facie case or facts from which an inference of discrimination can be drawn. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Moreover, where the trier of fact finds that there is direct evidence of discrimination, liability is established. Guidance on Recent Developments in Disparate Treatment Theory, No. 915.002, July 14, 1992, Section III; EEOC Compliance Manual § 604.3, "Proof of Disparate Treatment," at 6-7 (June 1, 2006).

Complainant is a transgender individual. "Transgender" is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to that typically associated with the sex to which they were assigned at birth. American Psychological Association, Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression, p. 1 (2011);[2] see also Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes"). "Gender identity" refers to a person's internal sense of being male or female (or, in some instances, both or neither); "gender expression" refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics. Id. In this case, Complainant identified as female and has consistently presented herself as female since at least November 2010.

***7** Complainant alleges that the Agency subjected her to sex discrimination when it treated her differently than other employees because she is transgender. In Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012), the Commission held that discrimination against a transgender individual because that person is transgender is, by definition, discrimination "based on . . . sex," and such discrimination violates Title VII, absent a valid defense. We stated:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." See Schwenk, 204 F.3d [1187] at 1202. This is true regardless

> of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." Price Waterhouse, 490 U.S. at 244.

Macy, EEOC Appeal No. 0120120821.

Here, the Agency acknowledges that Complainant's transgender status was *the* motivation for its decision to prevent Complainant from using the common women's restroom. The Deputy Program Manager testified that the restriction was imposed due to the Agency's belief that a significant number of women in the building would be "extremely uncomfortable having an individual [use the common female restroom because], despite the fact that she is conducting herself as a female, [the individual] is still basically a male, physically." Likewise, the Agency acknowledges that it restricted Complainant from the common women's restroom because of concerns about employee reaction to Complainant as a transgender individual. S1, for example, testified that management limited Complainant to the front executive restroom because it otherwise would have been a "real shocker for everyone in the workplace." This constitutes direct evidence of discrimination on the basis of sex.

The Agency defends its actions in part by pointing out that the Complainant agreed to use the "single shot" restroom while other employees adjusted to her transition. In this case, the "agreement" in question was a one-page memorandum from the Complainant to the management team. It outlined the reasons for Complainant's transition and a tentative list of next steps under the heading ""Path Forward." The first step, starting in mid-November, was for Complainant to start dressing consistent with her gender identity. During this time, her plan said she would "use [the] single shot restroom." The next step, set to occur about a month later, was for Complainant to undergo an undefined """""""""Surgical Procedure" and then put in a request to use the common facility. In accordance with her plan, Complainant used the single-shot restroom in the period following her change in dress. She apparently did not undergo a surgical procedure in December and did not submit a formal request to use the common facility exclusively. On two occasions, however, she found that the single-shot restroom was out-of-order or closed and decided to use the common facility. She was confronted by S2 after each time she used the common facility. He told her that she could not use those facilities until she had undergone "final surgery." Complainant asserted in response that she was "legally female" and entitled to use the women's restroom if needed.

***8** This case represents well the peril of conditioning access to facilities on any medical procedure. Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities -- or to other terms, conditions, or privileges of employment -- on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity. [3]

On this record, there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- *is* female. And certainly where, as here, a transgender female has notified her employer that she has begun living and working full-time as a woman, the agency must allow her access to the women's restrooms. This "real life experience" often is crucial to a transgender employee's transition. As OPM points out:

> [C]ommencement of the real life experience [i]s often the most important stage of transition, and, for a significant number of people, the last step necessary for them to complete a healthy gender transition. As the name suggests, the real life experience is designed to allow the transgender individual to experience living full-time in the gender role to which he or she is transitioning. . . . [0]nce [a transitioning employee] has begun living and working full-time in the gender that reflects his or her gender identity, agencies should allow access to restrooms and (if provided to other

> employees) locker room facilities consistent with his or her gender identity. . . . [T]ransitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender.

OPM Transgender Guidance.

Agencies are certainly encouraged to work with transgender employees to develop plans for individual workplace transitions. For a variety of reasons, including the personal comfort of the transitioning employee, a transition plan might include a limited period of time where the employee opts to use a private facility instead of a common one. See id.

Circumstances can change, however and an employee is never in a position to prospectively waive Title VII rights. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("[W]e think it clear that there can be no prospective waiver of an employee's rights under Title VII."); see also Vigil v. Dep't of the Army, EEOC Request No. 05960521 (June 22, 1998) (". . . [an] agreement that waives prospective Title VII rights is invalid as violative of public policy.") Agencies should, as the OPM Guidance suggests, view any plan with a transitioning employee related to facility access as a "temporary compromise" and understand that the employee retains the right under Title VII to use the facility consistent with his or her gender. OPM Transgender Guidance. [4]

***9** The Agency states that it would not allow Complainant to use the common female restroom because co-workers would feel uncomfortable with this approach. We recognize that certain employees may object -- some vigorously -- to allowing a transgender individual to use the restroom consistent with his or her gender identity. Some, like the Agency decision makers in this case, may not believe a transgender woman is truly female, and thus entitled or eligible to use a female bathroom, unless she has had gender reassignment surgery. Some co-workers may be confused or uncertain about what it means to be transgender, and/or embarrassed or even afraid to share a restroom with a transgender co-worker.

But supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. See Macy, EEOC Appeal No. 0120120821; see also Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (female employee could not lawfully be fired because employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants). Allowing the preferences of co-workers to determine whether sex discrimination is valid reinforces the very stereotypes and prejudices that Title VII is intended to overcome. [5] See Diaz, 442 F.2d at 389 ("While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large, extent, these very prejudices the Act was meant to overcome."); Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052 (D. Ariz. 1999); cf. Cruzan v. Special Sch. Dist., No.1, 294 F.3d 981 (8th Cir. 2002) (school's policy of allowing transgender women to use women's faculty restroom did not create a hostile work environment for other employees). [6]

Finally, the Agency maintains that it is unclear whether restricting Complainant from using the common restrooms is even an adverse employment action. The Commission has long held that an employee is aggrieved for purposes of Title VII if she has suffered a harm or loss with respect to a term, condition, or privilege of employment. Diaz v. Dep't of Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). Equal access to restrooms is a significant, basic condition of employment. See e.g., OSHA, Interpretation of 20 C.F.R. 1910.141 § (c)(1)(i): Toilet Facilities (Apr. 4, 1998) (requiring that employers provide access to toilet facilities so that all employees can use them when they need to do so). Here the

Agency refused to allow the Complainant to use a restroom that other persons of her gender were freely permitted to use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment. [7]

***10** But the harm to the Complainant goes beyond simply denying her access to a resource open to others. The decision to restrict Complainant to a "single shot" restroom isolated and segregated her from other persons of her gender. It perpetuated the sense that she was not worthy of equal treatment and respect Cf. 42 U.S.C. § 2000e-2(a)(2) (making it unlawful to "segregate" employees in any way that deprives or tends to deprive them of equal employment opportunities); Religious Garb and Grooming in the Workplace: Rights and Responsibilities, Q. 8 and Ex. 8 (limiting employees who wear religious attire that might make customers uncomfortable to "back room" positions constitutes religious segregation and violates Title VII). The Agency's actions deprived Complainant of equal status, respect, and dignity in the workplace, and, as a result, deprived her of equal employment opportunities. In restricting her access to the restroom consistent with her gender identity, the Agency refused to recognize Complainant's very identity. Treatment of this kind by one's employer is most certainly adverse. [8]

In sum, we find that the Agency's decision to restrict Complainant's access to the common women's restroom on account of her gender identity violated Title VII. We further find that the record contains direct evidence that the decision was based on the gender identity of the Complainant. The Agency, therefore, erred when it found that Complainant was not subjected to sex-based disparate treatment.

*Harassment: Gender Pronouns, Titles, and Access to Facilities*

To establish a claim of hostile work environment harassment, Complainant must show (1) that she was subjected to harassment in the form of unwelcome verbal or physical conduct because of a statutorily protected basis and (2) that the harassment had the purpose or effect of unreasonably interfering with the work environment and/or created an intimidating, hostile, or offensive work environment. See Harris v. Forklift Systems, 510 U.S. 17, 21 (1993).

In this case, Complainant contends that she was subjected to a hostile work environment because management restricted her from using the common women's restroom even after Complainant made clear that she no longer agreed with the initial plan restricting her to the executive bathroom facility, and S3 engaged in demeaning behavior toward her by refusing to refer to her correct name and gender. [9]

Complainant testified that S3 called her male names and "sir" in moments of anger or in group settings, and that his body language reflected a negative connotation and intentional conduct when he did so. Complainant testified that S3 called her "sir" on approximately seven occasions, including in an e-mail in which he engaged Complainant in a heated discussion about work matters. Complainant is not the only witness to testify that S3 intentionally referred to Complainant with male names. We note that one witness testified that he thought that S3 intentionally referred to Complainant as "sir" and by her former male name well after Complainant announced her transition to co-workers in November 2010. The witness further testified that S3 also smirked and giggled and said to her, "Oh well, do we call her [by her male or female name]?" Further, the record contains a copy of e-mail correspondence between Complainant and S3 on July 26, 2011. The e-mails reveal that, after Complainant wrote that S3 was on the side of other employees who do not treat her as an equal, S3 responded, "No Sir, not on anyone's side." The e-mails also reflect that this exchange occurred in the context of heated exchanges about work activities between Complainant and S3. S3 maintains that calling Complainant ""sir" or referring to her with a male name was "just a slip of the tongue and only occurred twice.

***11** After reviewing witness testimony and the e-mail exchanges between Complainant and S3, we are persuaded that S3's use of "sir" in this and several other situations was intentional. The e-mail exchanges reflect that S3 sometimes used male names and pronouns to insult Complainant or to convey sarcasm. Additionally, witness testimony indicates that S3 sometimes laughed and smiled when mentioning Complainant in groups and would say her feminine name with a

smirk. Further, Complainant testified in detail about S3's agitated demeanor when referring to her with male pronouns and names and another witness spoke of S3's "general feeling of hostility" toward Complainant and the snide comments S3 made that pertained to Complainant's transition and clothing. Complainant also testified that S3 seemed to especially call her male names when in the presence of other employees as a way to reveal that Complainant is transgender, as well as to ridicule and embarrass her.

The Commission has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee. See Jameson v. U.S. Postal Serv., EEOC Appeal No. 0120130992 (May 21, 2013). Persistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when "judged from the perspective of a reasonable person in the employee's position. See Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 (1998); see also Jameson, EEOC Appeal No. 0120130992; OPM Transgender Guidance ("Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect. Such misuse may also breach the employee's privacy, and may create a risk of harm to the employee.").

In this case, Complainant had clearly communicated to management and employees that her gender identity is female and her personnel records reflected the same. Yet S3 continued to frequently and repeatedly refer to Complainant by a male name and male pronouns. While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.

***12** Moreover, in determining whether actionable harassment occurred, S3's actions must be considered in the context of the Agency's actions related to Complainant's restroom access. As we note above, even after Complainant indicated that she no longer wished to abide by her initial plan regarding bathroom use, the Agency refused to allow Complainant to use the restroom consistent with her gender identity. It publicly segregated and isolated Complainant from other employees of her gender and communicated that she was not equal to those other employees because she is transgender. S3's comments compounded that discrimination and sent the message that Complainant was unworthy of basic respect and dignity because she is a transgender individual. Additionally, S3 was a team leader and his actions sometimes occurred in the presence of other employees and during meetings, signaling that such conduct was endorsed by Agency leadership.

Considering all these circumstances as we must, we find that these actions were sufficiently severe or pervasive to subject Complainant to a hostile work environment based on her sex. Because Complainant established that she was subjected to a level of severe or pervasive sex-based harassment that meets the Title VII standard for liability, the final element of our analysis is whether the Agency itself is liable for that harassment.

An agency may be vicariously liable for unlawful harassment by an employee when the agency has empowered that employee to take tangible employment actions against the victim -- i.e., the harassing employee is a supervisor of the victim. Vance v. Ball State University, 570 U.S. ___, 133 S.Ct. 2434 (2013). In cases where the harassing employee (or employees) is a co-worker of the victim, an agency is responsible for acts of harassment in the workplace when the agency was "negligent in permitting the harassment to occur." Id. at 2451. Negligence in permitting harassment to occur can take many forms. An assessment of whether an Agency is liable under this standard depends on the facts and circumstances of each case and the unique context of each workplace. See id. at 2451 (discussing "variety of situations" that a negligence standard can address).

In her appeal, the Complainant alleged that the Agency was liable under the negligence theory. We therefore analyze her claim under that standard. [10]

In this case, Complainant did not report S3's harassment to management. However, we note that S3's conduct sometimes occurred in groups or in the presence of other employees. For example, a witness testified that she witnessed S3 among a group of employees in which he would laugh and smile when Complainant's name was mentioned, and the group would laugh. Another witness testified that S3 would openly refer to Complainant by her former masculine name in the presence of other employees and smirk and giggle about it, well after he was aware of Complainant's gender identity as female. This witness testimony reflects that S3's conduct was pervasive, well-known, and openly practiced in the workplace. Consequently, we find that the Agency knew or should have known about S3's harassment. See Mayer v. Dep't of Homeland Security, EEOC Appeal No. 0120071846 (May 15, 2009) (Agency had constructive knowledge of sexual harassment because employees were aware that harasser was harassing Complainant); Taylor v. Dep't of the Air Force, EEOC Request No. 05920194 (July 8, 1992) (employers will generally be deemed to have constructive knowledge of harassment that is openly practiced in the workplace or is well-known among employees). There is no evidence that the Agency took prompt and effective corrective action to address the harassment. In fact, the only Agency actions we find in the record are when Complainant's supervisors chastised her for using a facility consistent with her gender and for discussing her transition with other employees. Consequently, we find that the Agency was negligent in permitting the harassment to occur and is therefore liable.

***13** In summary, we find that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant's gender identity was female.

*Decision of the Office of Special Counsel*

Complainant filed a prohibited personnel practice complaint against the Agency with the U.S. Office of Special Counsel (OSC) based on the events described above. On August 29, 2014, OSC issued a report finding that the Agency had discriminated against Complainant based on conduct not adverse to work performance, in violation of 5 U.S.C. §2302(b)(10). U.S. Office of Special Counsel, Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (August 28, 2014) (the "OSC Report"). The report's findings were based, in part, on OSC's interpretation of Title VII requirements. OSC explained that, while it was not making any explicit findings related to sex discrimination, "EEO law and federal policies relating to discrimination based on sex, including gender identity and expression, . . . circumscribes the permissible considerations that an agency may make when determining whether conduct adversely affects work performance for purposes of section 2302(b)(10)." OSC Report at 1. Specifically, OSC found that "the Agency unlawfully discriminated against [Complainant] on the basis of gender identity, including her gender transition from man to a woman--conduct which did not adversely affect her performance or the performance of others." Id. at 5.

OSC recommended that the Agency provide appropriate lesbian, gay, bisexual, and transgender (LGBT) diversity and sensitivity training to AMRDEC employees at Redstone Arsenal. OSC further recommended that appropriate remedial training regarding prohibited personnel practices, especially as they relate to transgender employees, be given to AMRDEC supervisors at Redstone Arsenal. OSC also found that Complainant did not suffer any economic harm that would require back pay, and that Complainant was ineligible to collect compensatory damages because the facts of this case arose before Congress created a compensatory damages remedy under section 107(b) of the Whistleblower Protection Enhancement Act of 2012; that provision is not retroactive. [11] OSC noted that it made no finding regarding Complainant's ability to recover damages under Title VII. [12]

***14** The OSC report does not moot the claim before the Commission. OSC addressed whether the Agency's actions violated U.S. government personnel practices. The answer to that question was affected, but not settled, by Title VII principles. Our decision today addresses the Agency's actions in light of the sex discrimination provisions in Title VII. However, in the Order below, we take notice of the remedies already prescribed by OSC in order to avoid duplicative actions by the Agency.

## CONCLUSION

Consequently, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission REVERSES the Agency's final decision. We REMAND this matter to the Agency to take remedial actions in accordance with this decision and the ORDER below.

## ORDER (E0610)

The Agency is ORDERED to undertake the following actions:

1. The Agency shall immediately grant Complainant equal and full access to the common female facilities.
2. The Agency shall immediately take meaningful and effective measures to ensure that coworkers and supervisors cease and desist from all discriminatory and harassing conduct directed at Complainant, and ensure that Complainant is not subjected to retaliation because of her EEO activity.
3. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford her an opportunity to establish a causal relationship between the hostile work environment to which she was subjected and her pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency will issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. A copy of the final decision must be submitted to the Compliance Officer, as referenced below.
4. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least eight hours of EEO training to all civilian personnel and contractors working at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. Additionally, the training shall inform employees about the EEO process and how to report harassment in their workplace organization. The Agency may count the diversity and sensitivity training ordered by OSC towards the eight hours required by this Order
5. Within one hundred and twenty (120) calendar days from the date this decision becomes final, the Agency shall provide at least 16 hours of in-person EEO training to all management officials at its Aviation Missile Research Development Engineering Center at Redstone Arsenal, and the Huntsville Project Management Office, regarding their responsibilities to ensure equal employment opportunities and the elimination of discrimination in the federal workplace. The training shall place special emphasis on sex discrimination, including issues of gender identity, harassment, and preventing and eliminating retaliation. The Commission does not consider training to be disciplinary action. The Agency may count in-person diversity and sensitivity training ordered by OSC towards the sixteen hours required by this Order.

***15** 6. The Agency shall consider taking appropriate disciplinary action against S2 and S3 and report its decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S2 or S3 have left the Agency's employ, the Agency shall furnish documentation of the departure date.

7. The Agency shall post the notice referenced in the paragraph below entitled, “Posting Order.”
8. The Agency is further directed to submit a report of compliance, as provided in the statement entitled “Implementation of the Commission's Decision.” The report shall include supporting documentation and evidence that the corrective action has been implemented.

POSTING ORDER (G0610)

The Agency is ordered to post at its Redstone Arsenal, Alabama, and the Huntsville, Alabama, Project Management Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted by the Agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated**. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

***16** The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington,

DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

***17** If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

Footnotes

1 The factual background as laid out here is not exhaustive. Two comprehensive reports of the facts relevant to this case have already been compiled: the EEO Report of Investigation and the Agency's Final Agency Decision (FAD). We have considered those documents as well as the Complainant's Brief in Support of Appeal and the extensive transcript from the Fact-Finding Conference conducted on October 17-18, 2012. The facts pertinent to the legal analysis necessary are largely not in dispute.

2 Available online at http:// www.apa.org/topics/sexuality/transgender.pdf.

3 Gender reassignment surgery is in no way a fundamental element of a transition. Transitions vary according to individual needs and many do not involve surgery at all. As the Office of Personnel Management has explained:

> Some individuals will find it necessary to transition from living and working as one gender to another. These individuals often seek some form of medical treatment such as counseling, hormone therapy, electrolysis, and reassignment surgery. Some individuals, however, will not pursue some (or any) forms of medical treatment because of their age, medical condition, lack of funds, or other personal circumstances. Managers and supervisors should be aware that not all transgender individuals will follow the same pattern, but they all are entitled to the same consideration as they undertake the transition steps deemed appropriate for them, and should all be treated with dignity and respect.

Office of Personnel Management (OPM), Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, (OPM Transgender Guidance), available online at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/.

4 This is not to say that plans have no place in the transition process. Properly developed, transition plans ensure that a transitioning employee is treated with dignity and respect. The process of developing a plan also opens important channels of communication between the transitioning employee and management. The plans should not, however, be used as a means for restricting a transitioning employee. Rather, they should serve as tools for enabling the employee to complete his or her transition in an open and welcoming way.

5 Thus, for instance, employers may not prohibit a transgender female worker from using the female bathroom based on speculation or stereotypes that such workers are somehow inherently dangerous or prone to violence, any more than a sheriff's office can exclude men from supervisory positions in female inmate housing based on unsubstantiated concerns that substantially all male deputies are likely to engage in sexual misconduct. See Ambat v. City & County of San Francisco, 757 F.3d 1017, 1029 (9th Cir. July 14, 2014) (concluding the assumption that "'all or substantially all' male deputies are likely to perpetrate sexual misconduct [against female inmates]" without evidence to support it "amount[s] to 'the kind of unproven and invidious stereotype that Congress sought to eliminate from employment decisions when it enacted Title VII'"). Of course, if a transgender woman using a common female restroom were to assault a co-worker using the same restroom, then the matter could and should be dealt with like any other workplace conduct violation -- just as it would be if any other woman using a common female restroom assaulted a co-worker.

6 For this reason, the Commission disagrees with the holdings of cases like Kastl v. Maricopa County Cmty. College Dist., 325 Fed. Appx. 492 (9th Cir. 2009), and Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007). In Kastl, the employer contended "that it banned Kastl from using the women's restroom for safety reasons." Id. at 494. In Etsitty, the employer claimed that it did so out of fear of being sued for allowing one of its employees to use the "wrong" restroom. In both cases, the courts found that these respective explanations were legitimate, non-discriminatory reasons under the circumstantial evidentiary framework from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and that the transgender employee had not proven that the proffered reason was pretextual. Kastl. at 493-94; Etsitty, 502 F.3d at 1224. The Commission finds the rationale of these cases unpersuasive. First, an employee need not use the McDonnell Douglas framework when there is direct evidence that an adverse employment action has been taken on the basis of a sex-based consideration such as an employee's transgender status. Second, where an employer proffers

an explanation inextricably linked to the protected trait -- such as admitting that it refused to allow a transgender worker to use a restroom consistent with the worker's gender identity because of a belief that the worker's transgender status might raise safety or liability issues -- that rationale is not non-discriminatory. Instead, that proffered justification is indistinguishable from the protected trait at issue and thus cannot serve as a "legitimate" explanation. Cf. Johnson v. State of NY, 49 F. 3d 75, 80 (2nd Cir. 1995) (holding that a policy requiring active membership in an organization where membership was automatically rescinded at age 60 was not neutral; it was, instead, "inextricably linked" with age). Indeed, the Etsitty Court itself acknowledged that: "It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual." However, as the Etsitty court went on to explain, it had already concluded that "Etsitty may not claim protection under Title VII based upon her transexuality *per se*" and thus Etsitty's claim had to "rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes." Etsitty at 1224. In light of that fact, the Etsitty court concluded that "[h]owever far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms." Id. Of course, as noted previously, the Commission in Macy has held that discrimination on the basis of transgender status is *per se* sex discrimination, finding that a plaintiff need not have specific evidence of gender stereotyping by the employer because "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." Id., 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012).

7 In this case, the Agency's restroom policy also deprived Complainant of the use of common locker and shower facilities that non-transgender employees could use, which also constituted a material employment disadvantage for Complainant.

8 Cf. John Doe, et al. v. Regional School Unit, 86 A.3d 600 (2014) (where it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes sexual orientation discrimination in violation of the Maine Human Rights Act); Mathis v. Fountain-Fort Carson School District 8, Colo. Dep't of Regulatory Agencies, Div. of Civil Rights, Charge No. P20130034X, Determination available at http:// www.transgenderlegal.org/media/uploads/doc529.pdf (June 18, 2013) (restroom restriction placed on female transgender student created "an exclusionary environment which tended to ostracize the [student]."); Statement of Interest of the United States in Tooley v. Van Buren Public Schools, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015)(citing Doe and Mathis).

9 Complainant did not avail herself of a hearing. Therefore, we must assess the credibility of witnesses on the record, without the assistance of a neutral EEOC AJ's personal observations of witness demeanor and tone. Wagner v. Dep't of Transp., EEOC Request No. 0120101568 (Aug. 23, 2010). We note, however, that the Agency conducted a fact-finding conference at which witnesses other than the Complainant gave testimony.

10 Given that the decision to restrict Complainant from the common restrooms consistent with her gender was instituted by management, there is an argument to be made that the supervisor liability standard is appropriate. We do not need to reach this issue, however, because Complainant has invoked the negligence liability standard and we find that she has met her burden under that analysis. See Wilson v. Tulsa Junior College, 164 F. 3d 534, 540 n. 4 (10th Cir. 1998) ("The

Supreme Court recognized in [Faragher] and Ellerth the continuing validity of negligence as a separate basis for employer liability").

11 See King v. Dep't of the Air Force, 119 M.S.P.R. 663, 668 (2013).

12 We address the matter of compensatory damages under Title VII in our Order, below.

EEOC DOC 0120133395 (E.E.O.C.), 2015 WL 1607756

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United States District Court,
D. Minnesota.

Jakob Tiarnan RUMBLE, Plaintiff,
v.
FAIRVIEW HEALTH SERVICES d/b/a Fairview Southdale Hospital, and Emergency Physicians, P.A., Defendants.

No. 14–cv–2037 (SRN/FLN).
|
Signed March 16, 2015.

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## MEMORANDUM OPINION AND ORDER

SUSAN RICHARD NELSON, District Judge.

## I. INTRODUCTION

***1** This matter is before the Court on (1) Defendant Emergency Physicians, P.A.'s Motion to Dismiss [Doc. No. 11]; and (2) Defendant Fairview Health Services' Motion to Dismiss [Doc. No. 18]. For the reasons set forth below, the Court denies both motions.

## II. BACKGROUND

Plaintiff Jakob Tiarnan Rumble ("Rumble" or "Plaintiff") filed suit against Defendant Fairview Health Services, d/b/a Fairview Southdale Hospital ("Fairview"), and Emergency Physicians, P.A. ("Emergency Physicians"), alleging that the treatment he received at Fairview from June 23 to June 28, 2013, constitutes discrimination in violation of Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116, and the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363A.11. (*See generally* Compl. [Doc. No. 1].) Specifically, Rumble alleges that "he received worse care [from both Defendants] ... because of his status as a transgender man." (*See id.* ¶ 3.)

Rumble resides in Hennepin County, Minnesota. (*Id.* ¶ 4.) He was eighteen years old when he experienced the alleged discrimination by Defendants. (*See* Pl.'s Mem. at 10 [Doc. No. 25].)

Defendant Fairview is a "Minnesota-based health care organization receiving federal and state financial assistance such as credits, subsidies, or contracts of insurance." (*Id.* ¶ 6.) At all times relevant, Fairview owned and operated Fairview Southdale Hospital, which is located at 6401 France Avenue South, Edina, Minnesota 55435. (*Id.* ¶ 5.) Plaintiff alleges that Fairview "employed the services of doctors, nurses, and other healthcare professional and non-professional health

care providers, including the nurses and other health care providers who cared for Jakob Rumble in June 2013, and held itself out and warranted itself to the public as competent, careful, and experienced in the care and treatment of patients." (*Id.* ¶ 7.)

Like Fairview, Defendant Emergency Physicians is also a "Minnesota-based healthcare organization receiving federal and state financial assistance such as credits, subsidies, or contracts of insurance." (*Id.* ¶ 10.) Emergency Physicians employs the emergency room physicians who staff Fairview Southdale Hospital. (*Id.* ¶ 9.) Plaintiff alleges that Randall Steinman, M.D. is one such emergency room physician who is employed by Defendant Emergency Physicians. (*Id.* ¶ 12.)

### A. Terminology Overview

Given the nature of this case, the Court provides an overview of the relevant terminology before detailing Plaintiff's claims. Rumble self-identifies as a "female-to-male transgender man." (*Id.* ¶ 4.) Transgender is "[a]n umbrella term that may be used to describe people whose gender expression does not conform to cultural norms and/or whose gender identity is different from their sex assigned at birth. Transgender is a self-identity, and some gender nonconforming people do not identify with this term." *See Trans Bodies, Trans Selves: A Resource for the Transgender Community* 620 (Laura Erickson–Schroth, ed.2014). Although Rumble was "labeled female at birth and given a female birth name," he "identifies as male." (Compl. ¶ 25 [Doc. No. 1].)

***2** Recently, courts have broadly characterized an individual's transgender status as part of that individual's "sex" or "gender" identity. *See, e.g., Smith v. City of Salem, Ohio,* 378 F.3d 566, 572–73 (6th Cir.2004) (holding that plaintiff with gender identity disorder sufficiently stated constitutional and Title VII sex discrimination claims based on his allegations that he was discriminated against because of his gender nonconforming behavior and appearance); *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund,* 867 F.Supp.2d 1023, 1032 (D.Minn.2012) (explaining that "the 'narrow view' of the term 'sex' in Title VII" in *Sommers v. Budget Mktg., Inc.,* 667 F.2d 748, 750 (8th Cir.1982), " 'has been eviscerated by *Price Waterhouse.*' ") (quoting *Smith,* 378 F.3d at 573).

This recent development is a result of the United States Supreme Court's ruling in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), *superseded on other grounds by statute as stated in Burrage v. U.S.,* 134 S.Ct. 881 (2014). In *Price Waterhouse,* the Supreme Court held that Title VII's prohibition against discrimination because of sex includes discrimination based on gender stereotyping. *See* 490 U.S. at 250–52. Because the term "transgender" describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping. Therefore, Plaintiff's transgender status is necessarily part of his "sex" or "gender" identity.

However, an individual's transgender status in no way indicates that person's sexual orientation. *See* American Psychological Association, *Identification of Terms: Sex, Gender, Gender Identity, Sexual Orientation, available online* http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf. Although this principle is factually correct, the State of Minnesota defines "sexual orientation" as including "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *See* Minn.Stat. § 363A.03, subd. 44. Therefore, solely for purposes of the Court's discussion of Plaintiff's Minnesota state law discrimination claim, the Court considers Plaintiff's gender identity as part of his "sexual orientation."

### B. Plaintiff's Medical Condition Before Going to Fairview Hospital

Rumble alleges that "[d]uring the week of June 16 to June 22, 2013, [he] saw his primary care provider with a complaint that his reproductive organs were inflamed and causing him extreme pain." (Compl. ¶ 26 [Doc. No. 1].) Plaintiff has a "uterus, vagina, cervix, and labia." [1] (*See id.* ¶ 42.) Rumble's primary care physician prescribed a "7–day course of antibiotic treatment." (*Id.* ¶ 26.) However, Rumble's pain allegedly increased during the course of his antibiotic treatment.

(*See id.* ¶ 27.) In fact, Rumble alleges that he "could hardly walk because of the pain[, and] [w]hen he urinated, he had to grab something to brace himself or bit down on a towel to endure the pain ." (*Id.*)

[1] Generally, it is offensive and inappropriate to ask anyone, including a transgender individual, whether their genitals correspond with their self-proclaimed gender identity. *See* Erickson–Schroth, *supra,* at 265. However, as this case pertains to the medical care that Plaintiff received to treat his genital pain, the Court engages in a discussion about Plaintiff's genitalia.

***3** On June 23, 2013, when the pain had reached this severity, Plaintiff's mother, Jennifer Rumble, took Plaintiff's temperature and determined that he had a one hundred and four degree fever. (*Id.*) As a medical professional, Jennifer Rumble knew that "800 mg of ibuprofen" is the "highest safe dosage for an adult." (*Id* . ¶¶ 37, 27.) To treat her son's pain, Jennifer gave Plaintiff 800 mg of ibuprofen. (*Id.* ¶ 27.) Plaintiff alleges that after he took the ibuprofen, he and his mother went to the emergency room at Fairview Southdale Hospital, which "was the hospital closest to their home." (*Id.* ¶ 28.)

### C. Treatment Plaintiff Received During Intake

Plaintiff arrived at Fairview at approximately 1 pm on June 23, 2013. (*Id.*) When checking-in at the front desk, Rumble handed the front desk clerk his driver's permit. (*Id.* ¶ 29.) At the time, Rumble's driver's permit "incorrectly identified [him] as female." (*Id.*) The clerk allegedly told Rumble that he could not find Rumble in the computer system, and Rumble responded by telling the clerk his birth name. (*See id.*) The Fairview clerk told Rumble that Fairview has "female on file," and subsequently gave Plaintiff a wristband labeled with an "F." (*See id.* ¶ 30.)

Plaintiff claims that he was given this "F" wristband even though he told the clerk that he identifies as male. (*See* Pl.'s Mem. at 1 [Doc. No. 25].) Although Plaintiff's Complaint does not expressly state that Rumble told the clerk that he identifies as male, the Court reads Plaintiff's Complaint as alleging that Rumble communicated his gender identity when he answered the clerk's "preliminary questions." (*See* Compl. ¶ 29 [Doc. No. 1].) Rumble further alleges that during this exchange with the Fairview clerk, the clerk "left the front desk to speak to [another] person and held a folder in front of his face while whispering to this person." (*See id.* ¶ 31.) Rumble believes that these two individuals were "discussing his gender." (*Id.*)

The clerk then took Rumble to an intake nurse in an examining room. (*See id.* ¶ 32.) Rumble allegedly registered a temperature of nearly one hundred degrees, "described the severity of his pain" to the intake nurse, and also told the intake nurse about his prior one hundred and four degree fever. (*See id.* ¶ 32–33.)

After Plaintiff's meeting with the intake nurse, Rumble and his mother were transferred to another room, where they waited to be seen by a doctor for hours. (*See id.* ¶ 35.) Rumble alleges that he remained in "severe pain" while he waited in this room. (*See id.*) Although Plaintiff and his mother both tried to call a nurse using the call button in the room, allegedly, no one responded to the call. (*See id.*) In order to gain the attention of a medical professional in the hospital, Plaintiff claims that his mother would "leave the room and search for emergency room staff." (*Id.* ¶ 36.) Rumble's mother told staff members that her son was in severe pain and asked for him to receive pain medication. (*See id.* ¶ 35.) Emergency room staff allegedly responded by stating that "they would need to ask a doctor about [administering or obtaining pain medication for Rumble]." (*See id.*) Finally, "[a]fter several hours," Fairview staff gave Plaintiff some pain medication. (*Id.* ¶ 36.) Plaintiff and his mother believe that "people with less urgent medical needs were treated much more quickly than [Rumble] was treated." (*Id.* ¶ 37.)

### D. Treatment Plaintiff Received by Emergency Room Doctor

***4** Dr. Randall Steinman finally came to Rumble's room four and a half to five hours after Rumble initially arrived at the emergency room. (*See id.* ¶ 38.) Dr. Steinman is employed by Defendant Emergency Physicians. (*See* Compl. ¶ 12 [Doc. No. 1].) Dr. Steinman was accompanied by a female nursing assistant/emergency room technician, and Dr. Karee

Lehrman, an obstetrician-gynecologist. (*Id.* ¶ 38.) Dr. Steinman allegedly asked Rumble in a "hostile and aggressive manner," "[w]ho are you having sex with?" (*Id.* ¶ 39.) When Rumble asked Dr. Steinman "what he meant by that [question]," Dr. Steinman asked, "[m]en, women, or both?" (*See id.* ¶ 40.) Rumble alleges that "Dr. Steinman seemed angry, and held his face a few inches from [Rumble's] face when he asked questions." (*Id.*) In fact, Rumble claims that "Dr. Steinman's manner was so hostile that [Rumble] felt as if the questions were an attempt to embarrass [Rumble] rather than to diagnose him." (*Id.*) For instance, Dr. Steinman allegedly asked Plaintiff if he was "engaging in penetration," and whether "he'd ever had sex with objects." (*See id.*)

After questioning Rumble, Dr. Steinman proceeded with a physical examination of Plaintiff's genitalia. Plaintiff informed Dr. Steinman that "he was in extreme pain," and asked Dr. Steinman "to please be gentle." (*See id.* ¶ 41.) "Dr. Steinman took a strip of gauze and [allegedly] wiped [Rumble's] labia in a very rough manner." (*Id.* ¶ 43.) In fact, Rumble alleges that he "felt like he was being stabbed," because "[i]t seemed as if [Dr. Steinman] was pressing down as hard as he could." (*Id.*) Dr. Steinman then allegedly "repeatedly jabbed at [Rumble's] genitals with his fingers." (*Id.*) Rumble began to cry from the pain of this exam. (*See id.*)

When Dr. Steinman asked "[i]s this what this normally looks like?," Plaintiff "responded that his labia were swollen to almost three times their normal size." (*Id.* ¶ 44.) Dr. Steinman then allegedly stated that "he couldn't tell what was going on because of the male hormones." (*See id.*) Rumble takes prescription hormone medication. (*Id.* ¶ 42.) Throughout the exam, Dr. Steinman "repeated several times that he didn't know what the male hormones [Rumble] was taking were doing to [Rumble's] body," nor did Dr. Steinman know "how much swelling was due to the hormones." (*Id.*)

Dr. Steinman proceeded by continuing to jab Plaintiff's genitals. (*Id.* ¶ 45.) Rumble cried out from the pain, and when he could not bear the pain any longer he asked Dr. Steinman to stop the exam, twice. (*See id.*) However, "Dr. Steinman [allegedly] ignored him and did not stop, but continued to forcefully jab at [Rumble's] genitals, causing [Rumble] more pain." (*Id.*) Although Dr. Lehrman and the female nursing assistant/emergency room technician were in the exam room, they did not intervene or stop Dr. Steinman. (*See id.* ¶ 48.)

***5** Rumble then asked his mother, "Mom, can you make him stop?" (*Id.* ¶ 46.) Jennifer Rumble responded by allegedly yelling "[s]top! He said that you needed to stop. Didn't you hear him?" (*Id.*) At this point, the female nursing assistant/emergency room technician left the room. (*See id.*) Dr. Steinman finally stopped jabbing Plaintiff's genitals and Rumble asked whether Dr. Steinman had determined the problem. Dr. Steinman allegedly stated in a tense and angry voice, "I can't tell you because your mom made me stop the exam." (*See id.* ¶ 47.) Without further explanation, Dr. Steinman then allegedly left the room. (*See id.*)

Once both doctors had left Rumble's exam room, Rumble waited in the room for two additional hours. (*See id.* ¶ 49.) Jennifer Rumble asked emergency room staff if they often made people wait in the emergency room for nearly seven hours, and the staff allegedly responded they did not. (*See id.* ¶ 50.) Rumble's mother also asked whether she and her son could have something to eat. (*See id.*) Although the staff initially stated that they did not feed people who were in the emergency room, after acknowledging that the Rumbles had been waiting for nearly seven hours, the staff brought the Rumbles sandwiches. (*See id.*)

**E. Treatment Plaintiff Received Once Admitted to Fairview**

Finally, around 8 pm on June 23, 2014, Plaintiff was admitted to the hospital. (*Id.* ¶ 51.) Jennifer Rumble was later informed by a Fairview hospital doctor that her son "would have been septic within 12 to 24 hours [from] when [she] brought [her son] in[to the emergency room] and he could have died." (*Id.* ¶ 59.) Because of the interaction with Dr. Steinman, Rumble was afraid of being left alone in the hospital. (*Id.* ¶ 51.) Rumble's mother shared his fear, as "[s]he did not know what might happen if she was not present." (*Id.* ¶ 52.) Therefore, Rumble's mother stayed in the hospital with her son for his entire stay, and she spent nights sleeping on a chair. (*Id.*)

Rumble was in the hospital for six days. (*Id.* ¶ 62.) While he was a patient, he had his own private room. (*Id.* ¶ 54.) On a dry erase board on the wall across from the foot of Rumble's bed, Fairview staff tracked the names of Rumble's on-duty nursing staff, his reported pain levels, and the names and specialties of his treating physicians. (*See id.*) One of Rumble's treating physicians was Dr. Lehrman, the same doctor who was present during Rumble's interaction with Dr. Steinman. (*See id.*) The dry erase board indicated that Dr. Lehrman is an "OB/GYN." (*See id.*) Rumble alleges that he was "upset and embarrassed by Defendant Fairview's disclosure on the dry erase board[,] that he was being treated by an 'OB/GYN[,]' to non-medical personnel such as dietary and housekeeping/environmental services and any personal guests to his room." (*See id.* ¶ 55.) Accordingly, Rumble's mother erased the "OB/GYN" notation with her finger after observing her son's discomfort with the visible information. (*See id.*) Rumble alleges that this visible notation was unnecessary because "all medical professionals treating [Plaintiff] would have had access to the same information on his charts." (*Id.*)

***6** In addition to Dr. Lehrman, Rumble was assigned an infectious disease doctor, Dr. Stephen Obaid. (*See id.* ¶ 56.) Dr. Obaid examined Rumble around 7 am on June 24, 2013. (*Id.*) Dr. Obaid examined Plaintiff's genital area while wearing gloves, then wiped his gloves on the blanket on Rumble's bed, and proceeded to examine Rumble's eyes and mouth using the same gloves. (*See id.*) Rumble "later developed sores on his face in the places that Dr. Obaid had touched." (*Id.*)

In addition to the lack of sanitary or hygienic precautions taken by Dr. Obaid, Plaintiff alleges that he was mistreated by the nurses at Fairview. (*See id.* ¶¶ 57–58.) For instance, Rumble claims that "some of the nurses were hostile towards him because they seemed tense and avoided speaking to him when they came into his room." (*Id.* ¶ 57.) Additionally, at the beginning of each nurse's shift, the nurse would examine his genitals. (*Id.*) Rumble asked one nurse why the nurses needed to conduct this exam, and the nurse responded that it was simply "completely necessary," without elaborating further. (*Id.*) Rumble also asked this nurse if she knew what was wrong and she responded that "I don't know because I don't have any experience with this sort of thing." (*Id* . ¶ 58.) Rumble believes that the nurse implied that she had no experience with transgender patients. (*Id.*)

Although Rumble was initially treated with antibiotics when he was admitted to the hospital, he "did not appear to be getting any better." (*Id.* ¶ 53.) Therefore, Rumble's mother decided to complete her own research and she "searched the internet to get information about what might be wrong." (*Id.* ¶ 60.) As a result of her research, she asked Dr. Obaid if her son may have a sexually-transmitted infection. (*Id.*) After this suggestion, Dr. Obaid swabbed Rumble's genitals for testing, and informed Rumble's mother that "it would be a week before they had the lab results." (*Id.* ¶ 61.) Nonetheless, Fairview staff began to treat Rumble with a different medication and his medical condition began to improve. (*Id.*) After two days on the new medicine, Rumble asked to be discharged. (*Id.* ¶ 62.) Although Rumble believed that he could have improved more from staying longer in the hospital, "he did not feel safe at the hospital and preferred to leave." (*Id.*) Rumble was released from the hospital on Friday, June 28, 2013. (*Id.*)

**F. Aftermath from Plaintiff's Treatment at Fairview**

A few weeks later, Rumble received a bill from Emergency Physicians, the group that employs Dr. Steinman. (*Id.* ¶ 63.) The bill was in regards to his emergency room visit at Fairview Southdale Hospital. (*Id.*) "The bill indicated [that] no insurance payments were pending and [Rumble] owed the full amount. In the billing description for the time he had spent at Fairview Southdale Hospital, it stated, 'THE DIAGNOSIS IS INCONSISTENT WITH THE PATIENT'S GENDER.' " (*Id.*) In contrast to the statement on this bill, Plaintiff alleges that his ultimate diagnoses were conditions that can, and do, affect people of any sex or gender. [2] (*Id.*)

2 Plaintiff does not allege that he incurred expenses because of the insurance company's initial denial of coverage. (*See generally* Compl. [Doc. No. 1]; Def. Emergency Physicians' Reply at 2 [Doc. No. 29].) Rather, Plaintiff only argues that the language further substantiates his federal and state law discrimination claims.

***7** As a result of his experience with Defendants, Plaintiff fears doctors and "refuses to visit a hospital or doctor's office alone." (*Id.* ¶ 64.) Additionally, Rumble claims that he will never go to Fairview Southdale Hospital again, "even in an emergency" although it is the nearest hospital to his home. (*Id.* ¶ 65.)

The Court also notes that on December 12, 2013, Plaintiff filed a complaint of discrimination with the Office for Civil Rights ("OCR") in the Department of Health and Human Services alleging that Defendants violated his rights under Section 1557 of the ACA. (*Id.* ¶ 67.) "The OCR is responsible for ensuring compliance with Section 1557. Region V of [the] OCR is responsible for investigating and remedying violations of Section 1557 that occur in Minnesota, where Fairview Southdale Hospital is located." (*Id.*) The OCR's investigation of this matter is allegedly ongoing.

**G. Plaintiff's Claims**

Plaintiff's Complaint states two counts against Defendants. In Count I, Plaintiff alleges that Defendants discriminated against him on the basis of sex, in violation of Section 1557 of the ACA. [3] (*See id.* ¶¶ 69–76.) According to Section 1557:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C.2000d et seq.), *title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.),* the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.
>
> *See* 42 U.S.C. § 18116 (emphasis added). Accordingly, Defendants, who both allegedly received federal financial assistance, may not discriminate against Plaintiff on the basis of "sex," as Title IX prohibits discrimination on this "ground." *See id.*

When analyzing Title IX, courts have interpreted the term "sex" to include "individuals who are perceived as not conforming to gender stereotypes and expectations." (*See* Compl. ¶ 72 (citing *Kastl v. Maricopa Cnty. Community College Dist.,* No. 02–cv–1531 (PHX/SRB), 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (stating that "[i]t is well settled that Title VII's prohibition on sex discrimination encompasses discrimination against an individual for failure to conform

[3] Section 1557 provides Plaintiff with a private right of action to sue Defendants. The Court reaches this conclusion because the four civil rights statutes that are referenced and incorporated into Section 1557 permit private rights of action. *See Gonzaga Univ. v. Doe,* 536 U.S. 273, 283–84 (2002) (holding that "Title VI ... and Title IX ... create individual rights because those statutes are phrased 'with an *unmistakable focus* on the benefited class' ") (emphasis added); *Barnes v. Gorman,* 536 U.S. 181, 185 (2002) (finding that section 504 of the Rehabilitation Act is "enforceable through private causes of action" because the statutory language of section 504 mirrors Title VI); 42 U.S.C. § 6104(e)(1) (the Age Discrimination Act of 1975 states that "any interested person [may] bring [an action] in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this Act ... [and][s]uch interested person may elect, by a demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff."). Because Section 1557 states that the enforcement mechanisms available under those four statutes apply to violations of Section 1557, Section 1557 necessarily also permits private causes of action.

to sex stereotypes."), and *Miles v. New York University,* 979 F.Supp. 248, 250 n.4 (S.D.N.Y.1997) (explaining that "the Title IX term 'on the basis of sex' is interpreted in the same manner as similar language in Title VII")) [Doc. No.1].) Furthermore, Leon Rodriguez, the Director of the OCR, stated in an agency opinion letter that Section 1557 of the ACA "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity." (*See* Barrett Wiik Decl., Ex. C [Doc. No. 26–1].) Accordingly, Plaintiff alleges that, in direct violation of Section 1557, "Defendants perpetrated discrimination[, based upon Rumble's gender identity or transgender status,] with malice, deliberate disregard for, or deliberate reckless indifference to Plaintiff's rights." (Compl. ¶ 75 [Doc. No. 1].)

***8** In Count II, Plaintiff alleges that Defendants' conduct violated the MHRA, Minn.Stat. § 363A.11. (*See id.* ¶¶ 77–82.) Pursuant to the MHRA, it is an "unfair discriminatory practice:"

> to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, *sexual orientation,* or sex ...

*See* Minn.Stat. § 363A.11, subd. 1(a)(1) (emphasis added). As noted above, Minnesota law defines "sexual orientation" as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." See Minn.Stat. § 363A.03, subd. 44. Plaintiff claims that, under the MHRA, he is protected from discrimination based on his gender identity and transgender status, "since those are subsumed under the statutory definition of 'sexual orientation.' " (Compl. ¶ 79 [Doc. No. 1].)

Plaintiff seeks: (1) a permanent injunction requiring that "Defendants adopt practices in conformity with the requirements of [Section 1557] and [the MHRA]" and "prohibiting Defendants from engaging in the practices complained of [by Plaintiff];" (2) compensatory damages "for his physical pain, embarrassment, humiliation, emotional pain and anguish, violation of his dignity, and loss of enjoyment of life;" and (3) punitive damages, "to the extent allowed by state and federal anti-discrimination law." (*See id.* at 16.)

### H. Procedural Posture

Plaintiff filed his Complaint on June 20, 2014. (*See generally* Compl. [Doc. No. 1].) On July 18, 2014, Defendant Emergency Physicians filed a Motion to Dismiss [Doc. No. 11], with a supporting memorandum [Doc. No. 13]. Similarly, Defendant Fairview filed a Motion to Dismiss [Doc. No. 18] and a supporting memorandum [Doc. No. 20] on July 18, 2014. Plaintiff filed a single response brief in opposition to both Defendants' motions [Doc. No. 25], with a declaration and several supporting exhibits [Doc. No. 26]. Defendant Fairview then filed a reply brief on October 17, 2014 [Doc. No. 28], and Defendant Emergency Physicians did the same [Doc. No. 29]. The Court heard oral argument on both motions on November 14, 2014. (*See* Minute Entry [Doc. No. 30].)

## III. DISCUSSION

### A. Standard of Review

Defendants move to dismiss Plaintiff's Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. When evaluating a motion to dismiss, the Court assumes the facts in the Complaint to be true and construes all reasonable inferences from those facts in the light most favorable to Plaintiff. *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir.1986). However, the Court need not accept as true wholly conclusory allegations, *Hanten v. School District of Riverview Gardens,* 183 F.3d 799, 805 (8th Cir.1999), or legal conclusions Plaintiff draws from the facts pled, *Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir.1990). In addition, the Court ordinarily does not consider matters outside the pleadings on a motion to dismiss. *See* Fed.R.Civ.P. 12(d). The Court may, however, consider exhibits attached to the complaint and documents that are necessarily embraced by the pleadings,

*Mattes v. ABC Plastics, Inc.,* 323 F.3d 695, 697 n.4 (8th Cir.2003), and may also consider public records, *Levy v. Ohl,* 477 F.3d 988, 991 (8th Cir.2007). [4]

4 In his Complaint, Rumble references two publicly-available documents that contain data and statistics about the discrimination transgender and gender nonconforming individuals face in health care settings, and a third document that constitutes federal agency correspondence relating to Section 1557. (*See* Compl. ¶¶ 19, 73 [Doc. No. 1].) The Court references these documents as needed throughout the Order.

***9** To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Id.* at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 555). In sum, this standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly,* 550 U.S. at 556.

### B. Defendant Emergency Physicians' Motion to Dismiss

Defendant Emergency Physicians argues that the Court should dismiss (1) Plaintiff's Count I because (a) Rumble failed to allege that he sought medical care from a health program or activity that receives federal funds, and (b) Plaintiff does not allege facts supporting either an adverse action or differential treatment on the basis of sex (*see* Def. Emergency Physicians' Mem. at 8, 9 [Doc. No. 13] ); and (2) Plaintiff's Count II because (a) Plaintiff "does not assert facts to demonstrate that [Emergency Physicians] denied Plaintiff any service, facility, privilege, advantage, or accommodation of any public accommodation," and (b) Plaintiff does "not assert facts to show that [Emergency Physicians] discriminated against Plaintiff because of Plaintiff's sexual orientation and gender identity" (*see id.* at 13–14.) The Court disagrees.

#### 1. Count I: Section 1557 Claim

To the Court's knowledge, this is the first case that requires interpretation of Section 1557. As this is a matter of first impression, the canons of statutory interpretation guide the Court's analysis. Statutory interpretation begins with the statute's "plain language." *See United States v. Cacioppo,* 460 F.3d 1012, 1016 (8th Cir.2006); *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) (explaining that when a "statute's language is plain," courts must enforce it "according to its terms."). "Where the language is plain, [the Court] need inquire no further." *Cacioppo,* 460 F.3d at 1016 (citing *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989)). In other words, if the statutory text is unambiguous, then the Court need not look to an agency's interpretation of the statute, nor look to the statute's legislative history. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984); *Horras v. Leavitt,* 495 F.3d 894, 900 (8th Cir.2007); *Degnan v. Sebelius,* 658 F.Supp.2d 969, 970–71 (D.Minn.2009). However, "[i]f the language of the statute is ambiguous or silent, the issue for the court is whether the agency's interpretation of the statute is a reasonable one." *See Degnan,* 658 F.Supp.2d at 970–71 (citing *Smiley v. Citibank, N.A.,* 517 U.S. 735, 744–45 (1996)).

***10** Section 1557 references and incorporates four different civil rights statutes: Title VI, which prohibits discrimination on the basis of race, color, and national origin; Title IX, which prohibits discrimination on the basis of sex; the Age Discrimination Act, which prohibits discrimination on the basis of age; and section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability. *See* 42 U.S.C. § 18116. The parties appear to disagree about the extent to which, or the manner in which, these four civil rights statutes are incorporated into Section 1557. The Court reads Section 1557 as referencing these four statutes to list "the ground[s]" on which discrimination is prohibited in a health care setting. *See id.* (stating that "an individual shall not, on the ground prohibited under [the four civil rights statutes] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity").

Although the four civil rights statutes provide the separate and distinct grounds or bases on which discrimination is prohibited, the Court finds that the language of Section 1557 is ambiguous, insofar as each of the four statutes utilize different standards for determining liability, causation, and a plaintiff's burden of proof. *See* 42 U.S.C. § 18116. Therefore, the Court looks to agency interpretation for some guidance.

The Department for Health and Human Services ("HHS") is responsible for promulgating regulations pursuant to Section 1557 and the OCR, a sub-agency of HHS, is responsible for enforcing compliance with Section 1557. Here, all parties agree that HHS and/or the OCR have yet to promulgate any rules or regulations interpreting Section 1557. (*See* Pl.'s Mem. at 9 [Doc. No. 25]; Def. Fairview's Reply at 3 [Doc. No. 28].)

Although the OCR has yet to promulgate formal regulations interpreting Section 1557, Plaintiff emphasizes that in an opinion letter, Leon Rodriguez, the Director of the OCR, stated that Section 1557 of the ACA "extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity" and prohibits "discrimination regardless of the actual or perceived sexual orientation or gender identity of the individuals involved." (*See* Barrett Wiik Decl., Ex. C [Doc. No. 26–1].) In *In re Union Pac. R.R. Employment Practices Litig.,* the Eighth Circuit held that "[a]n agency's interpretation that is found in an opinion letter ... 'lack[s] the force of law' and is not entitled to deference under *Chevron,* 467 U.S. 837 (1984)." *See* 479 F.3d 936, 943 (8th Cir.2007). Thus, Defendant Fairview correctly states that Rodriguez's opinion letter is not controlling on the Court. (*See* Def. Fairview's Reply at 3 [Doc. No. 28].)

Nonetheless, the Court may still determine that the OCR's interpretation is persuasive under *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). The weight that the Court places on the OCR's interpretation in its opinion letter is based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore,* 323 U.S. at 140. Here, the Court finds the OCR's interpretation of Section 1557 persuasively concludes that Section 1557 protects plaintiffs, like Rumble, who allege discrimination based on "gender identity." (*See* Barrett Wiik Decl., Ex. C [Doc. No. 26–1].) [5]

5 As further evidence that Section 1557 applies to plaintiffs alleging discrimination based on gender identity, Plaintiff points to an OCR Bulletin that details two investigations involving alleged sex discrimination. (*See* Pl.'s Mem. at 9 [Doc. No. 25].) Defendant Fairview argues that the persuasive effect of the two investigations detailed in the bulletin is minimal because the investigations did not develop into administrative or judicial adjudications. (*See* Def. Fairview's Reply at 3 [Doc. No. 28].) The Court disagrees. Rather, it concludes that the OCR's investigation of these two cases is consistent with the OCR's opinion letter insofar as the letter stated that Section 1557 "extends to claims of discrimination based on ... failure to conform to stereotypical notions of masculinity or femininity." (*See* Barrett Wiik Decl., Ex. C [Doc. No. 26–1].)

***11** While the OCR expresses an opinion about whether Section 1557 prohibits discrimination based on gender identity, the agency currently provides no guidance about the evidentiary or causation standards to apply to Section 1557 cases. Defendants contend that different statutory standards should apply depending upon the Section 1557 plaintiff's class status. For instance, Defendants argue that Title IX standards should apply to Plaintiff because his claim is based on discrimination because of sex. (*See* Def. Emergency Physicians' Mem. at 7–9 [Doc. No. 13]; Def. Fairview's Mem. at 9–13 [Doc. No. 20].) Plaintiff disagrees, and claims that the courts should apply a singular, uniform standard, regardless of the plaintiff's protected class status. (*See* Pl.'s Mem. at 22–27 [Doc. No. 25].)

Although the Court interprets Section 1557 in order to include "every word and clause" in its interpretation, the Court "must not be guided by a single sentence or member of a sentence, but look to the provision of the whole law, and to its

object and policy." *Hennepin Cnty. Med. Ctr. v. Shalala,* 81 F.3d 743, 748 (8th Cir.1996) (quoting *U.S. National Bank of Oregon v. Independent Insurance Agents,* 508 U.S. 439, 455 (1993)). Here, looking at Section 1557 and the Affordable Care Act as a whole, it appears that Congress intended to create a new, health-specific, anti-discrimination cause of action [6] that is subject to a singular standard, regardless of a plaintiff's protected class status.

6 Commentators have noted that Section 1557 "does not merely extend Title VI to additional health programs; [rather,] it creates a new civil right and remedy while leaving in place Title VI and other existing civil rights laws." *See* Sidney D. Watson, *Section 1557 of the Affordable Care Act: Civil Rights, Health Reform, Race and Equity,* 55 How. L.J. 855, 870 (2012); Sarah G. Steege, *Finding a Cure in the Courts: A Private Right of Action for Disparate Impact in Health Care,* 16 Mich. J. Race & L. 439, 456–59 (2011). The Court agrees with this observation. In fact, Section 1557 expressly states that "[n]othing in this title ... shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under [any of the four existing civil rights statutes]." *See* 42 U.S.C. § 18116(b). Thus, Congress likely intended to create a new right and remedy in a new context without altering existing laws.

Reading Section 1557 otherwise would lead to an illogical result, as different enforcement mechanisms and standards would apply to a Section 1557 plaintiff depending on whether the plaintiff's claim is based on her race, sex, age, or disability. For instance, a plaintiff bringing a Section 1557 race discrimination claim could allege only disparate treatment, but plaintiffs bringing Section 1557 age, disability, or sex discrimination claims could allege disparate treatment or disparate impact. *See Alexander v. Sandoval,* 532 U.S. 275, 293 (2001) (holding that no private right of action exists to enforce disparate impact regulations under Title VI); *Alexander v. Choate,* 469 U.S. 287, 299 (1985) ("assum[ing] without deciding that § 504 [of the Rehabilitation Act] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped"); *see also Sharif v. N. Y. State Educ. Dep't,* 709 F.Supp. 345, 361 (S.D.N.Y.1989) (holding that Title IX permits disparate impact suits).

Similarly, a plaintiff bringing a Section 1557 age discrimination claim would have to exhaust administrative remedies and would be barred from recovering damages, but plaintiffs bringing Section 1557 race, disability, or sex discrimination claims would not have to exhaust administrative remedies and would not be barred from recovering damages. *Compare* 42 U.S.C. § 2000d–1(1), 20 U.S.C. § 1682 (2006), and 29 U.S.C. § 794 (2006), *with* 42 U.S.C. § 6104(f); *see Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 285–90 (1998) (requiring actual knowledge of discrimination for monetary damages in a Title IX case); *Franklin v. Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 71–72 (1992) (holding that compensatory damages are available in a Title IX action alleging intentional discrimination); *Guardians Ass'n v. Civil Serv. Comm'n of City of New York,* 463 U.S. 582, 595–96 (1983) (holding that compensatory relief in a Title VI action is only available upon a showing of intentional discrimination).

***12** Plaintiff recognizes the absurd inconsistency that could result if the Court interpreted Section 1557 as Defendants do. (*See* Pl.'s Mem. at 22–27 [Doc. No. 25].) Rumble also aptly notes that if different standards were applied based on the protected class status of the Section 1557 plaintiff, then courts would have no guidance about what standard to apply for a Section 1557 plaintiff bringing an intersectional discrimination claim. [7] (*See id.* at 23.)

7 Intersectional discrimination claims are based on the intersectionality of at least two of a plaintiff's protected class statuses. Professor Cheryl I. Harris explains that:

> The particular experience of black women in the dominant cultural ideology of American society can be conceptualized as intersectional. Intersectionality captures the way in which the particular location of black

> women in dominant American social relations is unique and in some senses unassimilable into the discursive paradigms of gender and race domination. *See* Cheryl I. Harris, *Whiteness As Property,* 106 Harv. L.Rev. 1709, 1791 (1993) (internal quotation and citation omitted).

However, the Court does not intend to imply that Congress meant to create a new anti-discrimination framework that is completely "unbound by the jurisprudence of the four referenced statutes." (*Cf.* Def. Fairview's Reply at 4 [Doc. No. 28].) Nonetheless, given the inconsistency that would result if the Court interpreted Section 1557 as Defendants do, the Court holds that Congress likely referenced the four civil rights statutes mainly in order to identify the "ground[s]" on which discrimination is prohibited—i.e., race, sex, age, and disability. Congress also likely intended that the same standard and burden of proof to apply to a Section 1557 plaintiff, regardless of the plaintiff's protected class status. To hold otherwise would lead to "patently absurd consequences," *United States v. Brown,* 333 U.S. 18, 27 (1948), that "Congress could not possibly have intended," *F.B.I. v. Abramson,* 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting). But, as the Court discusses in more detail below, at this stage of the proceedings, it need not determine the precise standard to apply to Plaintiff's Section 1557 claim.

**a. Covered Health Program or Activity**

Defendant Emergency Physicians claims that Rumble "never alleges facts to show he sought medical care from [Emergency Physicians] pursuant to a[f]ederally funded or administered 'health program or activity.' " (*See* Def. Emergency Physicians' Mem. at 8 [Doc. No. 13].) Defendant misstates the relevant legal standard for determining which entities are covered by Section 1557. According to the ACA, entities that are subject to the anti-discrimination provisions in Section 1557 include "any health program or activity, *any part* of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance," or "any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)." *See* 42 U.S.C. § 18116 (emphasis added). Thus, as long as part of an organization or entity receives federal funding or subsidies of some sort, the entire organization is subject to the anti-discrimination requirements of Section 1557. A potential plaintiff need not seek medical care specifically from the part of the organization that receives federal funding. (*Cf.* Def. Emergency Physicians' Mem. at 8 [Doc. No. 13] ); *see* Civil Rights Restoration Act, Pub.L. No. 100–259, § 382, 102 Stat. 28, 28–29 (1988) (overturning the United States Supreme Court's decision in *Grove City Coll. v. Bell,* 465 U.S. 555, 556 (1984), to clarify that the civil rights laws reached an institution, as a whole, even if only part of the institution received federal funding). Rather, the organization is only required to have a health program or activity that receives federal financial assistance.

***13** Here, Plaintiff alleges that Emergency Physicians is a "Minnesota-based healthcare organization [that] receiv[es] federal and state financial assistance such as credits, subsidies, or contracts of insurance." (Compl. ¶ 10 [Doc. No. 1].) In his brief, Plaintiff argues that because Emergency Physicians allegedly receives Medicare and Medicaid funds, it is "a covered entity" for purposes of Title VI and the Rehabilitation Act, which are referenced by Section 1557. (Pl.'s Mem. at 18 [Doc. No. 25].) "The parties have not cited, and the Court has not found, any cases from the Eighth Circuit dealing with the issue of whether Medicare/Medicaid payments to a hospital are sufficient to create Title VI liability." *Bissada v. Arkansas Children's Hosp.,* No. 4:08CV00362 (JLH), 2009 WL 1010869, at *11 (E.D.Ark. Apr. 14, 2009) *aff'd,* 639 F.3d 825 (8th Cir.2011); *see also Bowen v. Am. Hosp. Ass'n,* 476 U.S. 610, 624 n.9 (1986) (declining "to review the [Second Circuit] Court of Appeals' assumption that the provision of health care to infants in hospitals receiving Medicare or Medicaid payments is a part of a 'program or activity receiving Federal financial assistance.' ").

Nonetheless, courts outside the Eighth Circuit have resoundingly held that Medicare and Medicaid payments constitute federal financial assistance for, at least, the purposes of section 504 and Title VI. [8] *See, e.g., United States v. Baylor Univ. Med. Ctr.,* 736 F.2d 1039, 1042 (5th Cir.1984) (holding that "Medicare and Medicaid are federal financial assistance for the purpose of Section 504 [of the Rehabilitation Act], and that the district court did not err in defining inpatient and emergency room services as the 'program or activity' that would be the appropriate target of HHS's investigation as the result of the alleged violation of Section 504."); *NAACP v. Medical Center, Inc.,* 599 F.2d 1247, 1248 n.4 (3d

Cir.1979), *aff'd in relevant part,* 453 F.Supp. 280, *later proceeding,* 453 F.Supp. 330 (D.Del.1978), (affirming district court's determination that hospital's receipt of Medicare, Medicaid, and unspecified "other" assistance triggered Section 504 and Title VI); *United States v. University Hosp. of State Univ. of N.Y. at Stony Brook,* 575 F.Supp. 607, 612–13 (E.D.N.Y.1983), aff'd on other grounds, 729 F.2d 144, 151 (2d Cir.1984) (holding that legislative history reveals Medicare and Medicaid are "federal financial assistance" for purposes of § 504); *United States v. Cabrini Medical Center,* 639 F.2d 908, 910 (2d Cir.1981) (holding that, under the Rehabilitation Act, Medicare and Medicaid payments constitute "federal financial assistance" if the payments are used for employment purposes); *Bob Jones University v. Johnson,* 396 F.Supp. 597, 603 n.21 (D.S.C.1974), aff'd without opinion, 529 F.2d 514 (4th Cir.1975) (holding that Medicare and Medicaid constitute federal financial assistance for Title VI purposes). Because Section 1557 relies on and incorporates section 504 and Title VI, the Court finds that Medicare and Medicaid payments received by Emergency Physicians constitute federal financial assistance for the purpose of Section 1557 as well.

8 Moreover, courts must generally "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co. Div. of Textron Inc.,* 416 U.S. 267, 275 (1974). "The Department of Health, Education and Welfare (the predecessor to the Department of Health and Human Services) expressly included Medicare and Medicaid as programs covered by Title VI, *see* 38 Fed.Reg. 17982 (1973); 40 Fed.Reg. 18173 (1975), and HHS's regulations continue to list these programs among those covered by Title VI." *United States v. Baylor Univ. Med. Ctr.,* 736 F.2d 1039, 1047 (5th Cir.1984) (citing 45 C.F.R. Part 80, Appendix A at Part 1, # 121 and Part 2, # 30). Additionally, "[t]he Department's regulations implementing Section 504 expressly state that service providers whose only source of federal financial assistance is Medicaid 'should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a non-discriminatory fashion.' " *Baylor,* 736 F.2d at 1047 (citing 45 C.F.R. Part 84, App. A, Subpart A(1)).

***14** In order for the Medicare and Medicaid funds to qualify as "federal financial assistance" relevant for section 504 and Title VI, a civil rights plaintiff is regularly required to demonstrate that the Medicare and Medicaid funds were used for a particular purpose. Specifically, "[a] number of cases have held ... that a Title VI plaintiff must show that the received funds were used for employment." *Bissada,* 2009 WL 1010869, at *11; *see Valentine v. Smith,* 654 F.2d 503, 512 (8th Cir.1981) (dismissing the plaintiff's Title VI claim because she failed to show that the university defendant used its federal assistance for the purpose of providing faculty employment); *see also Mass v. Martin Marietta Corp.,* 805 F.Supp. 1530, 1542 (D.Colo.1992) (explaining that a Title VI plaintiff must also demonstrate that the federal government received no goods or services in return for the Medicare or Medicaid payments). Similarly, a section 504 plaintiff must also demonstrate that "a primary objective for the federal funds" must be "to provide for the employment" of staff. *See Simon v. St. Louis Cnty ., Mo.,* 656 F.2d 316, 319 (8th Cir.1981) (holding that because the record demonstrated that "a primary objective for the federal funds going to the St. Louis County Police Department is to provide for the employment of commissioned police officers," the "district court properly concluded that Simon had standing to bring a suit under section 504.").

However, a civil rights plaintiff is not required to substantively prove how the funds were used until summary judgment or trial. *See Muller v. Hotsy Corp.,* 917 F.Supp. 1389, 1418 (N.D.Iowa 1996) (granting summary judgment for the defendant on the plaintiff's section 504 claim because the plaintiff failed to show that the government's intention was to subsidize the defendant, as opposed to compensate the defendant for its goods and services); *Bissada,* 2009 WL 1010869, at *12 (granting summary judgment for the defendant on the plaintiff's Title VI claim because the plaintiff failed to show that the federal assistance received by the defendant was used directly to provide employment for its physicians); *Simon,* 656 F.2d at 319 (affirming the district court's ruling that the section 504 plaintiff met his burden of proof during trial that the federal funds were used for employment purposes). Rather, Rumble must only allege facts that "raise a reasonable

expectation that discovery will reveal evidence" that substantiates his claim that Emergency Physicians received federal funds, which were used for employment purposes. *See Twombly,* 550 U.S. at 556.

In sum, Plaintiff is not required to demonstrate that he sought medical care from Emergency Physicians through one of Defendant's federally funded or administered health programs or activities. Because Plaintiff alleges that Emergency Physicians receives federal funds and is subject to Section 1557, the Court plausibly assumes that the federal funds were used for employment purposes. As explained above, Rumble could only substantiate his claim further with the benefit of discovery. Accordingly, the Court finds that Defendant Emergency Physicians is subject to the anti-discrimination provisions in Section 1557. [9]

9 Moreover, the Court notes that the fact that the OCR initiated an investigation of an emergency department in New Orleans, Louisiana, as part of its enforcement of Section 1557, demonstrates that at least one emergency room facility, which likely received Medicare and Medicaid payments from the federal government, qualified as an entity that was subject to the anti-discrimination mandate of Section 1557. (*See* Pl.'s Mem. at 10 n.3 [Doc. No. 25] .)

**b. Adverse Action or Differential Treatment on the Basis of Sex**

***15** In addition to arguing that Plaintiff failed to show that he sought medical care from a federally funded health program, Defendant Emergency Physicians argues that Plaintiff's Count I should be dismissed because he failed to show that Emergency Physicians took an adverse action against him or treated him differently because of his transgender status. (*See* Def. Emergency Physicians' Mem. at 8–9 [Doc. No. 13].) Specifically, Defendant argues that Rumble must establish that Emergency Physicians, through its employee, Dr. Steinman, had "discriminatory intent." (*See id.* at 10.) Defendant's basis for their argument is an Eighth Circuit case interpreting the intent standard required for a Title IX sex discrimination claim. (*See id.* at 9.)

In contrast, Plaintiff argues that the Court need not determine whether the Title IX standard should apply to Plaintiff's Section 1557 claim. (*See* Pl.'s Mem. at 34 [Doc. No. 25].) Alternatively, Plaintiff argues that even if the Court were to apply the Title IX standard, Rumble's Complaint meets the intent standard. (*See id.*) The Court agrees with Plaintiff that it need not decide whether the Title IX standard applies to Rumble's Section 1557 claim at this stage in the litigation. Rather, the Court holds that even if the Title IX standard applies, Plaintiff alleges a plausible Section 1557 claim.

**i. Adverse Action or Differential Treatment**

Defendant Emergency Physicians contends that Rumble failed to plead that Dr. Steinman's actions amount to an "adverse action" or "differential treatment" that is prohibited by Section 1557. (*See* Def. Emergency Physicians' Mem. at 9 [Doc. No. 13].) The Court disagrees. According to Section 1557, a covered entity, such as Emergency Physicians, may not exclude an individual from being a patient in the hospital, deny the individual the benefits of being a patient, or subject the individual to discrimination, on the basis of sex. *See* 42 U.S.C. § 18116. Therefore, in order for Dr. Steinman's action to rise to an actionable level, he must have either excluded Rumble from receiving medical care at the hospital, denied Rumble the benefits of medical care at the hospital, or otherwise discriminated against him. *See id.* The Court finds that Plaintiff alleges facts sufficiently demonstrating that Dr. Steinman discriminated against Rumble, and denied Rumble the benefits of medical care that he was entitled to as a patient in the emergency room at Fairview Southdale Hospital.

Dr. Steinman allegedly treated Rumble with hostility and aggression while asking him pointed questions that were allegedly meant to embarrass Rumble. (*See* Compl. ¶¶ 39–40 [Doc. No. 1] .) These questions included asking Plaintiff whether he was having sex with men or women, engaging in penetration, and whether he had ever had sex with objects. (*See id.*) Dr. Steinman also allegedly made disparaging comments about Rumble's use of hormones, and Dr. Steinman

aggressively communicated that he was unsure whether Rumble's genital inflammation was caused by the hormones. (*Id.* ¶ 44.) Therefore, although Dr. Steinman did not expressly "mock[ ] or criticize[ ]" Rumble's transgender status (*cf.* Def. Emergency Physicians' Mem. at 11 [Doc. No. 13]; Def. Emergency Physicians' Reply at 3 [Doc. No. 29] ), Plaintiff plausibly alleges that Dr. Steinman's comments were made as indirect, offensive references about Plaintiff's gender identity.

***16** Plaintiff also alleges facts that demonstrate Dr. Steinman conducted an "assaultive exam." (*See* Pl.'s Mem. at 32 [Doc. No. 25].) Specifically, Rumble alleges that although he was crying and demanded Dr. Steinman to stop the painful exam, *twice,* Dr. Steinman continued to forcefully jab at Rumble's genitals causing Rumble to continue to cry and scream in pain. (*See* Compl. ¶¶ 43–45 [Doc. No. 1].) In fact, it was not until Rumble's mother demanded and yelled for Dr. Steinman to stop jabbing at her son's genitals that Dr. Steinman's allegedly assaultive exam ended. (*Id.* ¶ 46.) At the conclusion of the physical exam, Dr. Steinman then allegedly left the room without explaining to Rumble and his mother what the next steps entailed, such as whether or not Rumble would be admitted to the hospital. (*Id.* ¶ 47.) Plaintiff's allegations about the exam are not "subjective impressions of Dr. Steinman's manner." (*Cf.* Def. Emergency Physicians' Mem. at 11 n.2 [Doc. No. 13].) Rather, these allegations describe an objective series of events, in which Dr. Steinman ignored Plaintiff's pleas for Dr. Steinman to stop the exam.

Read as a whole, these facts demonstrate that the alleged mistreatment rises to the level of the denial of benefits of appropriate medical care. (*See* Pl.'s Mem. at 24 [Doc. No. 25].) "Whether gender-oriented conduct rises to the level of actionable 'harassment' ... 'depends on a constellation of surrounding circumstances, expectations, and relationships.' " *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 651 (1999) (citing *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 82 (1998)). Generally, the two parties in a doctor-patient relationship are not on equal footing, as a doctor normally has significantly more experience and expertise in his position of authority. The specific circumstances surrounding Rumble's interaction with Dr. Steinman also supports the Court's finding. When any individual permits a doctor to conduct a genital exam, the patient is in a physically vulnerable position, which the doctor controls. Here, Rumble had a reasonable expectation that his treating doctor at the emergency room would not physically "assault" him, or at the very least would stop an intrusive and painful genital exam when asked to stop.

Defendant Emergency Physicians contends that because Rumble was eventually admitted to the hospital and received subsequent medical care, then Dr. Steinman must not have denied Rumble the benefits of medical care. (*See* Def. Emergency Physicians' Reply at 3 [Doc. No. 29].) The Court disagrees. Section 1557 does not require the plaintiff to demonstrate that he received no medical care or attention. (*Cf.id.*) Rather, the statute simply requires that the plaintiff demonstrate that he was denied the benefits of a health program or activity, or discriminated against. Here, Plaintiff meets this burden.

***17** Defendant erroneously argues that in order for Plaintiff's claim to survive dismissal, the Court must "invent facts not alleged by Plaintiff." (*Cf. id.* at 4–5.) In support of this proposition Defendant cites this Court's order in *Pittman v. Jesson,* No. 12–cv–1410 (SRN/TNL), 2014 WL 4954286, at *11 (D.Minn. Sept. 30, 2014). In *Pittman,* this Court held that the patient-plaintiff's race discrimination claim failed against one of the defendants because the plaintiff did not allege that this defendant treated white and black patients differently. *See id.* In fact, the plaintiff did not allege that this defendant treated him adversely in any way, or treated other black patients unfavorably. *See id.* In contrast, here, Rumble sufficiently alleges detailed examples of Dr. Steinman's discriminatory or unfavorable conduct as evidenced by his allegedly rude remarks, and failure to heed Plaintiff's requests to stop the painful exam. *Cf. Folger v. City of Minneapolis,* F.Supp.3d, No. 13–cv–3489 (SRN/JJK), 2014 WL 4187504, at *6, 10 (D.Minn. Aug. 22, 2014) (dismissing the plaintiffs' Fair Housing Act and Equal Protection Clause discrimination claims because the plaintiffs failed to allege "*any* factual basis" for the defendant's alleged "animus").

Moreover, the Court notes that Plaintiff need not allege facts demonstrating that Dr. Steinman "treated other patients who presented with similar symptoms and medical conditions differently." (*Cf.* Def. Emergency Physicians' Mem. at 11

[Doc. No. 13].) At this stage in the proceeding, without the benefit of discovery, Plaintiff does not have knowledge of how Dr. Steinman treated other patients in the emergency room with similar conditions. Thus, it would be unreasonable for the Court to require Plaintiff to plead comparative evidence in his Complaint. Accordingly, Plaintiff sufficiently alleges that Emergency Physicians, through Dr. Steinman, took an "adverse action" against him.

**ii. Dr. Steinman Discriminated On the Basis of Sex**

Defendant Emergency Physicians also argues that Rumble failed to allege facts showing that Dr. Steinman discriminated against Rumble *on the basis* of Rumble's sex. (*See* Def. Emergency Physicians' Mem. at 10 [Doc. No. 13].) Defendant relies on the Eighth Circuit's holding in *Wolfe v. Fayetteville, Arkansas Sch. Dist.,* 648 F.3d 860, 865 (8th Cir.2011) to support its contention that Plaintiff must prove that Dr. Steinman intended to discriminate against Rumble. (*See* Def. Emergency Physicians' Mem. at 9 [Doc. No. 13].) Likely, Defendant relies on *Wolfe* because Plaintiff alleges discrimination on the basis of sex, and *Wolfe* involves the Eighth Circuit's analysis of Title IX, a civil rights statute that prohibits discrimination on the basis of sex. *See* 20 U.S.C. § 1681(a).

According to *Wolfe,* a Title IX plaintiff is "legally required to show" that the defendant "intended to discriminate against him 'on the basis of sex,' meaning the harassment was motivated by either [the plaintiff's] gender or failure to conform with gender stereotypes." *See* 648 F.3d at 867.

***18** Even if Plaintiff was required to prove that Dr. Steinman intended to harass Rumble because of Rumble's transgender status, or Rumble's failure to conform with gender stereotypes, Plaintiff plausibly alleges facts demonstrating Dr. Steinman's requisite intent. As one district court explained, "[a] record of disparate treatment and unprofessional behavior directed at a plaintiff may constitute evidence of discriminatory intent." *See Pierce v. President and Fellows of Harvard College,* 994 F.Supp.2d 157, 163 (D.Mass.2014) (denying summary judgment because a jury could infer discriminatory intent from the defendants' unprofessional behavior and the defendants' inconsistent explanations for the treatment plaintiff received). Here, the alleged manner in which Dr. Steinman treated Plaintiff, at a minimum, constitutes "unprofessional behavior," from which a factfinder could infer discriminatory intent.

The Court finds that (1) the alleged questions that Dr. Steinman asked and the comments he made about Rumble's hormone use, (2) Dr. Steinman's alleged tone during questioning, (3) the alleged "assaultive behavior" Dr. Steinman subjected Rumble to during the physical exam, and (4) the medical bill Rumble received after his hospital visit, sufficiently "nudge[ ]" Rumble's Section 1557 claim "across the line from conceivable to plausible," and plausibly demonstrate Dr. Steinman's discriminatory intent. *See Twombly,* 550 U.S. at 547.

As the Court noted above, Plaintiff alleges that Emergency Physicians sent Rumble a medical bill after his visit to the hospital that stated, "THE DIAGNOSIS IS INCONSISTENT WITH THE PATIENT'S GENDER." (*Id.* ¶ 63.) Plaintiff argues that this "insulting bill" further demonstrates how Dr. Steinman's alleged maltreatment of Rumble was based on Rumble's gender. (*See* Pl.'s Mem. at 12 [Doc. No. 25].) Emergency Physicians contends that this bill was likely sent to Plaintiff as a result of confusion on the part of Rumble's insurer. (*See* Def. Emergency Physicians' Mem. at 12 [Doc. No. 13].) Defendant additionally notes that "[a]ny temporary confusion reflected in Plaintiff's allegation about [Emergency Physicians'] bill is not a material adverse action upon which Plaintiff can base a valid claim of sex discrimination." (*See id.*) The Court agrees, but the Court does not read Plaintiff's Complaint as alleging that the bill forms a separate and distinct factual basis for Rumble's discrimination claim. Rather, the Court reads Rumble's Complaint as alleging that the bill merely bolsters Plaintiff's claim that he was treated adversely because of his gender identity. [10]

10 The Court notes that neither party clearly describes the billing process, nor explains whether, nor how, Emergency Physicians selects the language to include on the bill. Nonetheless, at this stage in the proceedings the Court finds that the facts alleged about the medical bill are sufficient to bolster

Plaintiff's discrimination claims, and push Plaintiff's claims "across the line from conceivable to plausible." *See Twombly,* 550 U.S. at 547.

Reading the facts alleged in the Complaint as a whole, the Court holds that it is plausible that Dr. Steinman mistreated Plaintiff *because* of Rumble's gender identity, and the mistreatment was not "random[ ] poor treatment that anyone might have received." (*See* Pl.'s Mem. at 44 [Doc. No. 25].)

However, the Court notes that it need not determine whether the *Wolfe* intent standard applies to Plaintiff's Section 1557 claim at this stage in the litigation. As the Court explained in more detail above, Section 1557 references Title VI, Title IX, the Age Discrimination Act, and section 504 of the Rehabilitation Act when listing the grounds for which discrimination is prohibited (e.g., race, color, national origin, sex, age, and disability). *See* 42 U.S.C. § 18116. Therefore, Defendant Emergency Physicians' insistence that *Wolfe's* Title IX standard applies because Plaintiff's claim is "on the basis of sex" is not necessarily correct. Likely, Congress intended for the same discriminatory intent standard, and overall burden of proof, to apply to a Section 1557 plaintiff's claim, regardless of the basis for the alleged discrimination. [11] Accordingly, the Court declines to rule on the intent standard required for a Section 1557 claim at this time, but holds that even if Plaintiff is required to show that Dr. Steinman, or Defendant Emergency Physicians, intended to discriminate against Plaintiff because of his transgender status, then Plaintiff has sufficiently alleged plausible facts satisfying this standard.

11 Different intent standards apply to Title IX and the Rehabilitation Act, for example. Although Title IX requires that the defendant intended to discriminate, a Rehabilitation Act plaintiff need only demonstrate that the defendant "fail[ed] to abide by a legally imposed duty," and need not prove what motivated the defendant's action. *See Peebles v. Potter,* 354 F.3d 761, 767 (8th Cir.2004) (explaining that "it is not the employer's discriminatory intent in taking adverse employment action against a disabled individual that matters. Rather, discrimination occurs when the employer fails to abide by a legally imposed duty.").

**2. Count II: MHRA Claim**

***19** "The MHRA requires the plaintiff to show: (1) membership in a protected class; (2) denial of services or accommodations; and (3) that the denial occurred because of the plaintiff's membership in the protected class." *Childs v. Extended Stay of Am. Hotels,* No. 10–cv–3781 (SRN/JJK), 2012 WL 2126845, at *5 (D. Minn. June 12, 2012) (citing *Monson v. Rochester Athletic Club v. Rochester Athletic Club,* 759 N.W.2d 60, 63 (Minn.Ct.App.2009)); *see* Minn.Stat. § 363A.11, subd. 1(a)(1). Emergency Physicians argues that Rumble failed to show the second and third elements required to state an actionable MHRA claim.

Specifically, Emergency Physicians contends that the Court should dismiss Plaintiff's Count II because (a) Plaintiff "does not assert facts to demonstrate that [Emergency Physicians] denied Plaintiff any service, facility, privilege, advantage, or accommodation of any public accommodation," and (b) Plaintiff does "not asserts facts to show that [Emergency Physicians] discriminated against Plaintiff because of Plaintiff's sexual orientation and gender identity." (*See* Def. Emergency Physicians' Mem. at 13–14 [Doc. No. 13].) The Court addresses both of these arguments below.

**a. Denied Service or Accommodation**

Defendant asserts that Plaintiff failed to allege that he was denied access to any place of public accommodation. (*See* Def. Emergency Physicians' Mem. at 14 [Doc. No. 13].) Emergency Physicians notes that because Dr. Steinman evaluated Plaintiff in the emergency room, Plaintiff was ultimately admitted to the hospital, and Plaintiff remained hospitalized for seven days, it is clear that Rumble was not "prevented from receiving medical care or otherwise from accessing a public hospital or other facility." (*See id.*) The Court disagrees.

The MHRA prohibits the "full and equal enjoyment" of a public accommodation. *See* Minn.Stat. § 363A.11, subd. 1(a)(1). According to the Minnesota Supreme Court, an actionable MHRA claim must include "some tangible change in ... conditions," or some "material ... disadvantage." *See Bahr v. Capella Univ.,* 788 N.W.2d 76, 83 (Minn.2010) (citing *Burchett v. Target Corp.,* 340 F.3d 510, 518 (8th Cir.2003); *Brannum v. Mo. Dep't of Corr.,* 518 F.3d 542, 549 (8th Cir.2008); and *Jones v. Fitzgerald,* 285 F.3d 705, 714 (8th Cir.2002)).

Reading the facts that Rumble alleges as true, Plaintiff was denied the "full and equal enjoyment of humane and dignified care that other patients would have received." (*See* Pl.'s Mem. at 38 [Doc. No. 25].) Dr. Steinman allegedly treated Plaintiff inhumanely, not only by allegedly asking Rumble hostile questions meant to embarrass Plaintiff, but also by allegedly continuing with a painful physical examination of Plaintiff's genitals, even after Plaintiff twice cried out for Dr. Steinman to stop the examination. (*See* Compl. ¶¶ 39–47 [Doc. No. 1].) If true, this type of "assaultive exam" demonstrates that Plaintiff likely experienced a material disadvantage compared to others who were seen by emergency room doctors at Fairview. [12] Therefore, Plaintiff plausibly states a claim that, pursuant to the MHRA, he was denied the full and equal enjoyment of an individual seeking professional and humane medical care from an emergency room physician.

12 Emergency Physicians claims that Plaintiff's allegations "do not rise to the level of the material adverse events necessary to establish a valid claim of discrimination under the MHRA" because Plaintiff only alleges that (1) he perceived Dr. Steinman to be angry, and (2) he received an erroneous bill for services. (*See* Def. Emergency Physicians' Mem. at 15 [Doc. No. 13].) The Court disagrees. Plaintiff painstakingly accounts how Dr. Steinman allegedly "jabbed" at Rumble's genitals and did not stop jabbing until Rumble's mother demanded Dr. Steinman to stop. (*See* Compl. ¶¶ 43–47 [Doc. No. 1].)

**b. Dr. Steinman Discriminated *Because of* Rumble's Gender Identity/Sexual Orientation**

***20** Defendant Emergency Physicians also contends that Rumble failed to allege that Dr. Steinman's denied him full and equal benefits of emergency room care *because of* Rumble's sexual orientation and gender identity. (*See* Def. Emergency Physicians' Mem. at 14 [Doc. No. 13].) Again, the Court disagrees.

As noted above, the MHRA prohibits discrimination "because of ... sexual orientation." *See* Minn.Stat. § 363A.11, subd. 1(a)(1). Minnesota law further defines "sexual orientation" as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *See* Minn.Stat. § 363A.03, subd. 44. Thus, solely for the purposes of Plaintiff's MHRA claim, Rumble alleges that he was discriminated against by Dr. Steinman because of Rumble's "sexual orientation."

As with Plaintiff's Section 1557 claim against Emergency Physicians, the facts alleged in Plaintiff's Complaint plausibly demonstrate that Dr. Steinman discriminated against Plaintiff because of his gender identity or transgender status. Dr. Steinman's comments and hostile questioning about Plaintiff's sexual activities, coupled with his disregard for Rumble's repeated request for Dr. Steinman to stop the painful physical examination demonstrate that the alleged mistreatment Plaintiff endured was because of Rumble's gender identity. (*See* Pl.'s Mem. at 44 [Doc. No. 25].)

As noted earlier, Rumble need not allege in his Complaint that Dr. Steinman "treated other patients with similar clinical presentations more favorably because of their sexual orientation and gender identity." (*Cf.* Def. Emergency Physicians' Mem. at 14–15 [Doc. No. 13].) Rather, Plaintiff need only allege facts that make it plausible that he was treated differently because of his gender identity. Rumble correctly states in his brief that "comparator evidence is only one of several ways that a plaintiff may prove a claim of discrimination at trial." (*See* Pl.'s Mem. at 45 [Doc. No. 25].) For instance, Plaintiff may attempt to prove sexual orientation discrimination through "direct evidence in the form of actions or remarks by [Defendant] that reflect discriminatory intent ." *See Rodgers v. U.S. Bank, N.A.,* 417 F.3d 845, 859 n.9 (8th Cir.2005)

(Colloton, J., concurring) *abrogated on other grounds by Torgerson v. City of Rochester,* 643 F.3d 1031 (8th Cir.2011). Accordingly, Rumble sufficiently alleges "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [his MHRA claim]." *Twombly,* 550 U.S. at 556.

Emergency Physicians contends that Plaintiff impermissibly "relies on reports and surveys about general adverse treatment of the transgender population" to substantiate his discrimination claim against Dr. Steinman. (See Def. Emergency Physicians' Reply at 8 [Doc. No. 29].) The Court disagrees. Plaintiff does in fact cite to two reports in his Complaint that document discrimination that transgender people experience in health care settings. (See Compl. ¶¶ 18–23 (citing Lambda Legal, When Health Care Isn't Caring, (2009), http:// www.lambdaleg al.org/sites/default/files/ publications/downloads /whcic-report-when-health-care-isnt-caring.pdf; and Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (2011), http://transequality.org/sit es/default/files/ docs/resources/NTDS_Report.pdf) [Doc. No. 1].) While the Court does not read the reference to these reports as the substantive basis or proof of Dr. Steinman's alleged discrimination in this case, these public documents do bolster the plausibility of Plaintiff's claims.

### C. Defendant Fairview's Motion to Dismiss

***21** Defendant Fairview also filed a Motion to Dismiss Plaintiff's two counts. (*See* Def. Fairview's Mot. to Dismiss [Doc. No. 11].) Plaintiff alleges that "Defendant Fairview is vicariously and/or contractually liable for the actions of its principals, agents, employees, shareholders and/or partners." (Compl. ¶ 8 [Doc. No. 1].) Fairview claims that: (1) Fairview cannot be held vicariously liable under either federal or state law for the alleged acts of Dr. Steinman; and (2) Rumble failed to state a viable discrimination claim because he did not allege that any material adverse actions were taken against him. (*See* Def. Fairview's Mem. at 1 [Doc. No. 20].) The Court addresses both of these issues below.

#### 1. Liability for Dr. Steinman's Actions

Defendant Fairview claims that "only the facts alleged against *Fairview* are relevant to the instant [m]otion because Fairview is not vicariously liable for the acts Rumble alleges were done by Emergency Physicians [via Dr. Steinman]." (*See* Def. Fairview's Mem. at 7 (emphasis original) [Doc. No. 20].) Fairview suggests that the Court should not consider Dr. Steinman's actions when determining the plausibility of either Plaintiff's Section 1557 claim or his MHRA claim. The Court holds that it need not determine the vicarious liability standard to apply to Plaintiff's Section 1557 claim because Plaintiff sufficiently alleges that Defendant Fairview is directly liable for Dr. Steinman's actions. The Court additionally finds that, under the MHRA, Fairview may likely be held indirectly liable for Dr. Steinman's actions. (*See* Compl. ¶ 8 [Doc. No. 1].)

##### a. Liability Pursuant to Section 1557 Claim

As it applies to Plaintiff's Section 1557 claim, Fairview contends that it is not vicariously liable for Dr. Steinman's acts because Title IX "does not recognize the concept of vicarious liability," Plaintiff's Section 1557 sex discrimination claim is based on Title IX principles, and therefore, Plaintiff's Section 1557 claim also cannot rely on the concept of vicarious liability. (*See id.*) In opposition, Plaintiff argues that Defendant misstates the relevant Title IX standard, and "even if the Court assumes, as Fairview does, that the Title IX standard controls," then Plaintiff satisfies this standard. (*See* Pl.'s Mem. at 21–22 [Doc. No. 25].) The Court agrees that Fairview does not cite the relevant Title IX standard that may potentially apply to this case. Moreover, the Court holds that it need not determine the appropriate vicarious liability standard to apply to Plaintiff's Section 1557 claim because Plaintiff sufficiently alleges that Defendant Fairview is directly liable for Dr. Steinman's actions.

The Supreme Court announced the standard for determining a school district's direct liability for an employee's discriminatory acts under Title IX in *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 285–91 (1998). Fairview asserts that the *Gebser* Court held that "a plaintiff may not use Title IX to hold a [school] district liable for

an employee's harassment of a student based on the principles of *respondeat superior* or vicarious liability." (*See* Def. Fairview's Mem. at 8 [Doc. No. 20].) Fairview mischaracterizes and misapplies the relevant holding of *Gebser.* Rather, in *Gebser,* the Supreme Court held that a plaintiff *may* use Title IX to hold a district liable for an employee's harassment of a student based on principles of *direct* liability, if an "appropriate person," or "an official who at a minimum has authority to address the alleged discrimination and to institute correctives measures on the recipient's behalf[,] has actual knowledge of discrimination in the recipient's programs[,] and fails adequately to respond." *Gebser,* 524 U.S. at 290. The official's response must "amount to deliberate indifference to discrimination," in order for direct liability to attach. *See id.*

***22** Here, Dr. Steinman is not an employee of Fairview. Rather, as Plaintiff alleges, Dr. Steinman is an employee of Emergency Physicians. (*See* Compl. ¶ 12 [Doc. No. 1].) Therefore, *Gebser's* direct liability standard for employees is not relevant to this case. Instead, even assuming that the Court should apply case law interpreting Title IX, the Court must analyze the relevant direct liability standard for a third party's actions, as opposed to the actions of an employee.

In *Davis,* the Supreme Court discussed the standard for determining a school district's direct liability for a third party's discriminatory actions. *See* 526 U.S. at 633. The *Davis* Court held that "a [Title IX] private damages action may lie against the school board in cases of student-on-student harassment ... only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities ... [and] only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *See id.* The Court also held that a school district would only be liable for a third-party's actions when the school "exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 630.

The Court finds that even if the *Davis* Court's Title IX standard applies to this case, Defendant Fairview may be held liable for Dr. Steinman's actions if Plaintiff sufficiently alleges the following four elements: (1) Dr. Steinman's actions effectively barred Rumble's access to reasonable, non-harassing medical care; (2) an appropriate person at Fairview knew of Dr. Steinman's discriminatory acts; (3) that Fairview official acted with deliberate indifference to the discrimination; and (4) Fairview has substantial control over Dr. Steinman and the emergency room. *See id.* at 630, 633.

At this stage in the litigation, the Court finds that Plaintiff plausibly alleges the four elements outlined above. First, as discussed in more detail in Part III(B)(1)(b), Dr. Steinman's alleged treatment of Rumble was "objectively offensive," particularly when Dr. Steinman refused to stop a painful genital exam, despite Plaintiff's repeated pleas. By allegedly ignoring Plaintiff's requests, Dr. Steinman effectively barred Plaintiff from an opportunity to have "humane and dignified [medical] care." (*See* Pl.'s Mem. at 34 [Doc. No. 25].) A reasonable person, seeking treatment from an emergency room doctor at a hospital, would expect that the doctor would respect the patient's wishes to stop a painful exam.

Plaintiff also sufficiently alleges that an "appropriate person" knew of Dr. Steinman's behavior and actions. Specifically, Rumble alleges that Dr. Lehrman, an OB/GYN employed by Fairview, and a female nursing assistant/emergency room technician, also presumably employed by Fairview, were in the exam room, saw Dr. Steinman complete the exam, and did not intervene or stop Dr. Steinman from proceeding with the exam. (*See* Compl. ¶ 48 [Doc. No. 1].) The Eighth Circuit has noted that it cannot "pretend to fashion a bright-line rule as to what job titles and positions automatically mark an individual as having sufficient authority or control for the purposes of Title IX liability." *See Plamp v. Mitchell Sch. Dist. No. 17–2,* 565 F.3d 450, 457 (8th Cir.2009) (citing *Murrell v. Sch. Dist. No. 1, Denver, Colo.,* 186 F.3d 1238, 1247 (10th Cir.1999) (explaining that "[b]ecause officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry.")).

***23** Here, although Plaintiff does not detail whether either Dr. Lehrman or the female nursing assistant have "authority to address the alleged discrimination and to institute correctives measures," *Gebser,* 524 U.S. at 290, the Court does not expect that Plaintiff would be able to do so without further discovery, *see Plamp,* 565 F.3d at 457. Therefore, for the purposes of Defendants' Motions to Dismiss, the Court finds that Plaintiff plausibly alleges that at least one "appropriate person" knew of Dr. Steinman's "assaultive" exam.

The Court also concludes that Plaintiff plausibly alleges that either Dr. Lehrman or the nursing assistant acted with deliberate indifference to Dr. Steinman's discriminatory behavior by not intervening or stopping Dr. Steinman from continuing with the genital exam. Finally, the Court finds that Rumble plausibly alleges that Fairview has substantial control over the Fairview emergency room and over Dr. Steinman, a doctor who works in Fairview's emergency room. (*See* Compl. ¶ 7 [Doc. No. 1].) Additional facts about the control Fairview exercises will only become evident after discovery.

Therefore, even assuming that the Title IX standard for direct liability for a third-party's actions applies to this case, Plaintiff satisfies his burden. Accordingly, the Court considers Dr. Steinman's alleged actions when evaluating the plausibility of Plaintiff's Section 1557 claim against Defendant Fairview. The Court emphasizes, however, that it is not entirely clear whether Plaintiff must satisfy the four elements outlined above. Because Section 1557 incorporates and references four civil rights statutes, only one of which is Title IX, the Court may conclude that Plaintiff is not required to satisfy the Title IX liability standard. Rather, Plaintiff may be subject to an entirely different burden of proof under the unique cause of action created by Section 1557.

**b. Liability Pursuant to the MHRA**

In addition to arguing that Fairview is not liable for Dr. Steinman's actions for Plaintiff's Section 1557 claim, Defendant also claims that Fairview is not vicariously liable for Dr. Steinman's actions for Plaintiff's MHRA claim. (*See* Def. Fairview's Mem. at 8 [Doc. No. 20].) Similar to the Court's finding with respect to Plaintiff's Section 1557 claim, the Court holds that Plaintiff plausibly alleges that Fairview is liable for Dr. Steinman's actions for the MHRA claim as well.

The Court's analysis is guided by Title VII case law because Title VII and the MHRA are often interpreted similarly. *See Torgerson v. City of Rochester,* 643 F.3d 1031, 1043 (8th Cir.2011) (finding that "the same analysis applies to both MHRA and Title VII claims"); *see also Kasper v. Federated Mut. Ins. Co.,* 425 F.3d 496, 502 (8th Cir.2005); *Bahr v. Capella Univ.,* 788 N.W.2d 76, 83 (Minn.2010). [13] As this Court has done previously, it assumes, without deciding, "that standards for employer liability in federal hostile environment case law apply to [Rumble's] public-services [discrimination] claim under the MHRA." *See Hudson,* 2006 WL 752935, at *11.

13 The Court notes that although the statutes are often interpreted similarly, it is unclear whether a distinction exists under the MHRA between the standard for vicarious liability for sexual harassment in an employment setting and the standard for vicarious liability in the public accommodation setting. *See Hudson v. City of Minneapolis,* No. 04–cv–3313 (JNE/FLN), 2006 WL 752935, at *11 (D.Minn. Mar. 23, 2006). Nonetheless, as other courts have done, *see id.,* the Court proceeds by applying the standard that courts have used for vicarious liability for sexual harassment in an employment setting, under the MHRA.

***24** Title VII and the MHRA first require a plaintiff to show that the defendant was the third party's de facto employer. A plaintiff may demonstrate this de facto employee-employer relationship either by liberally interpreting the term "employer," *see Baker v. Stuart Broad. Co.,* 560 F.2d 389, 391 (8th Cir.1977) (citing *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C.Cir.1973)), or by showing how the relationship between the defendant and the third party satisfies a twelve factor test as set out in *Schweiger v. Farm Bureau Ins. Co. of Neb.,* 207 F.3d 480, 484 (8th Cir.2000) [14]. *See also Stoner v. Ark. Dep't of Corr.,* 983 F.Supp.2d 1074, 1087–88 (E.D.Ark.2013) (finding that the defendant was the third party's de facto employer under Title VII, either under the twelve factor test or under a liberal construction of the term "employer," because the facts showed that the defendant's policies applied to the third party, and the defendant controlled whether the third party was banned from the defendant's complex, which would "effectively terminat[e] [the third party's] employment").

14

> The Eighth Circuit explained in *Schwieger* that in order to determine whether an employer-employee relationship exists "[a] primary consideration is the hiring party's right to control the manner and means by which a task is accomplished." *Schwieger,* 207 F.3d at 484. The Eighth Circuit also noted the following twelve factors that a court could take into account when determining whether an employer-employee relationship exists:
>
> > the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
>
> *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 323–24 (1992)).

Similarly, Title VII and the MHRA also require a plaintiff to show that the defendant controlled the plaintiff's environment and could alter the conditions of the environment, knew or should have known of the discrimination, and failed to take prompt remedial action. *See Crist v. Focus Homes, Inc.,* 122 F.3d 1107, 1111–12 (8th Cir.1997) (holding that defendant residential program operator could be held liable for sexual harassment under the MHRA and Title VII for the acts of its employees because the defendant "clearly controlled" the plaintiff's environment and "had the ability to alter those conditions to a substantial degree").

Here, Plaintiff alleges that Fairview was Dr. Steinman's "employer," liberally construed, because Fairview exercised control over the physicians who work in the emergency room. (*See* Pl.'s Mem. at 23 [Doc. No. 25].) Rumble further alleges that Fairview could have stopped or prevented Dr. Steinman from discriminating against Plaintiff; Fairview knew of the discrimination because Dr. Lehrman and the nursing assistant witnessed it; and Fairview failed to take prompt remedial action. (*See* Compl. ¶¶ 48, 81 [Doc. No. 1].) Defendant contends, in contrast, that it had no opportunity to control or prevent Dr. Steinman's actions. (*See* Def. Fairview's Mem. at 9 [Doc. No. 20] .) As the Court noted above with respect to Plaintiff's Section 1557 claim, the Court cannot conclude without discovery whether Fairview, in fact, had the opportunity to control Dr. Steinman. Nonetheless, at this stage in the litigation, the Court construes all reasonable inferences in the light most favorable to Plaintiff, *Morton v. Becker,* 793 F.2d 185, 187 (8th Cir.1986), and concludes that Fairview plausibly may have been able to control Dr. Steinman; and thus, may be held indirectly liable for Dr. Steinman's actions. Accordingly, the Court considers Dr. Steinman's alleged actions when evaluating the plausibility of Plaintiff's MHRA claim against Defendant Fairview.

**2. Plausibility of Section 1557 Claim**

***25** Fairview contends that Rumble failed to state a claim under Section 1557. (*See* Def. Fairview's Mem. at 9 [Doc. No. 20].) Specifically, Fairview argues that although the "alleged differential treatment must be *material* to be actionable," here, Rumble failed to allege facts that constitute plausible, actionable discrimination. (*See* Def. Fairview's Mem. at 12 (emphasis original) [Doc. No. 20].) Defendant claims that "Rumble's allegations of snubs and delays are only the proverbial 'perceived slights' that the Eighth Circuit has held are *not* sufficient to give rise to a discrimination claim." (*See id.* at 12–13 (emphasis original).)

Because Fairview contends that it is not liable for Dr. Steinman's actions, Fairview does not discuss how Dr. Steinman's treatment of Plaintiff affects the plausibility of Plaintiff's Section 1557 claim. Thus, Fairview focuses solely on the alleged actions of hospital staff and asserts that the following treatment was not discriminatory: (1) Plaintiff received a hospital bracelet identifying his sex as "female;" (2) Rumble waited for several hours before he received treatment in the emergency room; the "OB/GYN" notation was written on the dry erase board in Rumble's hospital room; (4) Fairview nurses examined Rumble's genitals while he was a patient at the hospital; (5) a Fairview nurse told Rumble that she does not

know what was wrong with Rumble "because [she didn't] have any experience with this sort of thing;" and (6) hospital staff whispered about Plaintiff, and hospital nurses behaved unfriendly toward Rumble. (*See* Def. Fairview's Mem. at 13 [Doc. No. 20].)

Defendant correctly states that "mere name-calling" is not enough to arise to the level of an actionable discrimination claim. *See Scusa v. Nestle U.S.A. Co.,* 181 F.3d 958, 969–70 (8th Cir.1999) (holding that "general allegations of co-worker ostracism are not sufficient to rise to the level of an adverse employment action for purposes of Title VII."); *Oncale,* 523 U.S. at 80–81 (explaining that Title VII does not prohibit all verbal or physical harassment, rather, a plaintiff must prove that the conduct at issue constituted discrimination because of sex and was not just "merely tinged with offensive sexual connotations"); *Davis,* 526 U.S. at 651–52 (holding that for a plaintiff to have an actionable Title IX claim the harassment must amount to more than "simple acts of teasing and name-calling among school children"); *see also Wolfe,* 648 F.3d at 866–67 (holding that the plaintiff must prove that the harassment complained of amounted to more than mere name-calling, in order to state an actionable Title IX claim); *Shaver v. Indep. Stave Co.,* 350 F.3d 716, 721 (8th Cir.2003) (finding that "[c]onduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the [Americans with Disabilities Act]"). [15]

15 The Court notes that while Defendant ardently argues that only Title IX case law applies for determining whether Fairview is liable for Dr. Steinman's actions, Fairview references case law analyzing Title VII and the Americans with Disabilities Act when discussing whether Fairview's conduct amounts to an actionable Section 1557 claim. (*See* Def. Fairview's Mem. at 12–13 [Doc. No. 12].) The fact that even Defendant Fairview is inconsistent about which standards to apply, bolsters the Court's understanding that Section 1557 is likely not bounded by the existing interpretation of only one civil rights statute. Rather, Section 1557 creates a new cause of action that may require courts or the OCR to determine new standards.

However, the Court disagrees with Fairview insofar as it contends that the hospital staff's alleged conduct amounts to only "perceived slights." (*See* Def. Fairview's Mem. at 12 [Doc. No. 20].) Much of the conduct that Plaintiff alleges amounted to more than "mere name-calling," and constituted objectively offensive behavior.

***26** For instance, Plaintiff contends that Fairview purposefully "misgender [ed]" Plaintiff, by giving Rumble a hospital bracelet that identified his sex as "female." (*See* Pl.'s Mem. at 33–34 [Doc. No. 25].) Plaintiff explains that the "deliberate misgendering" of transgender people is a prime example of "trans-exclusion." (*See id.* (citing Julia Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2007).) Plaintiff alleges that the intake clerk purposefully and deliberately gave him a hospital bracelet that incorrectly identified his gender even after he explained that he had transitioned to identifying as male. (*See* Compl. ¶ 29 [Doc. No. 1].) Given Plaintiff's transgender status and the fact that the clerk was aware of Plaintiff's preferred gender, Fairview's misgendering of Rumble could be considered objectively offensive behavior.

The fact that Rumble was forced to wait for several hours in the emergency room before being provided pain medication or being seen by an emergency room doctor also amounts to more than a "perceived slight." (*See id.* ¶¶ 35–37.) Rumble's health and well-being was at stake while he waited in severe pain for someone at Fairview to treat him. (*See id.* ¶ 35–36.) Fairview's alleged delay in treating Plaintiff is even more appalling given Plaintiff's allegation that "people with less urgent medical needs were treated much more quickly than [Rumble] was treated." (*Id.* ¶ 37.) The urgent severity of Plaintiff's condition when he entered Fairview is evident by the fact that a Fairview doctor allegedly told Rumble's mother that her son "would have been septic within 12 to 24 hours" from being brought to the hospital. (*Id.* ¶ 59.)

Moreover, in addition to the fact that Plaintiff had to wait for Dr. Steinman, Plaintiff then also waited for several more hours before being admitted to the hospital and treated with any sort of antibiotic. (*Id.* ¶¶ 49–50.) As Plaintiff explains,

"several times during his time at Fairview, Rumble was refused care, and at other times, he was refused humane and dignified care." (*See* Pl .'s Mem. at 34 [Doc. No. 25].) Forcing Plaintiff to wait hours on end, while he was in unbearable pain and could have entered septic shock, is clearly actionable discriminatory conduct, if Fairview staff were motivated by the fact that Plaintiff is transgender.

Additionally, the fact that Dr. Obaid conducted a genital exam of Plaintiff's inflamed genitals, wiped his gloves on Plaintiff's hospital bed, and then examined Plaintiff's eyes and mouth using the same gloves also amounts to more than a "perceived slight." (*See* Compl. ¶ 56 [Doc. No. 1].) If this alleged conduct was because of Plaintiff's transgender status, then this incident also serves as a basis for Plaintiff's Section 1557 claim. This behavior amounts to conduct that is more than simply insensitive. Rather, if true, it constitutes unacceptable medical care, in which a medical professional misused his authority to harass a patient. (*See* Pl.'s Mem. at 38 [Doc. No. 25].) As the Supreme Court noted in *Davis,* "[t]he relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits." *Davis,* 526 U.S. at 653. Here, the Court finds that the relationship between the harasser and the victim necessarily affects the extent to which the misconduct breaches Section 1557's guarantee of equal access to medical benefits and care. Just as "teacher-student harassment" is more likely to satisfy the requirements for a Title IX claim than "peer harassment," so too is medical professional-patient harassment more likely to satisfy the requirements for a Section 1557 claim than patient-patient harassment.

***27** Finally, Plaintiff also alleges that it was objectively offensive that: a hospital staff person had written the "OB/GYN" notation on the dry erase board in his hospital room; and that hospital staff whispered about him; and that hospital nurses behaved unfriendly toward him. (*See* Compl. ¶¶ 31, 55, 57 [Doc. No. 1].) Although, on its own, this behavior may be insufficient to constitute discrimination under Section 1557, the Court reads these allegations in tandem with the other allegations in Plaintiff's Complaint and concludes that, as a whole, Plaintiff states a plausible Section 1557 claim against Fairview. *See Braden v. Wal–Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir.2009) (holding that a court must read a complaint as a whole "to determine whether each allegation, in isolation, is plausible").

Consistent with the Court's findings above, it is plausible that Fairview staff treated Plaintiff in the manner that they did because of his protected class status. The emergency room clerk was plausibly aware of Plaintiff's transgender status as a result of the conversation he had with Rumble about the difference between Rumble's assigned gender at birth and his current gender. The hospital staff members who made Plaintiff wait before and after seeing Dr. Steinman were also plausibly aware that Rumble is transgender because they could have found out this information from the intake clerk or Dr. Steinman. Additionally, the nurses and physicians who treated Plaintiff during his several day stay at the hospital were also plausibly aware that Plaintiff was transgender because they knew from examining Rumble that Rumble identifies as male, but has female genitalia. Moreover, the Court notes that if Defendant Fairview is later determined to be liable for Dr. Steinman's actions, then additional facts pertaining to the genital exam Dr. Steinman completed further bolster the plausibility that Fairview violated Section 1557.

### 3. Plausibility of MHRA Claim

Defendant Fairview argues that Rumble failed to state a plausible MHRA claim because Rumble did not allege that: (1) Fairview took any "tangible" or "material" adverse action against him that resulted in a denial of services (*see* Def. Fairview's Mem. at 14 [Doc. No. 20] ); and (2) the actions that Fairview did take were driven by "discriminatory animus" (*see* Def. Fairview's Reply at 9 [Doc. No. 28] ). [16] The Court addresses both of these arguments below.

16 Fairview also argues that the Court should dismiss Plaintiff's MHRA claim because the Court may decline to exercise supplemental jurisdiction over the state-law claim if the "court has dismissed all claims over which it has original jurisdiction." (*See* Def. Fairview's Mem. at 14 n.11 (citing 28 U.S.C. § 1367(c)

(3)) [Doc. No. 20].) As the Court did not dismiss Plaintiff's Section 1557 claim against either Defendant, the Court finds that Fairview's argument is inapposite.

**a. Adverse Action**

Defendant claims that Plaintiff merely alleges facts substantiating "hurt feelings," and not a denial of services or accommodations or discrimination to substantiate his MHRA claim. (*See* Def. Fairview's Mem. at 14–15 [Doc. No. 20].) The Court disagrees. Although generally an MHRA claimant alleges an outright "denial" of services or accommodations, *Childs,* 2012 WL 2126845, at *5, a plaintiff may also allege a denial of the "full and equal enjoyment" of services, *see* Minn.Stat. § 363A.11. In other words, a plaintiff may allege that he received materially inferior services because of his protected class status. *See id.; Bahr v. Capella Univ.,* 788 N.W.2d 76, 83 (Minn.2010) (citing *Burchett,* 340 F.3d at 518; *Brannum,* 518 F.3d at 549; and *Jones,* 285 F.3d at 714). Therefore, the MHRA does not require Plaintiff to allege that he was denied services. Rather, pursuant to the MHRA, Rumble appropriately alleges that he received inferior medical services from Fairview. (*See generally* Compl. [Doc. No. 1].)

***28** As the Court discussed in detail above, Plaintiff alleges facts about the harassment he experienced from the intake clerk, Dr. Obaid, the hospital staff, and the hospital nurses that, read as a whole, amount to an allegation that he received inferior medical care and treatment. *See supra* Part III(C)(1)(b)(2). The hospital staff's conduct and behavior amounts to more than mere "perceived slights" or "hurt feelings." Additionally, if the Court ultimately determines that Fairview is liable for Dr. Steinman's actions, then Plaintiff's MHRA claim against Fairview is further bolstered by facts demonstrating that Dr. Steinman treated Rumble poorly or adversely.

Rumble's case is clearly distinguishable from *Porter v. Children's Health–Care Minneapolis,* No. C5–98–1342, 1999 WL 71470 (Minn.Ct.App. Feb. 16, 1999). (*See* Def. Fairview's Mem. at 16 [Doc. No. 20].) In *Porter,* the Minnesota Court of Appeals upheld the district court's grant of summary judgment for the defendant on the plaintiff's MHRA discrimination claim. *See* 1999 WL 71470, *6. The *Porter* Court held that the plaintiff's MHRA claim failed because the plaintiff did not provide sufficient direct and circumstantial evidence that "he was treated differently from anyone else using [the defendant's] services at that time and under those circumstances." *Id.*

In contrast, here, Plaintiff provides the requisite direct and circumstantial evidence. Based on observing the individuals who came into the emergency room, Rumble alleges that "people with less urgent medical needs were treated much more quickly than [he was]." (*See* Compl. ¶ 37 [Doc. No. 1].) Therefore, Plaintiff alleges that he was treated differently from others seeking Fairview's services at the exact same time that he was seeking medical services from Fairview. *Cf. Porter,* 1999 WL 71470, at *6. Moreover, Plaintiff alleges that a Fairview staff person admitted to his mother that although Rumble was forced to wait for nearly seven hours in the emergency room before being admitted to the hospital or receiving treatment, Fairview did not usually keep patients waiting for this long. (*See* Compl. ¶ 50 [Doc. No. 1].) If the Court accepts this allegation as true, then the facts show that even one of Defendant's employees admitted that Plaintiff received disparate treatment. Accordingly, Rumble plausibly alleges that Fairview denied him the "full and equal enjoyment" of medical services, and the disparate treatment amounts to an actionable adverse action under Minn.Stat. § 363A.11.

**b. Discriminatory Animus**

Fairview also contends that Plaintiff's allegations do not demonstrate that he was denied medical treatment "because of" his sexual orientation or gender identity. (*See* Def. Fairview's Reply at 8–9 [Doc. No. 28].) Fairview claims that Plaintiff's allegations are based only on his "subjective belief" that he received disparate treatment "because of" his transgender status. (*See id.* at 9.) The Court disagrees.

***29** To prove a claim of disparate treatment under the MHRA, "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *See Hubbard v. United Press Intern., Inc.,* 330 N.W.2d 428, 441 n. 12 (Minn.1983) (quoting *International Brotherhood of Teamsters v. United States,* 431 U.S.

324, 335–36 n.15 (1977)). Rumble alleges several facts demonstrating that he was treated poorly or differently from other patients at the hospital. *See supra* Part III(C)(1)(b)(2). In fact, as the Court noted above, a Fairview staff person even admitted to Plaintiff that Fairview did not usually make people wait in the emergency room for nearly seven hours. (*See* Compl. ¶ 50 [Doc. No. 1].) And as with Plaintiff's Section 1557 claim, the Court also notes that if Defendant Fairview is determined to be liable for Dr. Steinman's actions, then additional facts pertaining to the genital exam Dr. Steinman completed may be used to show how Rumble received disparate treatment from Fairview in violation of the MHRA. Accordingly, at this stage of the proceedings, the Court finds that a discriminatory motive may be plausibly inferred from the fact that Rumble received disparate treatment.

The Court notes that, generally, merely pleading "on information and belief, without more, is insufficient to survive a motion to dismiss for failure to state a claim." *Kampschroer v. Anoka Cnty.,* No. 13–cv–2512 (SRN/TNL), 2014 WL 5530590, at *14 (D.Minn. Nov. 3, 2014) (citing *Solis v. City of Fresno,* No. 1:11–cv–00053, 2012 WL 868681, at *8 (E.D.Cal. Mar. 13, 2012)). And Defendant correctly notes that Plaintiff alleges that he: (1) "*believed* " that the intake clerk was discussing his gender with another person (Compl. ¶ 31 (emphasis added) [Doc. No. 1] ); (2) "*believed* that people with less urgent medical needs were treated much more quickly than [he] was treated" (*id.* ¶ 37) (emphasis added); and (3) "had the *impression* that some of the nurses were hostile towards him" (*id.* ¶ 57) (emphasis added).

Here, however, Plaintiff's allegations are not based solely upon information and belief. Rather, Plaintiff's allegations of discriminatory animus are based on the totality of the circumstances surrounding each interaction he had with Fairview employees.

For instance, the Court finds it plausible that the intake clerk was in fact whispering about Plaintiff's gender with another person, based on the fact that Plaintiff alleges that the whispering took place right after the clerk had a conversation with Plaintiff about his gender on file. (*See* Compl. ¶¶ 29–31 [Doc. No. 1].) Therefore, Plaintiff plausibly "believed" the whispering was motivated by discriminatory animus. (*See id.* ¶ 31.) It is also plausible that Rumble and his mother "believed" that other patients with less urgent medical needs were treated more quickly than Rumble was, because Plaintiff and his mother may have seen patients entering and exiting the emergency room waiting room and approaching the intake desk. (*See id.* ¶ 37.) In addition, Rumble may have had the "impression" that some of the nurses were hostile towards him because of his gender identity, based on a reasonable expectation that nurses would usually not avoid speaking to patients when caring for them. (*See id.* 57.) Thus, in sum, Plaintiff's allegations of discriminatory animus are based on more than pure speculation.

***30** Defendant cites the following cases to bolster its claim that Plaintiff failed to plausibly allege that Fairview had discriminatory animus: (1) *Bilal v. Northwest Airlines, Inc.,* 537 N.W.2d 614 (Minn.1995); (2) *Nash v. JBPM, Inc.,* No. 09–cv–1437 (RHK/RLE), 2010 WL 2346605 (D. Minn. June 9, 2010); (3) *Phillips v. Speedway SuperAmerica LLC,* No. 09–cv–2447 (RHK/FLN), 2010 WL 4323069 (D.Minn. Oct. 22, 2010); and (4) *Willenbring v. City of Breezy Point,* No. 08–cv–4760 (MJD/RLE), 2010 WL 3724361 (D .Minn. Sept. 16, 2010). However, each of these cases is distinguishable. First, the Court notes that all of these cases were decided after a full evidentiary trial was held, or upon a motion for summary judgment, after discovery had taken place. Here, Plaintiff has not yet had the benefit of the discovery process and is left with only the information that was readily available to him while he was a patient at Fairview. Second, these cases are clearly distinguishable insofar as the plaintiffs in these cases failed to substantiate their claims of discriminatory animus with any circumstantial or direct evidence.

For instance, in *Bilal,* the Minnesota Supreme Court held that the trial court judgment was properly reversed because the plaintiff had "not established a discriminatory motive on the part of [the defendant] or its employees." *See* 537 N.W.2d at 619. The plaintiff alleged that one of the defendant's employees had discriminated against her, because although the plaintiff was Muslim, the employee had told the plaintiff that she should "dress as if she were going to church." *Id.* at 617. The Minnesota Supreme Court explained that because the employee "did not even know of which religion, if any, [the plaintiff] was a member," then the employee could not have "intentionally discriminated against [the plaintiff]." *Id.*

at 619. Here, however, Plaintiff alleges that the Fairview employees either affirmatively knew or were likely aware that Rumble is transgender, and thus could have intentionally discriminated against him.

Nash is similarly distinguishable from Rumble's case. In Nash, the pro se plaintiff had not even filed a response brief to the defendant's motion for summary judgment. See 2010 WL 2346605, at *2. Therefore, the court held that there was no basis for a reasonable jury to conclude that the defendant's actions were taken because of the plaintiff's protected class status since the plaintiff had "proffered no evidence at all in response to [the defendant's] Motion." *See id.* The Nash Court explained that without any evidence to the contrary, it was forced to conclude that the defendant might act similarly to all customers, regardless of the customer's race. *See id.* Here, Rumble sufficiently alleges facts demonstrating that Fairview's actions were plausibly taken because of Rumble's protected class status. Moreover, Plaintiff alleges that other patients were likely treated differently and better than he was, because they were not transgender. While Rumble cannot yet proffer more specific evidence of comparative treatment at this stage in the litigation, after discovery Plaintiff will have the opportunity to present this evidence.

***31** Phillips is also distinguishable from Rumble's case. In Phillips, the court granted the defendant's motion for summary judgment on the plaintiff's MHRA claim because the plaintiff failed to present evidence that permitted the inference that the conduct complained of was motivated by the plaintiff's race. See 2010 WL 4323069, at *3. The court specifically noted that "[t]here is no dispute that other black customers patronized [the defendant's] store on the night in question, and they were neither detained nor accused of shoplifting," the plaintiff "proffered no evidence indicating that the store ha[d] a history of accusing blacks of theft or that [the defendant's employees] singled out black customers for disparate treatment," and an employee's lone comment about race was "insufficient to establish that [the defendant's employees] acted out of racial animosity." *See id.* However, as Rumble argues, "the [Phillips Court] does not state or even imply that if the plaintiff had provided sufficient evidence that he was accused of shoplifting and physically grabbed *because of* his race, that those actions would not have constituted discrimination." (*See* Pl.'s Mem. at 41 (emphasis added) [Doc. No. 25].)

Here, Rumble alleges facts that permit the inference that the conduct of Fairview staff was motivated by Plaintiff's transgender status. Specifically, Plaintiff alleges that based on the totality of the circumstances Fairview staff likely knew, or were affirmatively aware, that Plaintiff was transgender. Thus, Plaintiff plausibly alleges that he received disparate treatment because of his gender identity. The Court does not expect Plaintiff to bolster his MHRA claim with more substantive evidence at this stage in the litigation. Rather, Plaintiff must only allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly,* 550 U.S. at 556. Accordingly, Plaintiff meets this burden.

Finally, Plaintiff's case is also distinguishable from *Willenbring. See* 2010 WL 3724361. In *Willenbring,* the court granted the defendant's motion for summary judgment on the plaintiff's MHRA claim because the plaintiff provided no evidence suggesting that the defendant's employee's conduct was "motivated by [the plaintiff's] status as a woman." *Id.* at *12. Here, as earlier described in great detail, Plaintiff sufficiently alleges facts demonstrating that Fairview's conduct was motivated by Rumble's transgender status. Since "[a] record of disparate treatment and unprofessional behavior directed at a plaintiff may constitute evidence of discriminatory intent," *Pierce,* 994 F.Supp.2d at 163, Plaintiff's Complaint meets the requisite threshold to survive dismissal.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant Emergency Physicians' Motion to Dismiss [Doc. No. 11] is **DENIED.**

2. Defendant Fairview's Motion to Dismiss [Doc. No. 18] is **DENIED.**

**All Citations**

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**End of Document**

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United States District Court,
N.D. Texas, Wichita Falls Division.

State of Texas et al., Plaintiffs,
v.
United States of America et al., Defendants.

Civil Action No. 7:16-cv-00054-O
|
Signed August 21, 2016

**Synopsis**

**Background:** Various states, state agencies, and school districts brought action against Department of Education, Department of Labor, and Department of Justice, among others, challenging defendants' assertion that Title VII and Title IX require that all persons must be afforded opportunity to have access to restrooms, locker rooms, and showers that match their gender identity rather than their biological sex. Plaintiffs moved for a preliminary injunction.

**Holdings:** The District Court, Reed O'Connor, J., held that:

[1] plaintiffs had standing to bring suit;

[2] plaintiffs' challenge was ripe for review;

[3] federal guidelines were final agency action subject to judicial review;

[4] guidelines were subject to notice and comment; and

[5] deference was not owed to Department's interpretation of a Title IX implementing regulation.

Motion granted.

**Attorneys and Law Firms**

Austin R. Nimocks, Office of the Texas Attorney General, Austin, TX, for Plaintiffs.

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**PRELIMINARY INJUNCTION ORDER**

Reed O'Connor, UNITED STATES DISTRICT JUDGE

***1** Before the Court are Plaintiffs' Application for Preliminary Injunction (ECF No. 11), filed July 6, 2016; Defendants' Opposition to Plaintiffs Application for Preliminary Injunction (ECF No. 40), filed July 27, 2016; and Plaintiffs' Reply

(ECF No. 52), filed August 3, 2016. The Court held a preliminary injunction hearing on August 12, 2016, and counsel for the parties presented their arguments. *See* ECF No. 56. [1]

1 The Court also considers various amicus briefs filed by interested parties. *See* ECF Nos. 16, 28, 34, 36-1, 38-1.

This case presents the difficult issue of balancing the protection of students' rights and that of personal privacy when using school bathrooms, locker rooms, showers, and other intimate facilities, while ensuring that no student is unnecessarily marginalized while attending school. The sensitivity to this matter is heightened because Defendants' actions apply to the youngest child attending school and continues for every year throughout each child's educational career. The resolution of this difficult policy issue is not, however, the subject of this Order. Instead, the Constitution assigns these policy choices to the appropriate elected and appointed officials, who must follow the proper legal procedure.

That being the case, the issues Plaintiffs present require this Court to first decide whether there is authority to hear this matter. If so, then the Court must determine whether Defendants failed to follow the proper legal procedures before issuing the Guidelines in dispute and, if they failed to do so, whether the Guidelines must be suspended until Congress acts or Defendants follow the proper legal procedure. For the following reasons, the Court concludes that jurisdiction is proper here and that Defendants failed to comply with the Administrative Procedures Act by: (1) foregoing the Administrative Procedures Act's notice and comment requirements; and (2) issuing directives which contradict the existing legislative and regulatory texts. Accordingly, Plaintiffs' Motion should be and is hereby **GRANTED.**

## I. BACKGROUND

The following factual recitation is taken from Plaintiffs' Application for Preliminary Injunction (ECF No. 11) unless stated otherwise. Plaintiffs are composed of 13 states and agencies represented by various state leaders, as well as Harrold Independent School District of Texas and Heber-Overgaard Unified School District of Arizona. [2] They have sued the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials (collectively "Defendants"), challenging Defendants' assertions that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their gender identity rather than their biological sex. [3] Plaintiffs claim that on May 13, 2016, Defendants wrote to schools across the country in a Dear Colleague Letter on Transgender Students (the "DOJ/DOE Letter") and told them that they must "immediately allow students to use the bathrooms, locker rooms and showers of the student's choosing, or risk losing Title IX-linked funding." Mot. Injunction 1, ECF No. 11. Plaintiffs also allege Defendants have asserted that employers who "refuse to permit employees to utilize the intimate areas of their choice face legal liability under Title VII." *Id.* Plaintiffs complain that Defendants' interpretation of the definition of "sex" in the various written directives (collectively "the Guidelines") [4] as applied to Title IX of the Education Amendments of 1972 ("Title IX") and Title VII of the Civil Rights Act of 1964 ("Title VII") is unlawful and has placed them in legal jeopardy.

2 Plaintiffs include: (1) the State of Texas; (2) Harrold Independent School District (TX); (3) the State of Alabama; (4) the State of Wisconsin; (5) the State of West Virginia; (6) the State of Tennessee; (7) Arizona Department of Education; (8) Heber-Overgaard Unified School District (Arizona); (9) Paul LePage, Governor of the State of Maine; (10) the State of Oklahoma; (11) the State of Louisiana; (12) the State of Utah; (13) the state of Georgia; (14) the State of Mississippi, by and through Governor Phil Bryant; (15) the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin.

3 Plaintiffs refer to a person's "biological sex" when discussing the differences between males and females, while Defendants refer to a person's sex based on

the sex assigned to them at birth and reflected on their birth certificate *or* based on "gender identity" which is "an individual's internal sense of gender." *See* Am. Compl. 12, ECF No. 6; Mot. Injunction 1, ECF No. 11; Am. Compl. Ex. C (Holder Transgender Title VII Memo) ("Holder Memo 2014") App. 1 n.1, ECF No. 6-3 (" '[G]ender identity' [is defined] as an individual's internal senses of being male or female."); *Id.* at Ex. J. (DOJ/DOE Letter) 2, ECF No. 6-10. When referring to a transgendered person, Defendants' Guidelines state "transgender individuals are people with a gender identity that is different from the sex assigned to them at birth ...." Am. Compl., Ex. C (Holder Memo 2014), App. 1 n.1, ECF No. 6-3. "For example, a transgender man may have been assigned female at birth and raised as a girl, but identify as a man." *Id.* at Ex. D (OSHA Best Practices Guide to Restroom Access for Transgender Employees) ("OSHA Best Practice Guide"), App. 1, ECF No. 6-4. The Court attempts to use the parties' descriptions throughout this Order for the sake of clarity.

[4] The Guidelines refer to the documents attached to Plaintiffs' Amended Complaint: (1) Ex. A (DOE Bullying Memo 2010), ECF No. 6-1; (2) Ex. B (DOE Questions and Answers on Title IX and Sexual Violence Memo) ("DOE Q&A Memo), ECF No. 6-2; (3) Ex. C ("Holder Memo 2014"), ECF No. 6-3, (4) Ex. D (OSHA Best Practice Guide), ECF No. 6-4; (5) Ex. H (EEOC Fact Sheet), ECF No. 6-8; and (6) Ex. J (DOJ/DOE Dear Colleague Letter), ECF No. 6-10.

***2** Plaintiffs contend that when Title IX was signed into law, neither Congress nor agency regulators and third parties "believed that the law opened all bathrooms and other intimate facilities to members of both sexes." Mot. Injunction. 1, ECF No. 11. Instead, they argue one of Title IX's initial implementing regulations, 34 C.F.R. § 106.33 ("§ 106.33" or "Section 106.33"), expressly authorized separate restrooms on the basis of sex. Section 106.33 provides: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Plaintiffs assert the term sex in the pertinent statutes and regulations means the biological differences between a male and female. Mot. Injunction 2, ECF No. 11. Plaintiffs state that Defendants' swift move to supplant the traditional, biological meaning of sex with a definition based on gender identity through the Guidelines, coupled with Defendants' actions to enforce these new agency policies through investigations and compliance reviews, causes Plaintiffs to suffer irreparable harm for which a preliminary injunction is needed. *Id.* at 3–8; Pls.' Reply 3–7, ECF No. 54.

Defendants contend that the Guidelines and recent enforcement actions are designed to prohibit sex discrimination on the basis of gender identity and are "[c]onsistent with the nondiscrimination mandate of [Title IX]," and that "these guidance documents ... are merely expressions of the agencies' views as to what the law requires." Defs.' Resp. 2–4, ECF No. 40. Defendants also contend that the Guidelines "are not legally binding, and they expose [P]laintiffs to no new liability or legal requirements" because DOE "has issued documents of this nature for decades, across multiple administrations, in order to notify schools and other recipients of federal funds about how the agency interprets the law and how it views new and emerging issues." *Id.* at 4–5.[5] Defendants also state that the "[g]uidance documents issued by [DOE] 'do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations' " and these documents expressly state that they do not carry the force of law. *Id.* at 5 (citing Holder Memo 2, ECF No. 6-10, to clarify that "the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status," but the memo "is not intended to otherwise prescribe the course of litigation or defenses that should be raised in any particular employment discrimination case").

[5] Defendants cited to U.S. Dep't of Educ., Office for Civil Rights, Sex Discrimination Policy Guidance, http://www2.ed.gov/about/offices/list/ocr/

frontpage/faq/rr/policyguidance/sex.html (last visited August 5, 2016) (discussing the purpose of guidance documents and providing links to guidance documents).

### A. TITLE IX

Title IX, enacted in 1972, is the landmark legislation which prohibits discrimination among federal fund recipients by providing that no person "shall, on the basis of sex, ... be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. The legislative history shows Congress hailed Title IX as an indelible step forward for women's rights. Mot. Injunction at 2–4. After its passage, the DOE and its predecessor implemented a number of regulations which sought to enforce Title IX, chief among them, and at issue here, § 106.33. *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721 (4th Cir.2016) (stating that the Department of Health, Education, and Welfare ("HEW") adopted its Title IX regulations in 1975 pursuant to 40 Fed. Reg. 24,128 (June 4, 1975), and DOE implemented its regulations in 1980 pursuant to 45 Fed. Reg. 30802, 30955 (May 9, 1980)). Section 106.33, as well as several other related regulations, permit educational institutions to separate students on the basis of sex, provided the separate accommodations are comparable.

## II. LEGAL STANDARDS

### A. The Administrative Procedure Act (the "APA")

***3** **[1]** "The APA authorizes suit by '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' " *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 702). "Where no other statute provides a private right of action, the 'agency action' complained of must be *final* agency action.' " *Id.* at 61–62, 124 S.Ct. 2373 (quoting 5 U.S.C. § 704). [6] In the Fifth Circuit, "final agency action" is a jurisdictional threshold, not a merits inquiry. *Texas v. Equal Employment Opportunity Comm'n*, —— F.3d ——, ——, No. 14–10949, 2016 WL 3524242 at *5 (5th Cir. June 27, 2016) ("*EEOC* "); *see also Peoples Nat'l Bank v. Office of the Comptroller of the Currency of the United States*, 362 F.3d 333, 336 (5th Cir.2004) ("If there is no 'final agency action,' a federal court lacks subject matter jurisdiction." (citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir.1999))).

6 Agency action is defined in 5 U.S.C. § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004) (quoting 5 U.S.C. § 551(13)). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: 'an agency statement of ... future effect designed to implement, interpret, or prescribe law or policy' (rule); 'a final disposition ... in a matter other than rule making' (order); a 'permit ... or other form of permission' (license); a 'prohibition ... or ... taking [of] other compulsory or restrictive action' (sanction); or a 'grant of money, assistance, license, authority,' etc., or 'recognition of a claim, right, immunity,' etc., or 'taking of other action on the application or petition of, and beneficial to, a person' (relief)." *Id.* (quoting § 551(4), (6), (8), (10), (11)).

**[2]** **[3]** **[4]** An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948); and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970)). "In evaluating whether a challenged agency action meets these two conditions, this court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.' " *EEOC*, —— F.3d at ——, 2016 WL 3524242, at *5; *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir.2011) (quoting *Abbott*

*Labs. v. Gardner*, 387 U.S. 136, 149–50, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). When final agency actions are presented for judicial review, the APA provides that reviewing courts should hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150–151, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

### B. Preliminary Injunction

**[5]** The Fifth Circuit set out the requirements for a preliminary injunction in *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). To prevail on a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *Id.*; *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir.2008).

***4** **[6]** **[7]** To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir.2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n. 15 (5th Cir.2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

**[8]** **[9]** **[10]** **[11]** The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir.1985)). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light Co.*, 760 F.2d at 621. The decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Id.*

## III. ANALYSIS

Plaintiffs argue that: (1) Defendants skirted the notice and comment process—a necessity for legislative rules; (2) the new mandates are incompatible with Title VII and Title IX and the agencies are not entitled to deference; (3) the mandates violate the clear notice and anti-coercion requirements which the federal government may attach to spending programs; and (4) nationwide relief is necessary to prevent the irreparable harm Defendants will cause Plaintiffs. Mot. Injunction 2–3, ECF No. 11.

Defendants assert that Plaintiffs are not entitled to a preliminary injunction because: (1) Plaintiffs do not have standing to bring their claims; (2) this matter is not ripe for review; (3) Defendants' Guidelines do not violate the APA; (4) Plaintiffs cannot demonstrate irreparable harm and they have an alternative remedy; (5) Defendants did not violate the Spending Clause; (6) and an injunction would harm Defendants and third parties. Defs.' Resp. 1–3, ECF No. 40. Defendants allege that should an injunction be granted, it should be implemented only to Plaintiffs in the Fifth Circuit. *Id.* The Court addresses these issues, beginning with Defendants' jurisdictional arguments. [7]

7 The parties have requested that the Court provide expedited consideration of the preliminary injunction. The briefing on this request was completed on August 3, 2016, and the matter was not ripe until after the hearing was completed on August 12, 2016. Because further legal issues concerning the basis for Plaintiffs' Spending Clause claim were raised at the hearing and require further briefing,

the Court will not await that briefing at this time. *See* Hr'g Tr. 35, 44, 52–53 (discussing new program requirements and whether a new program is the same as annual grants). Therefore, the Spending Clause issue is not addressed in this Order. *See* ECF Nos. 11–12. Finally, where referenced, Title VII is used to help explain the legislative intent and purpose of Title IX because the two statutes are commonly linked. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 546, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982).

**A. Jurisdiction**

1. Standing

***5 [12]** Defendants allege that "[P]laintiffs' suit fails the jurisdictional requirements of standing and ripeness ... because they have not alleged a cognizable concrete or imminent injury." Defs.' Resp. 12, ECF No. 40 (citing *Lopez v. City of Hous.*, 617 F.3d 336, 342 (5th Cir.2010)). Defendants allege "a plaintiff must demonstrate that it has 'suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' " *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Defendants contend that "[t]he agencies have merely set forth their views as to what the law requires" regarding whether gender identity is included in the definition of sex, and "[a]t this stage, [P]laintiffs have alleged no more than an abstract disagreement with the agencies' interpretation of the law," since "[n]o concrete situation has emerged that would permit the Court to evaluate [P]laintiffs' claims in terms of specific facts rather than abstract principles." *Id.* at 13–14.

Defendants also allege that Plaintiffs "have [not] identified any enforcement action to which they are or are about to be subject in which a defendant agency is seeking to enforce its view of the law. As such, any injury alleged by plaintiffs is entirely speculative, as it depended on the initiation of some kind of enforcement action ... which may never occur." Defs.' Resp. 14, ECF No. 40.

Plaintiffs state that Defendants are affirmatively using the Guidelines to force compliance as evidenced by various resolution agreements reached in enforcement cases across the country and from the litigation against the state of North Carolina, all of which is designed to force Plaintiffs to amend their policies to comply or place their federal funding in jeopardy. Hr'g Tr. at 78. Plaintiffs argue they are clearly the object of the Defendants' Guidelines, and those directives run afoul of various state constitutional and statutory codes which permit Plaintiffs to exercise control of their education premises and facilities.[8] Hr'g Tr. at 77. Plaintiffs contend all of this confers standing according to the Fifth Circuit's opinion in *Texas v. Equal Employment Opportunity Commission*, —— F.3d ——, No. 14–10940, 2016 WL 3524242 (5th Cir. June 27, 2016). Hr'g Tr. 78.

8 Plaintiffs' motion provides the following citations to their state laws which give them legal control over the management of the safety and security policies of educational buildings in their states and which the Guidelines will compel them to disregard. Texas cites to Tex. Const. art. 7 § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); Tex. Educ. Code §§ 4.001(b) (stating the objectives of public education, including Objective 8: "School campuses will maintain a safe and disciplined environment conducive to student learning."); 11.051 ("An independent school district is governed by a board of trustees who, as a corporate body, shall: (1) oversee the management of the district; and (2) ensure the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations."); 11.201 (listing the duties of the superintendent including "assuming administrative

responsibility and leadership for planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district ...."); and 46.008 ("The commissioner shall establish standards for adequacy of school facilities. The standards must include requirements related to space, educational adequacy, and construction quality."); Pls.' Reply Ex. (Belew Decl.) 4, ECF No. 52-1 (stating the Texas Education Agency ("TEA") is responsible for "[t]he regulation and administration of physical buildings and facilities within Texas public schools" among other duties). Plaintiffs also provided an exhaustive list of similar state constitution citations, statutes, codes, and regulations that grant each Plaintiff the power to control the regulations that govern the administration of public education and public education facilities. *See* Mot. Injunction 9–11 n. 9-22, ECF No. 11 (quoting Ala. Code §§ 16–3–11, 16–3–12, 16–8–8–16–8–12 ("Alabama law authorizes state, county, and city boards of education to control school buildings and property."); Wis. stat. chs. 115, 118 ("In Wisconsin, local school boards and officials govern public school operations and facilities ... with the Legislature providing additional supervisory powers to a Department of Public Instruction."); Wis. Stat. § 120.12(1) ("School boards and local officials are vested with the 'possession, care, control and management of the property and affairs of the school district, and must regulate the use of school property and facilities."); Wis. Stat. § 120.13(17) ("Wisconsin law also requires school boards to '[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes.' "); W. Va. Const. art. XII, § 2; W. Va. code § 18–5–1, 18–5–9(4) ("West Virginia law establishes state and local boards of education ... and charges the latter to ensure the good order of the school grounds, buildings, and equipment."); Tenn. Code Ann. §§ 49–12, 1–302, 49–1–201 ("In Tennessee, the state board of education sets statewide academic policies, ... and the department of education is responsible for implementing those polices[, while] [e]ach local board of education has the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction."); Tenn. Code Ann. §§ 49–1–201(a)–(c)(5), 49–2–203(a)(2) ("The State Board is also responsible for "implementation of law" established by the General Assembly, ... and ensuring that the 'regulations of the state board of education are faithfully executed.' "); Ariz. Rev. Stat. §§ 15–203(A)(1), 15–341(A)(1), 15–341(A)(3) ("Arizona law establishes state and local boards of education, ... and empowers local school districts to '[m]anage and control the school property within its district.' "); Me. Rev. Stat. tit. 20–A, §§ 201–406, 1001(2), 6501 ("Maine provides for state and local control over public education. While state education authorities supervise the public education system, control over management of all school property, including care of school buildings[,] ... [a]nd Maine law provides requirements related to school restrooms."); Okla. Const. art. XIII, §§ 5, 5–117 ("Oklahoma law establishes a state board of education to supervise public schools. Local school boards are authorized by the board to operate and maintain school facilities and buildings."); La. Const. art. VIII, § 3, LSA–R. Stat. § 17:100.6 ("In Louisiana, a state board of education oversees public schools, ...while local school boards are charged with the management, administration, and control of buildings and facilities within their jurisdiction."); Utah Code §§ 53A–1–101, 53A–3–402(3) ("Utah law provides for state and local board of educations, ... and authorizes the local boards to exercise control over school buildings and facilities."); Ga. Code § 20–2–59, 520 ("Georgia places public schools under the control of a board of education, ... and delegates control over local schools, including the management of school property, to county school boards govern local schools."); Miss. Code Ann. § 37–7–301 ("In Mississippi, the state board of education oversees local

school boards, which exercise control over local school property."); Ky. Rev. Stat. §§ 156.070, 160.290 ("In Kentucky, the state board of education governs the state's public school system, ... while local boards of education control "*all* public school property" within their jurisdictions,.. and can make and adopt rules applicable to such property.").

***6** Defendants counter that *EEOC* was wrongly decided and, regardless, the facts here are distinguishable from that case. [9] *Id.* Defendants primarily distinguish *EEOC* from this case based on the *EEOC* majority's view that the "guidance [at issue] contained a 'safe harbor' [provision]" and "the [guidance at issue had] the immediate effect of altering the rights and obligations of the 'regulated community' ... by offering them [ ] detailed and conclusive means to avoid an adverse EEOC finding." Defs.' Resp. 15, ECF No. 40. Defendants claim that the same kind of facts are not present here. Defendants contend further that "the [transgender] guidance documents do not provide 'an exhaustive procedural framework,' [or] ... a safe harbor, but merely express[ ] the agencies' opinion about the proper interpretation of Title VII and Title IX." *Id.* Thus, they argue, the Court lacks jurisdiction and should decline to enter a preliminary injunction. *Id.* [10]

9 *Id.* at 14 ("[T]he government respectfully disagrees with that decision for many of the reasons stated in Judge Higginbotham's dissenting opinion, and ... EEOC is distinguishable from this case in important respects."); Hr'g Tr. 53 ("Let me say at the outset ... the Government disagrees with that decision.").

10 The Court addresses Defendants' claim that Plaintiffs have an adequate alternate remedy in Section III.A.4.

**[13]** **[14]** **[15]** The Court finds that Plaintiffs have standing. "The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.' " *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir.2013) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004)). Constitutional standing requires a plaintiff to establish that she has suffered an injury in fact traceable to the defendant's actions that will be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. The injury in fact must be "concrete and particularized" and "actual or imminent," as opposed to "conjectural" or "hypothetical." *Id.* at 560, 112 S.Ct. 2130. When "a plaintiff can establish that it is an 'object' of the agency regulation at issue, 'there is ordinarily little question that the action or inaction has caused [the plaintiff] injury, and that a judgment preventing or requiring the action will redress it.' " *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *2; *Lujan*, 504 U.S. at 561–62, 112 S.Ct. 2130. The Fifth Circuit provided, "[w]hether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Id.* at ——, 2016 WL 3524242 at *6 (quoting *Contender Farms LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir.2015)).

In *EEOC*, Texas sued the EEOC over employment guidance the EEOC issued to employers concerning their Title VII obligations. In response, the EEOC argued Texas lacked standing because the guidance was advisory only and imposed no affirmative obligation. The Fifth Circuit held that Texas had standing to seek relief because it was an object of the EEOC's guidance as the guidance applied to Texas as an employer. *Id.* at ——, 2016 WL 3524242 at *4.

This case is analogous. Defendants' Guidelines are clearly designed to target Plaintiffs' conduct. At the hearing, Defendants conceded that using the definition in the Guidelines means Plaintiffs are not in compliance with their Title VII and Title IX obligations. Hr'g Tr. 74. Defendants argue that that this does not confer standing because the Guidelines are advisory only. Defs.' Resp. 14, ECF No. 40. But this conflates standing with final agency action and the Fifth Circuit instructed district courts to address the two concepts separately. *See EEOC*, —— F.3d at ——, 2016 WL 3524242 at *3. Defendants' Guidelines direct Plaintiffs to alter their policies concerning students' access to single sex toilet, locker room, and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations. [11] Plaintiffs' counsel argued the Guidelines will force Plaintiffs to consider ways to build or reconstruct restrooms, and how to accommodate students who may seek to use private single person facilities, as other school districts and employers who

have been subjected to Defendants' enforcement actions have had to do. Hr'g Tr. 80–81. That the Guidelines spur this added regulatory compliance analysis satisfies the injury in fact requirement. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *4 ("[T]he guidance does, at the very least, force Texas to undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations ... overrides the State's interest .... [T]hese injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state ...."). That Plaintiffs have standing is strengthened by the fact that Texas and other Plaintiffs have a "stake in protecting [their] quasi-sovereign interests ... [as] special solicitude[s]." *Mass. v. E.P.A.*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) ("Congress has moreover recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious. § 7607(b)(1). Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.").

11 For example, Plaintiffs list Wisconsin's state statutes regarding this matter, which state that school boards are required to "[p]rovide and maintain enough suitable and separate toilets and other sanitary facilities for both sexes." Mot. Injunction 10 n.9, ECF No. 11 (citing Wis. Stat. s. 120.12(12)). Plaintiffs interpret this to mean that Wisconsin has the authority to maintain separate intimate facilities that correspond to a person's biological sex. *Id.*

***7** Accordingly, Plaintiffs have standing to pursue this lawsuit.

2. Ripeness

**[16]** Defendants also argue that this case is not ripe for review. According to Defendants, this Court should avoid premature adjudication to avoid entangling itself in abstract disagreements over administrative policies. Defs.' Resp. 13, ECF No. 40 (citing *Nat'l Park Hosp. Ass'n v. Dep.'t Interior*, 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003)). Defendants argue that more time should be given to allow the administrative process to run its course and develop more facts before the Court can address this case. *Id.* at 13 (citing *Abbott Labs.*, 387 U.S. 136, 149, 87 S.Ct. 1507 (1967)); Hr'g Tr. 62. Plaintiffs counter that, taking into account recent events where Defendants have investigated other entities that do not comply with the Guidelines, this case is ripe. Pls.' Reply 4–7, ECF No. 52; Hr'g Tr. 79.

**[17]** "A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.' " *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir.2007) (citing *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812, 123 S.Ct. 2026).

The Court finds that Plaintiffs' case is ripe for review. Here, the parties agree that the questions at issue are purely legal. Hr'g Tr. 61. Defendants asserted at the hearing that Plaintiffs are not in compliance with their obligations under Title IX given their refusal to change their policies. Hr'g Tr. 74. Furthermore, for the reasons set out below, the Court finds that Defendants' actions amount to final agency action under the APA. [12] *EEOC*, —— F.3d at —— n. 9, 2016 WL 3524242 at *11 n. 9 ("Having determined that the Guidance is 'final agency action' under the APA, it follows naturally that Texas's APA claim is ripe for review. Texas's challenge to the EEOC Guidance is a purely legal one, and as such it is unnecessary to wait for further factual development before rendering a decision.") (Internal citations omitted).

12 The Court further addresses this issue in section III.A.3.

Finally, the facts of this case have sufficiently developed to address the legal impact Defendants' Guidelines have on Plaintiffs' legal questions in this case. *Texas*, 497 F.3d at 498–99. The only other factual development that may occur, given Defendants' conclusion Plaintiffs are not in legal compliance, is whether Defendants actually seek to take action against Plaintiffs. But it is not clear how waiting for Defendants to actually take action would "significantly advance

[the court's] ability to deal with the legal issues presented." *Texas*, 497 F.3d at 498–99. As previously stated, Defendants' Guidelines clash with Plaintiffs' state laws and policies in relation to public school facilities and Plaintiffs have called into question the legality of those Guidelines. Mot. Injunction 9–12, ECF No. 11. Therefore, "further factual development would not 'significantly advance the courts ability to deal with the legal issues presented.' " *Texas*, 497 F.3d at 498–99. Accordingly, the Court finds that this case is ripe for review.

3. Final Agency Action under the APA

***8 [18]** The Court now evaluates whether the Guidelines are final agency action meeting the jurisdictional threshold under the APA. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *5. Defendants argue that there has been no final agency action as the documents in question are merely "paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." Defs.' Resp. 18, ECF No. 40. Defendants also allege that the Guidelines are "[v]alid interpretations of the statutory and regulatory authorities on which they are premised" because although Title IX and § 106.33 provide that federal recipients may provide for separate, comparable facilities, the regulation and statute "do not address how they apply when a transgender student seeks to use those facilities ...." *Id.* at 20–21.

Plaintiffs allege that the agencies' Guidelines are binding nationwide and the Defendants' enforcement patterns in various states clearly demonstrate that legal actions against those that do not comply will follow. Mot. Injunction 9–12, ECF No. 11; Reply 2–8, ECF No. 52. Plaintiffs identify a number of similar cases where Defendants have investigated schools that refused to comply with the new Guidelines and where they sued North Carolina over its state law which, in part, made it legal to require a person to use the public restroom according to their biological sex. Reply 6, ECF No. 52.

An administrative action is "final agency action" under the APA if: (1) the agency's action is the "consummation of the agency's decision making process;" and (2) "the action [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' " *Bennett*, 520 U.S. at 177–78, 117 S.Ct. 1154. "In evaluating whether a challenged agency action meets these two conditions, the court is guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.' " *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *5 (quoting *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir.2011)).

The Court finds that the Guidelines are final agency action under the APA. Defendants do not dispute that the Guidelines are a "consummation" of the agencies' decision-making process. Hr'g Tr. 61; *Nat'l Pork Producers Council v. E.P.A.*, 635 F.3d 738, 755–56 (5th Cir.2011) (citing *Her Majesty the Queen in Right of Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1532 (D.C.Cir.1990) (deciding that EPA guidance letters constitute final agency actions as they "serve[d] to confirm a definitive position that has a direct and immediate impact on the parties ....")).

The second consideration is also satisfied in this case because legal consequences flow from the Defendants' actions. Defendants argue no legal consequences flow to Plaintiffs because there has been no enforcement action, or threat of enforcement action. Hr'g Tr. 71. The Fifth Circuit held in *EEOC* however that "an agency action can create legal consequences even when the action, in itself, is disassociated with the filing of an enforcement proceeding, and is not authority for the imposition of civil or criminal penalties." —— F.3d at ——, 2016 WL 3524242 at *8. According to the Fifth Circuit, " 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability." *Id.* (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, —— U.S. ——, 136 S.Ct. 1807, 1814–15, 195 L.Ed.2d 77 (2016) (holding that using the pragmatic approach, an agency action asserting that plaintiff's land was subject to the Clean Water Act's permitting process was a final agency action which carried legal consequences). The Fifth Circuit concluded that "[i]t is also sufficient that the Enforcement Guidance [at issue in *EEOC*] has the immediate effect of altering the rights and obligations of the 'regulated community' (i.e. virtually all state and private employers) by offering them a detailed and conclusive means to avoid an adverse EEOC finding ...." —— F.3d at ——, 2016 WL 3524242 at *6.

***9** In this case, although the Guidelines provide no safe harbor provision, the DOJ/DOE Letter provides not only must Plaintiffs permit individuals to use the restrooms, locker rooms, showers, and housing consistent with their gender identity, but that they find *no* safe harbor in providing transgender students individual-user facilities as an alternative accommodation. Indeed, the Guidelines provide that schools may, consistent with Title IX, make individual-user facilitates available for *other* students who "voluntarily seek additional privacy." *See* DOJ/DOE Letter 3, ECF No. 6-10. Using a pragmatic and common sense approach, Defendants' Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines. *EEOC,* —— F.3d at ——, 2016 WL 3524242 at *8 ("Instead, 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability."); *Resident Council of Allen Parkway Vill. v. U.S. Dep't of Hous. & Urban Dev.*, 980 F.2d 1043, 1056–57 (5th Cir.1993) (stating that "[w]ere HUD to formally define the phrase [at issue] ... [the plaintiffs] would undoubtedly have the right to review HUD's final agency action under § 702 [of the APA]"); *Frozen Foods Express v. United States*, 351 U.S. 40, 44–45, 76 S.Ct. 569, 100 L.Ed. 910 (1956) (holding an order specifying which commodities the Interstate Commerce Commission believed were exempt was final agency action, even though the order simply gave notice of how it would interpret the statute and would apply only when an action was brought): *compare with AT & T Co. v. E.E.O.C.*, 270 F.3d 973, 975–76 (D.C.Cir.2001) (holding that the EEOC's compliance manual was not a final agency action because the policy guidance did not intend to bind EEOC staff in their official conduct, the manual simply expressed the agency's view with respect to employers' actions and compliance with Title VII).

13 The Holder Memorandum concludes, "For these reasons, the [DOJ] will no longer assert that Title VII's prohibition of discrimination based on sex does not encompass gender identity *per se* (including transgender discrimination)." Holder Memo 2, ECF No. 6-3. Other guidance from Defendants take similar actions. *See also* DOJ/DOE Letter 4–5, ECF No. 6-10.

Accordingly, the Court finds that Defendants' Guidelines are final agency action such that the jurisdictional threshold is met. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *5.

4. Alternative Legal Remedy

**[19]** Defendants also contend that district court review is precluded and Plaintiffs should not be allowed to avoid the administrative process by utilizing the APA at this time. Defs.' Resp. 16, ECF No. 40. Defendants allege that "review by a court of appeals is an 'adequate remedy' within the meaning of the APA," and "[s]ection 704 of the APA thus prevents plaintiffs from circumventing the administrative and judicial process Congress provided them." *Id.* Defendants argue "Congress has precluded district court jurisdiction over pre-enforcement actions like this." *Id.* at 17. Defendants cite several cases, including the Supreme Court's opinions in *Thunder Basin v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994) and *Elgin v. Department of Treasury*, —— U.S. ——, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012), in support of this argument. [14]

14 Defendants also assert *NAACP v. Meese* supports this argument but the Court disagrees. In that case, the plaintiffs sought to enjoin the Attorney General from reopening or agreeing to reopen any consent decree in any civil rights action pending in any other court. The district court denied this request, holding such actions would violate principles of separation of powers and comity. 615 F.Supp. 200, 201–02 (D.D.C.1985) ( "Plaintiffs' action must fail (1) under the principle of the separation of powers, and (2) because this Court lacks authority to interfere with or to seek to guide litigation in other district courts throughout the United States."). The *Meese* court also concluded there was no final agency action to

enjoin and, by definition, there would be an alternative legal remedy related to those cases where a consent decree existed because those decrees were already subject to a presiding judge. *Id.* at 203 n. 9. Additionally, Defendants reliance on *Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953 (5th Cir.1991) does not apply because there was no final agency action in that case.

Defendants' assertion that there is no jurisdiction to review Plaintiffs' APA claims fails and their reliance on *Thunder Basin*, *Elgin*, and the other cited cases is misplaced. In *Thunder Basin*, the Supreme Court held that the Mine Act's statutory review scheme precluded the district court from exercising subject-matter jurisdiction over a pre-enforcement challenge. To determine whether pre-enforcement challenges are prohibited courts look to whether this "intent is 'fairly discernible in the statutory scheme.' " *Thunder Basin*, 510 U.S. at 207, 114 S.Ct. 771 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 351, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984)). The Supreme Court held that "[w]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history ... and whether the claims can be afforded meaningful review." *Id.* (internal citation omitted).

***10** Although the Mine Act was silent about pre-enforcement claims, the Supreme Court held that "its comprehensive enforcement structure demonstrate[d] that Congress intended to preclude challenges," and the Mine Act "expressly authorize[d] district court jurisdiction in only two provisions ... [which allowed] the Secretary [of Labor] to enjoin [ ] violations of health and safety standards and to coerce payment of civil penalties." *Id.* at 209, 114 S.Ct. 771. Thus, plaintiffs had to "complain to the Commission and then to the court of appeals." *Id.* (italics omitted).

*Elgin* reached a similar conclusion, holding that the Civil Service Reform Act ("CSRA") was the exclusive avenue to judicial review for petitioners' claims against the Treasury Department. 132 S.Ct. 2126, 2128 ("Just as the CSRA's 'elaborate' framework [citation omitted] demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review.").

No similar elaborate statutory framework exists covering Plaintiffs' claims. Neither Title VII nor Title IX presents statutory schemes that would preclude Plaintiffs from bringing these claims in federal district court. Indeed, the Supreme Court has held that Title IX's enforcement provisions, codified at Title 20 U.S.C. §§ 1681–1683, does not provide the exclusive statutory remedy for violations. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (holding that Title IX did not preclude a private right of action for damages). Given Defendants lack of authority to the contrary, the presumption of reviewability for all agency actions applies. *EEOC*, —— F.3d at ——, 2016 WL 3524242 at *11 (citing *Abbott Labs.*, 387 U.S. at 140, 87 S.Ct. 1507) ("To wholly deny judicial review, however, would be to ignore the presumption of reviewability, and to disregard the Supreme Court's instruction that courts should adopt a pragmatic approach for the purposes of determining reviewability under the APA.").

Having concluded that Plaintiffs claims are properly subject to judicial review, the Court next evaluates whether a preliminary injunction is appropriate.

### B. Preliminary Injunction

#### 1. Likelihood of Success on the Merits

The first consideration is whether Plaintiffs have shown a likelihood of success on the merits for their claims. Plaintiffs aver that they have shown a substantial likelihood that they will prevail on the merits because Defendants have violated the APA by (1) circumventing the notice and comment process and (2) by issuing final agency action that is contrary to law. Mot. Injunction 12–16, ECF No. 11. Furthermore, Plaintiffs contend that Defendants' new policies are not valid agency interpretations that should be granted deference because "[a]gencies do not receive deference where a new

interpretation conflicts with a prior interpretation." Pls.' Reply 11, ECF No. 52 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994)).

Defendants contend that their actions do not violate the APA because the Guidelines are interpretive rules and are therefore exempt from the notice and comment requirements. Defs.' Resp. 12–18, ECF No. 40. Defendants argue the Guidelines are exempt because they do not carry the force of law, even though "the agencies' interpretations of the law are entitled to some deference." Further, they argue because their interpretation is reasonable, this interpretation is entitled to deference. [15] Defendants also assert they did not act contrary to law because the Guidelines are valid interpretations of Title IX as the statute and regulations "do not address how [the laws] apply when a transgender student seeks to use those facilities" or "how a school should determine a transgender student's sex when providing access to sex-segregated facilities." *Id.* at 20–21. Thus, according to Defendants, this situation presents an ambiguity in the regulatory scheme and Defendants are allowed to provide guidelines to federal fund recipients on this matter. *Id.* at 21. [16]

15 Defendants argue the Court should be guided in this decision by the Fourth Circuit's decision in *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.2016) ("*G.G.*"). Defendants contend the Fourth Circuit's majority opinion in *G.G.* should be followed as it provides the proper analysis. The Supreme Court recalled the Fourth Circuit's mandate and stayed the preliminary injunction entered by the district court in that case. *See Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, —— U.S. ——, 136 S.Ct. 2442, 2442, —— L.Ed.2d —— (2016) (Breyer, J. concurring) ("In light of the facts that four Justices have voted to grant the application referred to the Court by THE CHIEF JUSTICE, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy."). The Supreme Court takes such actions only on the rarest of occasions. *Bd. of Ed. of City School Dist. of City of New Rochelle v. Taylor*, 82 S.Ct. 10, 10 (1961) ("On such an application, since the Court of Appeals refused the stay '* * * this court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari."); *Russo v. Byrne*, 409 U.S. 1219, 1221, 93 S.Ct. 21, 34 L.Ed.2d 30 (1972) ("If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions, or questions of transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted."). Because it is impossible to know the precise issue (s) that prompted the Supreme Court to grant the stay, it is difficult to conclude that *G.G.* would control the outcome here. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., in chambers) (declaring it is very difficult to predict anticipated Supreme Court decision). Nevertheless, the Court has reviewed the opinion and considers the well-expressed views of each member of the panel in reaching the decision in this case.

16 Defendants characterize their Guidelines as, "supply[ing] 'crisper and more detailed lines' than the statutes and regulations that they interpret," without "alter[ing] the legal obligations of regulated entities." *Id.* at 20 (citing *Am. Mining Cong. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir.1993)).

***11** In their Reply, Plaintiffs counter that DOE's implementing regulation, § 106.33, is not "ambiguous[,] [a]s a physiologically-grounded regulation, it covers every human being and therefor all those within the reach of Title IX." Reply 8, ECF No. 52. They contend further, "[t]o create legal room to undo what Congress (and preceding regulators) had done, Defendants manufacture an ambiguity, claiming that 'these regulations do not address how they apply when a

transgender student seeks to use those facilities ....' " *Id.* (citing Defs.' Response 20–21, ECF No. 40). Plaintiffs continue, "[i]n enacting Title IX, Congress was concerned that women receive the same opportunities as men, [t]hus, Congress utilized 'sex' in an exclusively biological context[,] [and] "[t]he two sexes are not fungible." *Id.* at 8–9 (quoting *Ballard v. United States*, 329 U.S. 187, 193, 67 S.Ct. 261, 91 L.Ed. 181 (1946). It is the biological differences between men and women, Plaintiffs allege, that led Congress in 1972 to "permit differential treatment by sex only[,]" provide a basis for DOE "to approve 'separate toilet, locker rooms, and shower facilities on the basis of sex" in § 106.33, and led the Supreme Court "to conclude that educational institutions must 'afford members of each sex privacy from the other sex.' " *Id.* at 9 (quoting 118 Cong. Rec. 5807 (1972)); *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996)).

The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33's text is not ambiguous; and (3) Defendants are not entitled to agency deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). [17]

17 Defendants' counsel stated at the hearing that Defendants would not be entitled to *Chevron* deference for the Guidelines. *See* Hr'g Tr. 72. Thus, the Court addresses only Defendants' claim that they are entitled to *Auer* deference when interpreting § 106.33.

*i. Notice and Comment under the APA*

Defendants state that "[t]he APA does not require agencies to follow notice and comment procedures in all situations [, and the APA] specifically excludes interpretive rules and statements of agency policy from these procedures." Defs.' Resp. 17–18, ECF No. 40. Defendants allege "[t]he guidance documents are ... paradigmatic interpretive rules, exempt from the notice-and-comment requirements of the APA." *Id.* at 18. According to Defendants, "the interpretations themselves do not carry the force of law ...." *Id.* at 19. Defendants rely on *G.G.*, 822 F.3d 709, 720 (4th Cir.2016) to support their claim that DOE's "interpretation of the single-sex facility regulation implementing Title IX is reasonable, and does not conflict with those regulations in any way." *Id.*

Plaintiffs contend that Defendants' rules are legislative because: "(1) they grant rights while also imposing significant obligations; (2) they amend prior legislative rules or longstanding agency practice; and (3) bind the agencies and regulated entities," requiring them to go through the notice and comment process. Mot. Injunction 12, ECF No. 11.

**[20]** **[21]** The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them. 5 U.S.C. §§ 553(b)–(c). This is referred to as the notice and comment requirement. The purpose is to permit the agency to understand and perhaps adjust its rules based on the comments of affected individuals. *Prof'ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir.1995). However, not every action an agency takes is required to go through the notice and comment process. "The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C.Cir.2014). "Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not." *Id.* (citing 5 U.S.C. § 553). "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–03, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

**[22]** **[23]** The APA does not define a legislative or "substantive" rule, but in *Morton v. Ruiz*, 415 U.S. 199, 234, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), the Supreme Court held that a substantive rule or "a legislative-type rule," is one that "affect[s] individual rights and obligations." *Id.* at 232, 94 S.Ct. 1055. The Supreme Court also held, "the promulgation of these regulations must conform with any procedural requirements imposed by Congress." *Chrysler Corp.*, 441 U.S.

at 303, 99 S.Ct. 1705. Thus, agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *Id.* (quoting *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969)). If a rule is substantive, notice and comment requirements must be adhered to scrupulously. *Prof'ls and Patients for Customized Care*, 56 F.3d at 595.

***12** "[L]egislative rules (and sometimes interpretive rules) may be subject to pre-enforcement review" because they subject a party to a binding obligation which can be the subject of an enforcement action. *McCarthy*, 758 F.3d at 251. ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule ...."). The APA treats interpretive rules and general statements of policy differently. *Id.* ("As to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule."). [18]

18 *Catawba Cty.* provides: "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.")

**[24]** **[25]** **[26]** Courts have focused on several factors to evaluate whether rules are interpretative or legislative. Courts analyze the agency's characterization of the guidance and post-guidance events to determine whether the agency has applied the guidance as if it were binding on regulated parties. *McCarthy*, 758 F.3d at 252–53. However, "the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *McCarthy*, 758 F.3d at 252 (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34; *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C.Cir.2002)). "A touchstone of a substantive rule is that it establishes a binding norm." *Prof'ls and Patients for Customized Care*, 56 F.3d at 596; *see also Texas v. United States*, 809 F.3d 134, 202 (5th Cir.2015) (King, J., dissenting) (declaring that an agency action establishing binding norms which permit no discretion is a substantive rule requiring notice and comment). If agency action "draws a 'line in the sand' that, once crossed, removes all discretion from the agency" the rule is substantive. *Id.* at 601.

**[27]** Here, the Court finds that Defendants rules are legislative and substantive. Although Defendants have characterized the Guidelines as interpretive, post-guidance events and their actual legal effect prove that they are "compulsory in nature." *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C.Cir.2000); [19] *see also Prof'ls and Patients for Customized Care*, 56 F.3d at 596 (the label an agency places on its exercise of administrative power is not conclusive, rather it is what the agency does with that policy that determines the type of action). Defendants confirmed at the hearing that schools not acting in conformity with Defendants' Guidelines are not in compliance with Title IX. Hr'g Tr. 71. Further, post-Guidelines events, where Defendants have moved to enforce the Guidelines as binding, buttress this conclusion. *Id.* at 7; Mot. Injunction 15–16, ECF No. 11; Reply 4–8, ECF No. 52. The information before the Court demonstrates Defendants have "drawn a line in the sand" in that they have concluded Plaintiffs must abide by the Guidelines, without exception, or they are in breach of their Title IX obligations. Thus, it would follow that the "actual legal effect" of the Guidelines is to force Plaintiffs to risk the consequences of noncompliance. *McCarthy*, 758 F.3d at 252; *Catawba Cty.*, 571 F.3d at 33–34; *Gen. Elec. Co.*, 290 F.3d at 382; *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C.Cir.2005). Plaintiffs, therefore, are legally affected in a way they were not before Defendants issued the Guidelines. The Guidelines are, in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards. *Panhandle Producers and Royalty Owners Ass'n v. Econ. Regulatory Admin*, 847 F.2d 1168, 1174 (5th Cir.1988) (stating that a substantive rule is one that establishes standards of conduct that carry the force of law). As such, Defendants should have complied with the APA's notice and comment requirement. 5 U.S.C. § 553; *Nat'l Min. Ass'n*, 758 F.3d at 251; *Chrysler Corp.*, 441 U.S. at 301–03, 99 S.Ct. 1705. Permitting the definition of sex to be defined in this way would allow Defendants to "create de facto new regulation" by agency action without complying

with the proper procedures. *Christensen v. Harris Cty.*, 529 U.S. 576, 586–86, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000). This is not permitted.

19 In *Appalachian Power*, the D.C. Circuit held that an EPA guidance was a legislative rule despite the guidance document's statement that it was advisory. The Court analyzed the document as a whole and found that "the entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates." 208 F.3d at 1022–23. Similarly, the DOJ/DOE Letter uses the words "must," and various forms of the word "require" numerous times throughout the document. Am. Compl. Ex. J (DOJ/DOE Letter), ECF No. 6-10.

***13** Accordingly the Court finds that Plaintiffs would likely succeed on the merits that Defendants violated the notice and comment requirements of the APA.

*ii. Agency Action Contrary to Contrary to Law (5 U.S.C. § 553)*

Plaintiffs contend that Defendants' Guidelines are contrary to the statutory and regulatory text, Congressional intent, and the plain meaning of the term. Mot. Injunction 14, ECF No. 11. When an agency acts contrary to law, its action must be set aside. 5 U.S.C. § 706(2)(A). Plaintiffs argue that Defendants' interpretation of the meaning of the term "sex" as set out in the Guidelines contradicts its meaning in Title VII, Title IX, and § 106.33. They assert "the meaning of the terms 'sex,' on the one hand, and 'gender identity,' on the other, both now and at the time Titles VII and IX were enacted, forecloses alternate constructions." Mot. Injunction 16, ECF No. 11 (citing *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381. They also allege that the ordinary meaning of the term controls. *Id.* at 17 (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995)).

Defendants contend that Plaintiffs' arguments for legislative history and intent at the time of passage are irrelevant. Hr'g Tr. 33 ("But it may very well be that Congress did not intend the law to protect transgender individuals. [But,] ... as the Supreme Court has made it absolutely clear in *Oncale*, the fact that Congress may have understood the term sex to mean anatomical sex at birth is largely irrelevant.") Defendants also allege that "Title IX and Title VII should be construed broadly" to protect any person, including transgendered persons, from discrimination. Hr'g Tr. 33–34.

The starting point to analyze this dispute begins with the actual text of the statute or regulation, where the words should be given their ordinary meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). When the words are unambiguous, the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). The pertinent statutory text at issue in this case provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." 20 U.S.C. § 1681. Title IX expressly permits educational institutions to maintain separate living facilities for the different sexes. *Id.* at § 1686. The other language at issue comes from one of the DOE regulations promulgated to implement Title IX, which states: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Defendants assert the Guidelines simply provide clarity to an ambiguity in this regulation, and that ambiguity is how to define the term sex when dealing with transgendered students. Defs.' Resp. 20, ECF No. 40. Because they contend the regulation is ambiguous, Defendants argue "[f]oundational principles of administrative law instruct [the Court] to give controlling weight to [their] interpretations of their own ambiguous regulations unless [they are] plainly erroneous." *Id.*

***14** Plaintiffs contend the text of both Title VII and Title IX is not ambiguous. Mot. Injunction 16–19, ECF No. 11. They argue when Congress passed both statutes it clearly intended sex to be defined based on the biological and anatomical differences between males and females. *See id.* at 17–18 (citing legislative history and common understanding of its meaning at the time of passage). Plaintiffs likewise assert § 106.33 is unambiguous, for the same reason, as it was designed to separate students based on their biological differences because they have a privacy right to avoid exhibiting their "nude or partially nude body, genitalia, and other private parts" before members of the opposite sex. Pls.' Reply 8–9, ECF No. 52. Based on this, they argue Defendants have manufactured an ambiguity so they can then unilaterally change the law to suit their policy preferences. *Id.* at 8.

*iii. Auer Deference*

**[28]** Because Defendants assert their regulation is ambiguous, the Court must determine whether their interpretation is entitled to deference. Defendants contend an agency may interpret its own regulation by issuing an opinion letter or other guidance which should be given controlling weight if: (1) the regulation is ambiguous; and (2) the interpretation is not plainly erroneous or inconsistent with the regulation. Defs.' Resp. 21, ECF No. 40; *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) ("[An agency's] interpretation of [its regulation] is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' ") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

**[29]** **[30]** **[31]** This deference is only warranted however when the language of the regulation is ambiguous. *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 495 (5th Cir.2003). Legislation is ambiguous if it is susceptible to more than one accepted meaning. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir.2015). "Multiple accepted meanings do not exist merely because a statute's 'authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope.' " *Id.* (citing *Moore*, 317 F.3d at 497 *and* applying this rule of construction to regulations).

**[32]** **[33]** **[34]** If a regulation is not ambiguous, the agency's interpretation may be considered but only according to its persuasive power. *Moore*, 317 F.3d at 495. "Thus, a court must determine whether 'all but one of the meanings is ordinarily eliminated by context.' " *Calix*, 784 F.3d at 1005 (quoting *Deal v. United States*, 508 U.S. 129, 132–33, 113 S.Ct. 1993, 124 L.Ed.2d 44 1993 (1993)). When a term is not defined, courts may generally give the words their common and ordinary meaning in accordance with legislative intent. *D.C. Bd. of Elections & Ethics v. D.C.*, 866 A.2d 788, 798 n. 18 (D.C.2005) ("In finding the ordinary meaning, 'the use of dictionary definitions is appropriate in interpreting undefined statutory terms.' "); *1618 Twenty–First St. Tenants Ass'n, Inc. v. Phillips Collection*, 829 A.2d 201, 203 (D.C.2003) (same). Furthermore, "an agency is not entitled to deference when it offers up an interpretation of [a regulation] that [courts] have already said to be unambiguously foreclosed by the regulatory text." *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 399 (5th Cir.2014) (citing *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655).

Based on the foregoing authority, the Court concludes § 106.33 is not ambiguous. It cannot be disputed that the plain meaning of the term sex as used in § 106.33 when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth. *See* 34 C.F.R. § 106.33; 45 Fed. Reg. 30955 (May 9, 1980); *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S.Ct. 2381 (holding that intent determined at the time the regulations are promulgated). It appears Defendants at least tacitly agree this distinction was the intent of the drafter. *See* Holder Memo 1, ECF No. 6-3 ("The federal government's approach to this issue has also evolved over time."); *see also* Hr'g Tr. 33 ("[I]t may very well be that Congress did not intend the law to protect transgender individuals.").

***15** Additionally, it cannot reasonably be disputed that DOE complied with Congressional intent when drawing the distinctions in § 106.33 based on the biological differences between male and female students. Pls.' Mot. Injunction 17–18, ECF No. 11 (citing legislative history and common understanding of its meaning at the time of passage). As the support identified by Plaintiffs shows, this was the common understanding of the term when Title IX was enacted, and remained the understanding during the regulatory process that led to the promulgation of § 106.33. *See* Pls.' Am. Compl. ¶¶ 8–13, ECF No. 6; *see also G.G.*, 822 F.3d at 736 (Niemeyer, J., dissenting) (providing comprehensive list of various definitions from the 1970s which demonstrated "during that time period, virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions."). This undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their "nude or partially nude body, genitalia, and other private parts," and separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy. *See G.G.*, 822 F.3d at 723.

This conclusion is also supported by the text and structure of the regulations. Section 106.33 specifically permits educational institutions to provide separate toilets, locker rooms, and showers based on sex, *provided* that the separate facilities are comparable. The sections immediately preceding and following § 106.33 likewise permit educational institutions to separate students on the basis of sex. For instance, § 106.32 permits educational institutions to provide separate housing for students on the basis of sex, again so long as the separate housing is comparable, and § 106.33 permits separate educational sessions for boys and girls when dealing with instruction concerning human sexuality. 34 C.F.R. §§ 106.32, 106.34. Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex. *G.G.*, 822 F.3d at 723. Accordingly, this interpretation of § 106.33 is consistent with the structure and purpose of the regulations.

Based on the foregoing, the Court concludes § 106.33 is not ambiguous. Given this regulation is not ambiguous, Defendants' definition is not entitled to *Auer* deference, meaning it does not receive controlling weight. *Auer*, 519 U.S. at 461, 117 S.Ct. 905. Instead, Defendants' interpretation is entitled to respect, but only to the extent it has the power to persuade. *Christensen*, 529 U.S. at 587, 120 S.Ct. 1655. In his dissent in *G.G.*, Judge Niemeyer characterized Defendants' definition as "illogical and unworkable." *G.G.*, 822 F.3d at 737. He outlined a number of scenarios, which need not be repeated here, where the Defendants' interpretation only causes more confusion for educational institutions. *Id.* A definition that confuses instead of clarifies is unpersuasive. Additionally, since this definition alters the definition the agency has used since its enactment, its persuasive effect is decreased. *See Morton*, 415 U.S. at 237, 94 S.Ct. 1055; *see also Christopher v. SmithKline Beecham Corp.*, —— U.S. ——, 132 S.Ct. 2156, 2168, 183 L.Ed.2d 153 (2012) (holding that an agency announcement of an interpretation preceded by a very lengthy period with no interpretation indicates agency considered prior practice lawful). Accordingly, the Court concludes Defendants' interpretation is insufficient to overcome the regulation's plain language and for the reasons stated above is contrary to law.

2. Threat of Irreparable Harm

**[35]** The Court next addresses irreparable harm. Defendants allege that Plaintiffs have not identified any pending or imminent enforcement action, and the Guidelines "expose [P]laintiffs to no new liability or legal requirements." Defs.' Resp. 7, ECF No. 40 (citing *Google v. Hood*, 822 F.3d 212, 227 (5th Cir.2016). Defendants argue that, "[a]lthough [P]laintiffs *do* identify a small number of specific 'policies and practices' that they claim are in conflict with [D]efendants' interpretation of Title IX, they have identified no enforcement action being taken against them—now or in the future—as a result of these polices." Defs.' Resp. 8–9, ECF No. 40. They assert that even if DOE were "to decide to bring an administrative enforcement action against plaintiffs for noncompliance ... at some point in the future, [P]laintiffs *still* would be unable to make a showing of irreparable harm because they would have an opportunity to challenge the

interpretation in an administrative process prior to any loss of federal funds." *Id.* at 9 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir.1975)).

***16** Plaintiffs counter that "Defendants' actions cause irreparable harm by forcing policy changes, imposing drastic financial consequences, and usurping [Plaintiffs'] legitimate authority." Mot. Injunction 21, ECF No. 11. According to Plaintiffs, Defendants' actions present "a Hobson's choice between violating federal rules (labeled as regulations, guidance, and interpretations) on the one hand, and transgressing longstanding policies and practices, on the other." *Id.* Thus, Plaintiffs characterize Defendants' administrative letters and notices as "mandates" which effectively carry the force of law. *Id.* Plaintiffs also allege that Defendants' rules are "irreconcilable with countless polices regarding restrooms, showers, and intimate facilities," while threatening to override the practices of "countless schools," which had previously been allowed to differentiate intimate facilities on the basis of biological sex consistent with Title IX, federal regulations, and laws protecting privacy and dignity. *Id.* (citing Mot. Injunction, Ex. P. (Thweatt Dec.) 5–7, ECF No. 11-2).

Defendants' appear to concede the Guidelines conflict with Plaintiffs' policies and practices, *see* Defs.' Resp. 8–9; ECF No. 40 ("[P]laintiffs do identify a small number of specific 'policies and practices' ...."); however, they argue that additional threats of enforcement are required before irreparable harm exists. Case law does not support this contention. Instead the authorities hold, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Coalition for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir.1997) (stating, whenever an enactment of a state's people is enjoined, the state suffers irreparable injury); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir.2013) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws."); *Maryland v. King*, —— U.S. ——, 133 S.Ct. 1, 3, 183 L.Ed.2d 667 (2012) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S.Ct. 359, 54 L.Ed.2d 439 (1977) (Rehnquist, J., *in chambers*) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

As Defendants have conceded the conflict between the Guidelines and Plaintiffs' policies, and Plaintiffs have identified a number of statutes that conflict, the Court concludes Plaintiffs have sufficiently demonstrated a threat of irreparable harm. [20]

20 Defendants also contend the injunction should be denied because Plaintiffs delayed in seeking this relief. The DOJ/DOE Letter is dated May 13, 2016. This case was filed very soon after on May 25, 2016, and the parties reached an agreement on a briefing schedule to consider this request. The Court concludes Plaintiffs did not fail to act timely.

3. Balance of Hardships and Public Interest [21]

21 The Parties address the third and fourth Canal factors together, therefore they are treated together in this Order as well.

**[36]** The Court next considers whether the threatened injury to the Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants and its impact on the public interest. *Nichols*, 532 F.3d at 372. Plaintiffs risk either running afoul of Defendants' Guidelines or complying and violating various state statutes and, in some cases, their state constitutions. Mot. Injunction 21, ECF No. 11. Plaintiffs also state that they likely risk legal action from parents, students, and other members of their respective communities should they actually comply with Defendants' Guidelines. Defendants argue these harms do not outweigh the damage that granting the injunction will cause because it will impede their ability to eliminate discrimination in the workplace and educational settings, prevent them from definitively

explaining to the public the rights and obligations under these statutes, and it would have a deleterious effect on the transgendered.

***17** The Court concludes Plaintiffs have established that the failure to grant an injunction will place them in the position of either maintaining their current policies in the face of the federal government's view that they are violating the law, or changing them to comply with the Guidelines and cede their authority over this issue. *See* DOJ/DOE Letter, ECF No. 6-10 ("This letter summarizes a school's Title IX obligations regarding transgender students and explains how [DOE and DOJ] evaluate a school's compliance with these obligations."). Plaintiffs' harms in this regard outweigh those identified by Defendants, particularly since the Supreme Court stayed the Fourth Circuit's decision supporting Defendants' position, and a decision from the Supreme Court in the near future may obviate the issues in this lawsuit. As a result, Plaintiffs interests outweigh those identified by Defendants. Further, Defendants have not offered evidence that Plaintiffs are not accommodating students who request an alternative arrangement. Indeed, the school district at issue in *G.G.* provided its student an accommodation.

Accordingly, the Court finds that Plaintiffs have met their burden and these factors weigh in favor of granting the preliminary injunction.

### C. Scope of the Injunction

Finally, the Court must determine the scope of the injunction. Plaintiffs seek to apply the injunction nationwide. Mot. Injunction 3, ECF No. 11; Pls.' Reply 13, ECF No. 52. Defendants counter that the injunction should be narrowly tailored to Plaintiffs in the Fifth Circuit. Defs.' Resp. 28, ECF No. 40.

**[37]** **[38]** "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* at 702, 99 S.Ct. 2545 (permitting a nationwide injunction because the class action was proper and finding that a nationwide injunction was not more burdensome than necessary to redress plaintiffs' complaints).

The Court concludes this injunction should apply nationwide. As the separate facilities provision in § 106.33 is permissive, states that authorize schools to define sex to include gender identity for purposes of providing separate restroom, locker room, showers, and other intimate facilities will not be impacted by it. Those states who do not want to be covered by this injunction can easily avoid doing so by state law that recognizes the permissive nature § 106.33. It therefore only applies to those states whose laws direct separation. However, an injunction should not unnecessarily interfere with litigation currently pending before other federal courts on this subject regardless of the state law. As such, the parties should file a pleading describing those cases so the Court can appropriately narrow the scope if appropriate.

## IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs' application for a preliminary injunction (ECF No. 11) should be and is hereby **GRANTED**. *See* Fed. R. Civ. P. 65. It is **FURTHER ORDERED** that bond is set in the amount of one hundred dollars.[22] *See* Fed. R. Civ. P. 65(c). Defendants are enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions. Further, while this injunction remains in place, Defendants are enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex. Additionally, Defendants are enjoined from using the Guidelines or asserting the Guidelines carry weight in any litigation initiated following the date of this Order. All parties to this cause of action must maintain the status quo as of the date of issuance of this Order and this preliminary injunction will remain in effect until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals. This

preliminary injunction shall be binding on Defendants and any officers, agents, servants, employees, attorneys, or other persons in active concert or participation with Defendants, as provided in Federal Rule of Civil Procedure Rule 65(d)(2).

22 Neither party addressed the appropriate bond amount should an injunction be entered.

***18 SO ORDERED** on this **21st day** of **August, 2016.**

**All Citations**

--- F.Supp.3d ----, 2016 WL 4426495

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