

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

DREW ADAMS, a minor, by and through
his next friend and mother, ERICA
ADAMS KASPER,

Plaintiff,

v.

THE SCHOOL BOARD OF ST. JOHNS
COUNTY, FLORIDA,

Defendant.

Case No. 3:17-cv-00739-TJC-JBT

**REQUEST FOR JUDICIAL NOTICE AND MEMORANDUM OF LAW AS TO
EEOC DECISIONS HOLDING DISCRIMINATION BASED ON TRANSGENDER
STATUS IS A FORM OF SEX DISCRIMINATION UNDER TITLE VII**

Pursuant to Federal Rule of Evidence 201, Plaintiff, Drew Adams, a minor, by and through his next friend and mother, Erica Adams Kasper (“Plaintiff”), and by and through their undersigned counsel, respectfully requests that this Court take judicial notice of federal administrative decisions holding that discrimination on the basis of gender identity or transgender status constitute a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq. Specifically, Plaintiff requests that the Court take judicial notice of decisions by the Equal Employment Opportunity (“EEOC”) holding that discrimination on the basis of gender identity or transgender status constitute a form of sex discrimination prohibited by Title VII.

MEMORANDUM OF LAW

Federal Rule of Evidence 201 allows this Court to take judicial notice of adjudicative facts that cannot reasonably be disputed and are subject to ready proof. Specifically, “[t]he Court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Moreover, the Court is required to take judicial notice upon Plaintiff’s request where, as here, the Court “is supplied with the necessary information.” Fed. R. Evid. 201(c). All of these requirements are met here.

The facts proposed for judicial notice are relevant to this proceeding. Plaintiff has asserted that the School Board of St. John’s County has discriminated against him based upon his transgender status and sex which includes, but is not limited to, his gender identity. “Courts regularly apply Title VII principles to Title IX discrimination and retaliation claims.” *Bigge v. Dist. Sch. Bd. of Citrus Cty., Fla.*, No. 5:13-CV-49-OC-10PRL, 2015 WL 1138472, at *10 (M.D. Fla. Mar. 13, 2015); *see also Does v. Covington Cty. Sch. Bd. of Educ.*, 930 F. Supp. 554, 574 (M.D. Ala. 1996) (“Title VII’s body of case law supports the court’s conclusion, particularly since Title VII and Title IX’s prohibitions against sex discrimination are the same and Title VII’s legal principles also govern sex discrimination claims brought under Title IX.”). Moreover, “the EEOC’s interpretation of Title VII, for which it has primary enforcement responsibility, . . . need only be reasonable to be entitled to deference.” *U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 613 (11th Cir. 2000). As such, the fact that the EEOC has interpreted Title VII’s sex discrimination prohibition to encompass discrimination based on gender identity or

transgender status is highly relevant to this. So is, the EEOC's conclusion that prohibiting a transgender female employee from using the restroom consistent with her gender identity violates Title VII's prohibition on sex discrimination. That the EEOC has come to such conclusions are admissible facts and, as publicly available records, can be readily authenticated by this Court. *See* Fed. R. Evid. 902(6).

“[A] court may take judicial notice of another court's order for the limited purpose of recognizing the judicial action taken or the subject matter of the litigation.” *Pueschel v. United States*, No. 3:05-CV-1134-J-34TEM, 2011 WL 13176215, at *1 (M.D. Fla. June 1, 2011) (quoting *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1166 n.11 (11th Cir. 1995)). As such, courts routinely take judicial notice of EEOC decisions, like the ones referenced below. *See, e.g., Perry v. United States*, No. TDC-14-2862, 2015 WL 3558081, at *1 n.1 (D. Md. June 2, 2015) (taking judicial notice of administrative decisions issued by the EEOC), *aff'd*, No. 16-1129, 2016 WL 5682564 (4th Cir. Oct. 3, 2016) (per curiam); *Nurriddin v. Bolden*, 674 F. Supp. 2d 64, 87 (D.D.C. 2009) (“Court takes judicial notice of an EEOC appeal decision that has been publicly reported.”).

Accordingly, pursuant to Federal Rule of Evidence 201, Plaintiff hereby requests that this Court take judicial notice of the following EEOC decisions listed below:

- 1) *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (attached hereto as Exhibit 1). In *Macy*, the EEOC “conclude[d] that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.” *Id.* at *11.

2) *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 WL 1607756 (E.E.O.C. Apr. 1, 2015) (attached hereto as Exhibit 2). In *Lusardi*, the EEOC concluded that “there is no cause to question that Complainant -- who was assigned the sex of male at birth but identifies as female -- is female” and that “where . . . 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.” *Id.* at *8.

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiff respectfully requests that this Court take judicial notice of the enclosed aforementioned EEOC decisions, pursuant to Federal Rule of Evidence 201(b), as they are not subject to reasonable dispute.

CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL RULE 3.01(g)

Pursuant to 3.01(g) of the Local Rules of the Middle District of Florida, the undersigned certifies that he has conferred with the attorneys representing Defendant regarding the relief requested in the motion. Defendant does not object to the Court taking judicial notice of Exhibits 1 and 2 attached hereto.

Dated this 29th of November, 2017

Respectfully submitted,

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
(admitted pro hac vice)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3919
Telephone: 212-809-8585
Facsimile: 212-809-0055
ogonzalez-pagan@lambdalegal.org

Kirsten Doolittle, Trial Counsel
Florida Bar No. 942391
THE LAW OFFICE OF KIRSTEN DOOLITTLE, P.A.
The Elks Building
207 North Laura Street, Ste. 240
Jacksonville, FL 32202
Telephone: 904-551-7775
Facsimile: 904-513-9254
kd@kdlawoffice.com

Tara L. Borelli (*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
tborelli@lambdalegal.org

Paul D. Castillo (*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, Texas 75219
Telephone: 214-219-8585
Facsimile: 214-219-4455
pcastillo@lambdalegal.org

Natalie Nardecchia
(*admitted pro hac vice*)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel. 213-382-7600 | Fax: 213-351-6050
nnardecchia@lambdalegal.org

Jennifer Altman
Florida Bar No: 881384
Markenzy Lapointe
Florida Bar No: 172601
Shani Rivaux
Florida Bar No: 42095
Aryeh Kaplan
Florida Bar No: 60558
PILLSBURY WINTHROP SHAW PITTMAN, LLP
600 Brickell Avenue Suite 3100
Miami, FL 33131
Telephone: 786-913-4900
Facsimile: 786-913-4901
jennifer.altman@pillsbury.com
markenzy.lapointe@pillsburylaw.com
shani.rivaux@pillsbury.com
aryeh.kaplan@pillsbury.com

Richard M. Segal (*admitted pro hac vice*)
Nathaniel R. Smith (*admitted pro hac vice*)
PILLSBURY WINTHROP SHAW PITTMAN LLP
501 W. Broadway, Suite 1100
San Diego, CA 92101
Telephone: 619-234-5000
Facsimile: 619-236-1995
richard.segal@pillsburylaw.com
nathaniel.smith@pillsburylaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, the foregoing motion was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record, including:

Terry J. Harmon (tharmon@sniffenlaw.com)
Robert J. Sniffen (rsniffen@sniffenlaw.com)
Michael P. Spellman (mspellman@sniffenlaw.com)
Lisa B. Fountain (lfountain@sniffenlaw.com)
Kevin Kostelnik (kkostelnik@sniffenlaw.com)
SNIFFEN & SPELLMAN, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

Robert Christopher Barden (rcbarden@mac.com)
RC Barden & Associates
5193 Black Oaks Court North
Plymouth, MN 55446-2603

Attorneys for Defendant, The School Board of St. Johns County, Florida

/s/ Omar Gonzalez-Pagan

Omar Gonzalez-Pagan

(admitted pro hac vice)

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

120 Wall Street, 19th Floor

New York, New York 10005-3919

Tel.: 212-809-8585 | Fax: 212-809-0055

ogonzalez-pagan@lambdalegal.org

EXHIBIT 1



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Mia Macy,
Complainant,

v.

Eric Holder,
Attorney General,
Department of Justice,
(Bureau of Alcohol, Tobacco, Firearms and Explosives),
Agency.

Appeal No. 0120120821

Agency No. ATF-2011-00751

DECISION

On December 9, 2011, Complainant filed an appeal 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. For the following reasons, the Commission finds that the Complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND¹

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant's supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

¹ The facts in this section are taken from the EEO Counselor's Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.

benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC (“Aspen”),² the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.³

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor’s Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011,⁴ she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

² It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission’s Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a “joint employment” relationship may exist where both the Agency and the “staffing firm” may be deemed employers. The Commission makes no determination at this time as to whether or not a “joint employment” relationship exists in this case as this issue is not presently before us.

³ On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency’s Personnel Security Branch had received Complainant’s completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he “hope[d] to finish your investigation the first of next week.”

⁴ In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency’s EEO Counselor on May 5, 2011. However, the EEO Counselor’s report indicates that the initial contact occurred on May 10, 2011.

else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation.⁵ Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor's report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as "change in gender (from male to female)."

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off "sex" and the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of "my sex, gender identity (transgender woman) and on the basis of sex stereotyping."

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the "claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office." The letter went on to state, however, that "since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy." The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at <http://www.justice.gov/jmd/ps/chpt4-1.html> (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

⁵ The Counselor's Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.

On November 8, 2011, Complainant's attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that "[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency]," and that the discrimination against Complainant was based on "separate and related" factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency's contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant's November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint "on the basis of sex (female) and gender identity stereotyping." However, the Agency again stated that it would process only her claim "based on sex (female)" under Title VII and the EEOC's Part 1614 regulations. Her claim based on "gender identity stereotyping" would be processed instead under the Agency's "policy and practice," including the issuance of a final Agency decision from the Agency's Complaint Adjudication Office.

CONTENTIONS ON APPEAL

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of "sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity" when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency's "reclassification" of her claim of discrimination into two separate claims of discrimination - one "based on sex (female) under Title VII" which the Agency will investigate under Title VII and the EEOC's Part 1614 regulations, and a separate claim of discrimination based on "gender identity stereotyping" which the Agency will investigate under a separate process designated for such claims -- is a "de facto dismissal" of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant's appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant's appeal was "premature" because the Agency had accepted a claim designated as discrimination "based on sex (female)."

In response to the Agency's January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of "discrimination based on sex (female)," as characterized by the Agency, and to pursue solely the Agency's dismissal of her complaint of discrimination

based on her gender identity, change of sex and/or transgender status. In a letter to the Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim “based on sex (female)” as the Agency had characterized it, in order to remove any possible procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the Commission to rule on her appeal that the Agency should investigate, under Title VII and the EEOC’s Part 1614 regulations, her claim of discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant’s complaint makes clear that she believes she was not hired for the position as a result of making her transgender status known. As already noted, Complainant stated that she was discriminated against on the basis of “my sex, gender identity (transgender woman) and on the basis of sex stereotyping.” In response to her complaint, the Agency stated that claims of gender identity discrimination “cannot be adjudicated before the [EEOC].” See Agency Letters of October 26, 2011 and November 18, 2011. Although it is possible that the Agency would have fully addressed her claims under that portion of her complaint accepted under the 1614 process, the Agency’s communications prompted in Complainant a reasonable belief that the Agency viewed the gender identity discrimination she alleged as outside the scope of Title VII’s sex discrimination prohibitions. Based on these communications, Complainant believed that her complaint would not be investigated effectively by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some, but not all, of the claims in a complaint should be dismissed, it must notify the complainant of its determination. However, this determination is not appealable until final action is taken on the remainder of the complaint. In apparent recognition of the operation of §1614.107(b), Complainant withdrew the accepted portion of her complaint from the 1614 process so that the constructive dismissal of her gender identity discrimination claim would be a final decision and the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint’s procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC’s responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government’s efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant's complaint into separate claims: one described as discrimination based on "sex" (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as "sex stereotyping," "gender transition/change of sex," and "gender identity" (Complainant Letter of Nov. 8, 2011); by the Agency as "gender identity stereotyping" (Agency Letter Nov. 18, 2011); and finally by Complainant as "gender identity, change of sex and/or transgender status" (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, "[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) (emphasis added). *Cf.* 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is 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 such individual's . . . sex*") (emphasis added).

As used in Title VII, the term "sex" "encompasses both sex—that is, the biological differences between men and women—and gender." *See Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in *Price Waterhouse* agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (emphasis added) ("Congress' intent to forbid employers to take *gender* into account in making employment decisions appears on the face of the statute.").

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the

statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In Price Waterhouse, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should act. Id. at 230–31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at Price Waterhouse discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." Schwenk, 204 F.3d at 1201–02; see also Price Waterhouse, 490 U.S. at 254–55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." Price Waterhouse, 490 U.S. at 242.⁶

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 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

⁶ There are other, limited instances in which gender may be taken into account, such as is in the context of a valid affirmative action plan, see Johnson v. Santa Clara County Transportation Agency, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.

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.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in many scenarios involving individuals who act or appear in gender-nonconforming ways.⁷ And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination "on the basis of sex" in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

⁷ See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female "tomboyish" plaintiff had been fired for not having the "Midwestern girl look" suggested "her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype"); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer's vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that "a plaintiff may satisfy her evidentiary burden [under Title VII] by showing that the harasser was acting to punish the plaintiff's noncompliance with gender stereotypes"); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against "for walking and carrying his tray 'like a woman' - i.e., for having feminine mannerisms"); Simonton v. Runyon, 232 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex"), vacated and remanded on other grounds, 523 U.S. 1001 (1998).

violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201–02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner “considered herself a transsexual and that she planned to seek sex reassignment surgery in the future.” *Id.* at 1202. According to the court, the guard had targeted the transgender prisoner “only after he discovered that she considered herself female[,]” and the guard was “motivated, at least in part, by [her] gender”—that is, “by her assumption of a feminine rather than a typically masculine appearance or demeanor.” *Id.* On these facts, the Ninth Circuit readily concluded that the guard’s attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure “to conform to socially-constructed gender expectations.” *Id.* at 1201–02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females – i.e., “as anatomical males whose *outward behavior and inward identity* [do] not meet social definitions of masculinity” – is actionable discrimination “because of sex.” *Id.* (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank’s refusal to give a loan application to a biologically-male plaintiff dressed in “traditionally feminine attire” because his “attire did not accord with his male gender” stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f).

Similarly, in Smith v. City of Salem, the plaintiff was “biologically and by birth male.” 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). *Id.* Smith’s co-workers began commenting that her appearance and mannerisms were “not masculine enough.” *Id.* Smith’s employer later subjected her to numerous psychological evaluations, and ultimately suspended her. *Id.* at 569–70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, “both because of [her] *gender non-conforming conduct* and, more generally, because of [her] *identification* as a transsexual.” *Id.* at 571 (emphasis added).

The district court rejected Smith’s efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on “transsexuality.” *Id.* The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court’s conclusion:

cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex

stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual" is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Id. at 574–75.⁸

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it "inappropriate" for her to appear at work dressed as a woman and that he found it "unsettling" and "unnatural" that she would appear wearing women's clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as "a man dressed as a woman and made up as a woman," and admitted that his decision to fire her was based on "the sheer fact of the transition." Id. at 1320–21. According to the Eleventh Circuit, this testimony "provides ample direct evidence" to support the conclusion that the employer acted on the basis of the plaintiff's gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007); see also Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

⁸ See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that "a claim for sex discrimination under Title VII . . . can properly lie where the claim is based on 'sexual stereotypes'" and that the "district court therefore did not err when it instructed the jury that it could find discrimination based on 'sexual stereotypes'").

Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011).⁹

There has likewise been a steady stream of district court decisions recognizing that discrimination against transgender individuals on the basis of sex stereotyping constitutes discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress rescinded an offer of employment it had extended to a transgender job applicant after the applicant informed the Library's hiring officials that she intended to undergo a gender transition. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination claim. According to the district court, it did not matter “for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” Id. at 305. In any case, Schroer was “entitled to judgment based on a Price-Waterhouse-type claim for sex stereotyping” Id.¹⁰

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services, Inc.:

⁹ But see Etsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4–5 (D. Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff'd on other grounds, 502 F.3d 1215 (10th Cir.2007).

¹⁰ The district court in Schroer also concluded that discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is “*literally* discrimination ‘because of . . . sex.’” Schroer, 577 F. Supp. 2d at 308; see also id. at 306–07 (analogizing to cases involving discrimination based on an employee’s religious conversion, which undeniably constitutes discrimination “because of . . . religion” under Title VII). For other district court cases using sex stereotyping as grounds for establishing coverage of transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300, 2010 WL 2573988, at * 4 (D. Colo. June 24, 2010); Lopez v. River Oaks Imaging & Diag. Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., No. Vic. A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] 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. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; *see also* Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII’s prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility,¹¹ by a desire to protect people of a certain gender,¹² by assumptions that disadvantage men,¹³ by gender stereotypes,¹⁴ or by the desire to accommodate other people’s prejudices or discomfort.¹⁵ While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, “sex stereotyping” is not itself an independent cause of action. As the Price Waterhouse Court

¹¹ *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination “because of sex”); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (“A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).

¹² *See* Int’l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

¹³ *See, e.g.*, Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

¹⁴ *See, e.g.*, Price Waterhouse, 490 U.S. at 250-52.

¹⁵ *See, e.g.*, Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that “assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black” nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her 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).

noted, while “stereotyped remarks can certainly be *evidence* that gender played a part” in an adverse employment action, the central question is always whether the “employer actually relied on [the employee’s] gender in making its decision.” *Id.* at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee’s parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer’s actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.

Applying Title VII in this manner does not create a new “class” of people covered under Title VII—for example, the “class” of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318–19 (noting that “all persons, whether transgender or not” are protected from discrimination and “[a]n individual cannot be punished because of his or her perceived gender non-conformity”).

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination therefore violates Title VII.¹⁶

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant's entire complaint within the Part 1614 EEO complaints process is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

¹⁶ The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that “[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination “because of . . . sex” under Title VII.” EEOC Amicus Brief in *Pacheco v. Freedom Buick GMC Truck*, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).

EXHIBIT 2



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Tamara Lusardi,
Complainant,

v.

John M. McHugh,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120133395
Agency No. ARREDSTON11SEP05574

DECISION

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.

BACKGROUND¹

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

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.

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.

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.

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.

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.

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

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.

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

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.

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

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/>.

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. . . . [O]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

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

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.

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

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

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

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).

use. That constitutes a harm or loss with respect to the terms and conditions of Complainant's employment.⁷

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.

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/doc 529.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).

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.

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

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.

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.

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

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”).

transition with other employees. Consequently, we find that the Agency was negligent in permitting the harassment to occur and is therefore liable.

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

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.

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.
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)

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)

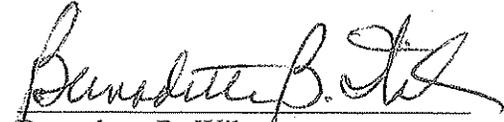
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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)

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

April 1, 2015
Date