IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-CV-02362-RBJ

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, and

EGAN J. WOODWARD,

Intervenor,

v.

A & E TIRE, INC.,

Defendant.

DEFENDANT'S F.R.C.P. 12(b)(6) MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant A & E Tire ("Defendant" or "A & E"), through its counsel, Marilee E. Langhoff, files this Motion, and supporting memorandum, to Dismiss Plaintiff's Complaint pursuant to F.R.C.P. 12(b)(6).

I. INTRODUCTION

This case stems from Defendant A & E Tire's decision not to hire Egan Woodward ("Woodward"), an applicant for a vacant position at A & E's facility in Denver, Colorado. Plaintiff EEOC maintains that A & E violated Title VII's prohibition of discrimination based upon sex because Woodward is a transgender male. The EEOC further contends that A & E's decision was "predicated on unlawful sex-based considerations, specifically that

Woodward is a transgender male and/or because [he] did not conform to the Defendant's sex- or gender-based preferences, expectations, or stereotypes." (Complaint—Doc #1 at **58**).

Defendant contends, based upon Tenth Circuit authority, that the Complaint fails to state a viable Title VII claim, as a matter of law, and further should be dismissed because Plaintiff's Complaint does not allege sufficient facts, which accepted as true, state a claim for relief plausible on its face. For these reasons, as explained below, Plaintiff's Complaint should be dismissed.

II. PLAINTIFF EEOC'S FACTUAL ALLEGATIONS[1]

On May 15, 2014, A & E posted an ad for a managerial administrative and dispatch position online. (**16**). Woodward completed an application on May 16, 2014 and provided Defendant with a copy of his resume. (**17-18**). On that same day, Woodward wearing traditional male attire and a goatee, was personally interviewed for about 45 minutes, by an A & E Tire Manager (the "Manager"). (**21, 22, 23 & 25**). During the interview, the Manager did not recognize that Woodward was a transgender male (**24**). The Manager and Woodward got along well during the interview, discussed their similar backgrounds; they both grew up in mid-western states, (**26, 27 & 29**), and the Manager described himself as a "good old boy" from Nebraska. (**28**).

[1] The bold numeric references contained throughout this motion are to the numbered paragraphs contained in the EEOC's Complaint – [Doc #1].

The Complaint alleges that following a discussion about salary expectations and potential (**30-32**), the Manager told Woodward, and later reiterated, that he had the job if he could pass pre-employment testing such as a drug test and criminal background check. (**33 & 40**). The Manager then gave Woodward a tour of the company's premises (**34**), taking him to various locations including a new building under construction to which the operation would be moved (**35, 37 & 38**). When the Manager introduced Woodward to others, he reportedly introduced him as their new manager (**36**). The Manager asked Woodward for input on the new offices, asking him to draw up some plans. (**39**).

Woodward completed a screening consent form authorizing the background check and providing other personal information. (**42**). In response to questions on that form, Woodward reportedly provided the name he was assigned at birth, which is typically associated with the female sex, and indicated that his sex was female. (**43-44**).

After Woodward left the Defendant's premises, he received a call from the Manager who allegedly said: "I see on your drug test that you checked female." (**46**). When Woodward confirmed that this was correct, the Manager reportedly hung up abruptly stating: "Oh, that's all I need." (**47-48**).

The Complaint also alleges that Woodward made numerous efforts to contact the Manager in the next few weeks about completing the background screenings and starting employment (**49**) and ultimately spoke with him on June 10, 2014 at which time he was informed that the position was being given to a different applicant, Steven Montez. (**51).**

Montez had applied for the position on May 21, was interviewed on June 6, and began work on June 10, 2014. (**52-54**).

Defendant denies many of the Plaintiff's factual allegations and expressly denies that its decision not to hire Woodward was in any way related to or affected by Woodward's sex and/or the fact that he is a transgendered male. Defendant submits, however, that even accepted as true, the allegations in Plaintiff's Complaint fail to state a claim upon which relief may be granted, and thus dismissal is warranted.

III. STANDARD OF REVIEW

To withstand a motion to dismiss under Rule 12(b)(6), a complaint must allege "'enough facts to state a claim to relief that is plausible on its face.'" *Schrock v. Wyeth, Inc,* 727 F.3d 1273, 1280 (10th Cir. 2013) *(quoting Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Ruiz v. McDonnell*, 299 F. 3d 1173, 1181 (10th Cir. 2002).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009). However, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if based upon "naked assertion[s]" devoid of "further factual enhancement." *Id at 557*.

Moreover, particularly pertinent to this case, is that "the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded

claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (*quoting Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

IV. ARGUMENT

Plaintiff's claim is based on its conclusory assertion that the decision not to hire Woodward was predicated on "unlawful sex-based considerations, specifically that Woodward is a transgender male and/or because [he] did not conform to the Defendant's sex- or gender-based preferences, expectations, or stereotypes." (**58).** Although Plaintiff states but one claim, it appears to be based on two legal theories.

The first theory is that discrimination based on an individual's status/identity as transgendered is, in and of itself, unlawful discrimination because of sex under Title VII. In other words, Plaintiff's claim is premised upon the contention that transgendered individuals are a protected class under Title VII.

In the alternative, Plaintiff's claim appears to be based on the theory recognized in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250 (1989), specifically, that a Title VII discrimination claim can be premised upon evidence of discrimination arising from an employee's failure to conform to stereotypical gender norms. Plaintiff in *Price Waterhouse* was denied a partnership because she did not conform to the decision makers' expectations of how a woman should behave and appear. The female Plaintiff was described by the decision makers as "macho" and, among other things, advised that

she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." The Court held that the Plaintiff stated a claim for discrimination based upon her failure to conform to stereotypical gender norms. *Price Waterhouse*, 490 U.S. at 235.

Defendant maintains that Plaintiff's Title VII claim in this matter fails under both theories.

A. TENTH CIRCUIT AUTHORITY IS CLEAR THAT A TRANSGENDERED INDIVIDUAL IS NOT PROTECTED UNDER TITLE VII BASED SOLELY ON THE PERSON'S STATUS AS A TRANSGENDERED INDIVIDUAL

Title VII prohibits discrimination based upon sex. Although courts in some jurisdictions have held that the protection afforded by Title VII extends to transgendered[2] individuals based solely on the person's status as transgendered, the Tenth Circuit held to the contrary in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). Etsitty was born as a biological male, but identified as a woman. Outside of work she lived and dressed as a woman, but throughout her training as a bus operator for the Utah Transit Authority (UTA), she presented as a man. After she was hired, she informed her supervisor she was a transsexual and began wearing makeup, jewelry, and acrylic nails at work and began using female restrooms while on her bus routes. The Transit Authority ultimately terminated Etsitty's employment because of the possibility of liability for UTA arising from her use of female restrooms. Etsitty brought suit asserting unlawful gender

[2] Plaintiff uses the term "transgender" to describe Egan Woodward and Defendant will do likewise. However, some Courts have used the interchangeable term, "transsexual" and where a court has used that term in a case, Defendant will do the same.

discrimination under Title VII, claiming, among other things, that she was terminated because she was transsexual.

The *Etsitty* Court concluded that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII." *Id.* at 1221. The Court reasoned that the plain meaning of "sex" encompasses nothing more than male or female and expressly declined to expand the traditional definition of sex to include transsexuals as a protected class under Title VII. *Id.* at 1222. The Court went on to say: "Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female." *Id*. This holding requires dismissal of Plaintiff's Title VII claim based upon Woodward's transgender status.

B. PLAINTIFF HAS FAILED TO ALLEGE FACTS GIVING RISE TO A FACIALLY PLAUSIBLE CLAIM UNDER THE *PRICE WATERHOUSE* GENDER NON-CONFORMITY/SEX STEREOTYPING THEORY.

In *Etsitty*, the Plaintiff argued that even if she were not entitled to protection under Title VII as a transgendered person, she was "nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear." *Etsitty*, 502 F.3d at 1223. The *Etsitty* Court noted that although the Plaintiff identified and presented herself as female who wished to be allowed to use female restrooms, the claim was premised on her status as a biological male. *Id.* at *fn*3. The Court did "not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination 'because of sex' and [did] not decide whether such a claim may extend Title VII

protections to transsexuals who act and appear as a member of the opposite sex." *Id.* at 1224.[3]

Since *Etsitty*, when trial courts in this District have considered the viability of a claim premised on gender non-conformity, they have looked beyond the claimant's identity/status and examined the facts in reaching their decision as to whether such a claim was legally viable. That is to say that in this jurisdiction, as in many others, an individual's status as transgendered is not, in and of itself, sufficient to support a claim of gender non-conformity, and in fact, "an individual's status as a transsexual should be irrelevant to the availability of Title VII protection." *Etsitty*, 502 F. 3d at 1222. See also, *Smith v. City of Salem*, 378 F. 3d 566, 574 (6th Cir. 2004). In stating a gender-nonconformity/sex stereotyping claim "the plaintiff must show that the employer discriminated against her based on her failure to conform to stereotypical gender norms." *McBride v. Peak Wellness Center, Inc.*, 688 F.3d 698, 711 (10th Cir. 2012).

For example, in *Rice v. Deloitte Consulting LLP*, 2013 U.S. Dist. LEXIS 95439 (Dist. Colo. 2013), Judge Daniel found that, under the facts presented, a transgendered employee did not have a sex stereotyping/gender nonconformity claim under *Price Waterhouse.* Although Plaintiff was clearly a transgendered person and that fact was

[3] In *Etsitty*, the Court assumed that the transgendered employee had a claim for sex discrimination based upon *Price Waterhouse* where the biologically male employee was terminated for using female restrooms, clearly a non-conforming gender behavior. Ultimately, however, summary judgment was granted in favor of the employer based upon the Plaintiff's failure to raise a genuine issue as to the whether the employer's proferred reason was pretextual.

known to her employer, the Court determined that those facts alone did not support a sex stereotyping claim. Rather, the Court examined evidence related to the employer's conduct and statements to determine whether the employer discriminated against the Plaintiff based on her failure to conform to stereotypical gender norms. Finding that the employer's comments about *Rice* involved gender-neutral criticisms – regarding her unprofessional appearance, her poor writing skills, poor verbal communications, and client interactions -- Judge Daniel held that the Plaintiff failed to present evidence that could support a reasonable inference that the employer discriminated against her in its termination decision based on her failure to conform to stereotypical gender norms**.**[4]

Deneffe v. Skywest, Inc., 2015 U.S. Dist LEXIS 62019 (Colo Dist. 2015) is also instructive with regard to sexual stereotyping claims. The Plaintiff in *Deneffe*, a gay male pilot, acknowledged that the Tenth Circuit has not recognized a Title VII claim for discrimination based on sexual orientation and thus premised his Title VII claim on the *Price Waterhouse* theory of his failure to conform to gender stereotypes. In denying the Defendant's Rule 12 Motion to Dismiss, the Court identified numerous factual allegations in the complaint, beyond the fact that the plaintiff was gay, which supported his claim. For example, the complaint alleged that other male pilots regularly engaged in banter about their heterosexual exploits and frequently made disparaging remarks about openly gay men, while the Plaintiff did not engage in male braggadocio about sexual exploits and did

[4] Defendant recognizes that *Rice* was decided on summary judgment rather than on a Rule 12(b)(6) motion. However, Defendant submits that where, as here, a Plaintiff alleges no facts, other than an individual's status as transgendered, to support a claim based upon gender non-conformity, the complaint fails to state a facially plausible claim.

not joke about gays as the other male pilots did. The Court found that these allegations, among others, sufficed to state a plausible claim that the negative action taken against him was based upon his failure to conform to male stereotypes.

The Complaint here is devoid of any allegations describing the "sex- or gender-based preferences, expectations, or stereotypes'' of the Manager or any other employee or representative of the Defendant and thus clearly fails to plausibly allege that the decision not to hire Woodward was because he did not conform to their unidentified preferences, expectations, or stereotypes. As Plaintiff itself noted, Defendant's manager and Woodward discussed that they had similar backgrounds, and both grew up in mid-western states (Complaint—[Doc #1] at **27** & **29**). Despite these facts, Plaintiff maintains, based on sheer surmise, that one has discriminated against the other based upon different preferences, expectations, and stereotypes. There are no factual allegations that could support such a conclusion. Clearly one's background and/or where one was raised is not dispositive of what that person's preferences and expectations are and, without more, a bald claim of discrimination based upon gender non-conformity must fail under these circumstances.

Notably, Plaintiff does not allege any comments about gender related traits or behaviors, appropriateness of attire or appearance, etcetera, were made in the limited exchange between Woodward and the Manager. The only mention of gender alleged in the Complaint occurred when Defendant contacted Woodward to determine whether he had made an error in completing a drug screening form containing a question about the applicant's gender. Given Woodward's presentation at the interview, this was a legitimate

question posed by the Manager as to whether he had made an error in completing the form. When advised that it was not a mistake, the Manager simply replied, according to the Complaint, "Oh that is all I needed." Nothing in this innocuous remark plausibly suggests that the Defendant's decision to hire a more highly qualified and experienced male candidate was in any way related to Woodward's gender, much less on any gender based preferences, expectations, or stereotypes.

It should be noted that Plaintiff does not allege that Woodward was discriminated against because he is female and presents as male. Instead, the EEOC found that it had reasonable cause to believe that the Defendant violated Title VII in that "Defendant failed to hire Charging Party because of his sex, **male,** and/or transgender status.**"** Complaint—[Doc #1] at **10**. (emphasis added).

Plaintiff offers nothing more than labels and conclusions, based upon speculation and surmise, to support its Title VII claim under a *Price Waterhouse* theory. Such is clearly insufficient to "nudge[ ] [its] claims across the line from conceivable to plausible." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotations and citations omitted).

Furthermore, as noted above, in determining whether a complaint contains sufficient allegations of fact to state a claim for relief plausible on its face, the Court must assess not whether ***some*** plaintiff could prove ***some*** set of facts in support of the pleaded claim, but whether **"***this* plaintiff has a reasonable likelihood of mustering factual support for *these* c*laims." Robbins, 519 F.3d at 1247.* (emphasis in original). Defendant submits

that under the circumstances of this case, it is apparent that *this* Plaintiff has not and cannot meet that burden.

As alleged in the Complaint, the Plaintiff EEOC is the governmental agency charged with enforcement of Title VII. Complaint [Doc #1] at **3**. In connection with its enforcement obligations, the EEOC is authorized to investigate charges of discrimination such as the one made by Egan Woodward and as alleged in the Complaint, it did so. ("EEOC investigated the charge of discrimination." Complaint--[Doc #1] at **8**). During the course of its investigation, which included, among other things, interviews with representatives of the Defendant and a review of various documents such as the application of and communications with other applicants, statements of various employees, and officers of the Defendant (*See* e.g., Complaint—[Doc #1] at **52-55**), the EEOC had ample opportunity to "muster factual support" for its sexual stereotyping/gender nonconformity claim. This Complaint contains no such support.

CONCLUSION

It is readily apparent that the sole basis for Plaintiff's claim in this matter is Woodward's status as a transgendered individual. While the EEOC, and some jurisdictions other than the Tenth Circuit, have held that a person's status as transgender is sufficient to establish the first prong of a Title VII claim, that law does not govern in this District. The fact that Woodward is transgendered is not fatal to the claim in this matter, but at this time in this jurisdiction, without more, Plaintiff cannot state a viable Title VII claim and the Complaint is properly dismissed.

WHEREFORE, Defendant A & E Tire, respectfully request the Court to enter judgment in its favor and against Plaintiff, and such other and further relief as the Court deems just and proper.

DATED this **15th** day of **December, 2017**.

Respectfully Submitted,

MARILEE E. LANGHOFF, P.C.

/s/ Marilee E. Langhoff
Marilee E. Langhoff
6795 East Tennessee Avenue, #330
Denver, Colorado 80224
Phone: (720) 639-2870
Fax: (720) 639-2869
Marilee@langhofflaw.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, a true and correct copy of the foregoing DEFENDANT'S F.R.C.P. 12(b)(6) MOTION, TO DISMISS PLAINTIFF'S COMPLAINT was electronically filed and served via CM/ECF on the following:

James P. Driscoll-MacEachron
Supervisory Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office
3300 N. Central Avenue, Suite 690
Phoenix, AZ 85012

Sara A. Green
Bachus & Schanker, LLC.
1899 Wynkoop Street, Suite 700
Denver, CO 80203

/s/ Diane Burns
Diane Burns, Paralegal