

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-CV-02362-RBJ

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

EGAN J. WOODWARD,

Intervenor-Plaintiff

v.

A&E TIRE, INC.,

Defendant.

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**PLAINTIFF AND PLAINTIFF-INTERVENOR'S JOINT RESPONSE TO DEFENDANTS  
MOTIONS TO DISMISS**

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The EEOC and Egan Woodward allege that A&E Tire, Inc., refused to hire Woodward once it learned that, despite the fact that he presented as male, Woodward in fact was birth-assigned female. A&E seeks to dismiss the EEOC's and Egan Woodward's Complaints under Rule 12(b)(6), but the claims stated in the Complaints are legally sufficient, and the Complaints plead sufficient facts to put A&E on notice of the claims against it.<sup>1</sup> The EEOC and Woodward therefore request that the Motions to

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<sup>1</sup> The factual allegations in the EEOC's complaint and in Woodward's Complaint-in-Intervention are indistinguishable, and A&E Tire's motions to dismiss the two complaints are similarly indistinguishable. As a result, the EEOC and Woodward file this response jointly and refer to the Complaint and the Complaint-in-Intervention, collectively, as the "Complaints."

Dismiss be denied.

### **I. Legal Standard**

Dismissal under 12(b)(6) is intended to be the exception rather than the rule, as it cuts off a plaintiff's lawsuit before the chance of discovery to prove one's case. See *Lauer v. Thelin*, 433 F. App'x 686, 686 (10th Cir. 2011) (stating that "a motion to dismiss for failure to state a claim is rarely granted") (internal quotation marks omitted); *Cannon v. Countrywide Bank, FSB*, No. 1:10CV062 DS, 2011 WL 1885412, at \*1 (D. Utah May 18, 2011) ("Dismissal under rule 12(b)(6) is a harsh remedy which must be cautiously applied to protect the interests of justice.") (internal quotation marks omitted). As a result, courts "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Albers v. Bd. Of Cty. Comm'rs of Jefferson Cty, Colo.*, 771 F.3d 697, 700 (10th Cir. 2014).

The showing necessary to survive a motion to dismiss is not high. A plaintiff need not allege with particularity every element of the prima facie case. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016) ("[T]he Rule 12(b)(6) standard doesn't require a plaintiff to 'set forth a prima facie case for each element.'"); see also *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002). Instead, a plaintiff need only plead facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

If a complaint does plead a prima facie case, dismissal is inappropriate. A claim is plausible if the complaint pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hogan v.*

*Winder*, 762 F.3d 1096, 1104 (10th Cir. 2014). And the Court may use the prima facie case as a guide in determining if the claim is plausible. *Khalik v. United Air Lines*, 671 F.3d 1188, 1191–92 (10th Cir. 2012).

The Complaints in this case allege failure to hire claims under Title VII, and they must therefore plead facts that, if taken as true, allow the court to infer that A&E is liable for failing to hire Woodward. The prima facie case for a failure-to-hire claim under Title VII may be satisfied by showing: “(1) the plaintiff belongs to a protected class; (2) the plaintiff applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, the plaintiff was rejected; and (4) after the plaintiff’s rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications.”<sup>2</sup> *EEOC v. Unit Drilling Co.*, No.13-CV-147-TCK-PJC, 2015 WL 1482543, at \*6 (N.D. Okla. Mar. 31, 2015).

Notably, “an employment discrimination plaintiff need not anticipate legitimate, non-discriminatory reasons that may be proffered by the employer for the adverse employment action nor allege pretext to survive a motion to dismiss.” *Easaw v. Newport*, 253 F. Supp. 3d 22, 26–27 (D.D.C. 2017); *Prier v. Steed*, No. 03-1446-JTM, 2004 WL 624971, at \*2 (D. Kan. Mar. 19, 2004). There is also no requirement for direct evidence, as direct evidence is an alternative to this burden-shifting approach. *Fischer v. Forestwood Co., Inc.*, 525 F.3d 972, 983 (10th Cir. 2008).

## **II. Factual Background**

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<sup>2</sup> The Tenth Circuit has held that the last element can be satisfied without showing that the position was filled by someone outside the protected class. *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000)

For purposes of this motion, the Court may take the following facts as true:

1. Egan Woodward is a transgender male who did not conform to sex stereotypes. ECF 1, ¶ 24, 58, ECF 11, ¶ 1, 16, 52.
2. Woodward applied to work at A&E on or about May 16, 2014. ECF 1, ¶¶ 17-21, ECF 11, ¶¶ 11-13.
3. Woodward wore traditional male attire and had a goatee when he was interviewed. ECF 1, ¶¶ 22-23, ECF 11 ¶¶ 14-15.
4. When Woodward applied, he filled out a screening consent form. ECF 1, ¶¶ 42-44, ECF 11 ¶¶ 34-36. On the consent form, Woodward indicated that he was female. *Id.*
5. Woodward met the qualifications for the position—in fact, A&E’s manager told Woodward he “had the job” if he passed the background check and drug test. ECF 1, ¶ 33, 36, 40, ECF 11, ¶ 25, 28, 32. Haight also introduced Woodward to other A&E employees that day as their new manager. ECF 1, ¶ 36, ECF 11, ¶ 28.
6. After Woodward filled out forms for the drug test and left, the manager who had interviewed him—and who had seen Woodward with a goatee and wearing traditional male attire—called him and said, “I see on your drug test that you checked female.” ECF 1, ¶¶ 21-25, 46, ECF 11 ¶¶ 13-17, 38. Woodward said that was correct, and Haight responded “Oh, that’s all I need.” ECF 1 ¶ 48, ECF 11 ¶ 40.
7. For the next three weeks, Woodward tried to follow up on when his

employment would start, but on June 10, 2014, the manager said they were hiring another applicant. ECF 1 ¶¶ 49-51, ECF 11 ¶¶ 41-43.

8. Instead of hiring Woodward, A&E hired Stephen Montes for the position approximately one month after it chose not to hire Woodward. ECF 1, ¶¶ 52-55, ECF 11, ¶¶44-47.

### **III. Dismissal under Title VII is unwarranted.**

While the Complaints need not specifically plead every element of the prima facie case to survive a motion to dismiss, the Complaints plausibly allege (1) Woodward is a transgender male and did not conform to sex stereotypes; (2) he applied for and was qualified for the position; (3) he was not hired; and (4) after he was not hired, the position remained open until it was filled with another applicant. A&E does not contest elements 2-4, leaving only whether alleging Woodward is a transgender male who did not conform to sex stereotypes is sufficient to survive a motion to dismiss. See ECF 18, at 6-12; ECF 19, at 7-13. As will be shown below, the allegations in the Complaints are more than sufficient to establish this element of the prima facie case, and the motion to dismiss should therefore be denied.

#### **A. A&E's motion must fail because the Complaints plead sufficient facts for a sex-stereotyping theory under *Price Waterhouse*, as allowed by *Etsitty*.**

A&E acknowledges that it may be liable for sex-stereotyping discrimination under Title VII, but attempts to argue that allegations involving a birth-assigned female who presents as male do not plausibly allege a failure to conform to sex stereotypes under Title VII. ECF 18, at 7-8, ECF 19 at 8-9 (favorably discussing sex-stereotyping claims in the Tenth Circuit). Ignoring the conflict between sex stereotypes of how birth-assigned

females should appear and a birth-assigned female presenting as male, A&E suggests that the EEOC and Woodward must allege additional facts such as “comments about gender related traits or behaviors, appropriateness of attire or appearance.” ECF 18, at 10, ECF 19 at 11. But nothing in Title VII, the law regarding sex-stereotyping claims, or the facts of this case suggest such a heightened standard is appropriate. Under the standard framework for sex-stereotyping claims, the Complaints allege sufficient facts to survive a motion to dismiss.

Since the Supreme Court decided *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), courts have understood that sex-stereotyping is a form of discrimination because of sex under Title VII. The Supreme Court explained the basis for a sex-stereotyping claim, stating that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). “By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.” *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004). Courts now regularly recognize sex-stereotyping claims under Title VII. See, e.g., *Potter v. Synerlink Corp.*, 562 F. App’x 665, 674 (10th Cir. 2014); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc).

The sex-stereotyping theory applies with particular force in claims involving transgender individuals. “By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (collecting cases recognizing sex stereotyping claims for transgender individuals). As the Eleventh Circuit explained, “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.” *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (affirming summary judgment for plaintiff on a sex stereotyping claim under section 1983); *Smith*, 378 F.3d at 575 (6th Cir. 2004) (“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 Ann Hopkins in *Price Waterhouse...*”); *Doe 1 v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at \*28 (D.D.C. Oct. 30, 2017) (“The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.”).

As A&E acknowledges, ECF 18, at 8 n.3, ECF 19 at 8 n.3, the Tenth Circuit also recognizes the possibility that discrimination claims by transgender individuals may proceed under a sex-stereotyping theory. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); see also *Michaels v. Akal Sec., Inc.*, No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, at \*4 (D. Colo. June 24, 2010) (“This Court will assume

without deciding that a *Price Waterhouse* gender stereotyping claim is available.”).<sup>3</sup>

Another district court in the Tenth Circuit has also expressly found discrimination under that theory. In *Tudor v. Se. Oklahoma State Univ.*, CIV-15-324-C, 2015 WL 4606079, at \*1 (W.D. Okla. July 10, 2015), the Court denied a motion to dismiss, holding that, consistent with *Etsitty*, the transgender plaintiff could proceed with a sex-stereotyping theory. *Id.* at \*2. After the plaintiff alleged her employer started treating her differently after she announced her intention to transition from male to female, the district court denied a motion to dismiss because “it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.” *Id.* at \*2. The district court later denied summary judgment on the same grounds. *Tudor v. Se. Oklahoma State Univ.*, CIV-15-324-C, 2017 WL 4849118, at \*2 (W.D. Okla. Oct. 26, 2017).

Here, the Complaints plead facts sufficient to show sex stereotyping under these cases because they allege that A&E did not hire Woodward after it learned he was transgender—and that he did not conform to sex stereotypes. The facts are more than sufficient to establish an inference that A&E did not hire Woodward because his outward appearance did not match stereotypes of how birth-assigned women should

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<sup>3</sup> A&E cites *Rice v. Deloitte Consulting LLP*, No. 12-CV-00253-WYD-KMT, 2013 WL 3448198, at \*6 (D. Colo. July 9, 2013), to suggest a higher evidentiary burden, but that decision, at the summary judgment stage, does not support A&E’s claim. The Court noted that the plaintiff did not claim discrimination based on her transgender status—and the relevant comments in the record were “gender neutral.” See *id.* at \*\*5-6. Based on that posture, the *Rice* court does not appear to have analyzed the relationship between transgender individuals and sex stereotypes.

appear. Taking the allegations in the Complaints as true, Woodward applied for an open position at A&E, and he presented as male with a goatee and wearing traditional male attire. ECF 1, ¶¶ 22-23, ECF 11, ¶¶ 14-15. He was repeatedly told he would be hired after the background check; in fact, Haight told other A&E employees that Woodward would be hired. ECF 1, ¶¶ 33, 36, 40, ECF 11, ¶¶ 25, 28, 32. But once A&E learned that Woodward had checked female on his screening consent form—and once Haight called Woodward to confirm that was in fact the case—A&E chose not to hire Woodward. ECF 1, ¶¶ 42-55, ECF 11, ¶¶ 34-47. A&E instead continued to solicit applicants and ultimately hired another applicant.<sup>4</sup> ECF 1, ¶¶ 42-55; ECF 11, ¶¶ 34-47. Thus, according to the well-pleaded facts of the Complaint, after saying it would hire him, A&E learned that Woodward was birth-assigned female—despite the fact his physical appearance indicated he was male.<sup>5</sup> Before that conversation, A&E indicated it was going to hire him; after learning that Woodward had checked female despite presenting as male, A&E did not hire him. These facts plausibly state a claim of sex discrimination under a sex stereotyping theory. The motion to dismiss the Complaints should therefore be denied.

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<sup>4</sup> A&E asserts in its Motion that it hired Montes because he had superior qualifications, ECF 18, at 11, ECF 19 at 11, but the issues of legitimate, non-discriminatory reason and pretext are inappropriate at the motion-to-dismiss state. See *Easaw*, 253 F. Supp. 3d at 26-27.

<sup>5</sup> A&E suggests that the Complaints cannot allege these facts because the EEOC's Letter of Determination states that Woodward is male. ECF 18, at 11, ECF 19 at 12. But the Complaints plainly allege that Woodward presents as male and indicated he is female. ECF 1, at ¶¶ 21-25, 44, 58, ECF 11, ¶¶ 13-17, 36, 52. The Letter of Determination is consistent with these facts, as it states: "Charging Party, who is male, alleged that he was discriminated against in violation of Title VII in that he was denied hire to a position he applied for and was qualified for after Respondent discovered that he was designated female at birth." Ex. 1.

**B. The Complaints also allege a plausible claim of sex discrimination under *Etsitty* because *Etsitty* allowed for development of a more robust record to show the definition of sex under Title VII includes transgender individuals.**

If the Court finds it necessary to look beyond a sex-stereotyping theory, the Complaints also plausibly allege a claim of discrimination because of sex under Title VII. A&E argues that *Etsitty* forecloses any argument that “sex” in Title VII includes transgender individuals, but the opinion in *Etsitty* allows room for further argument. *Etsitty* held ten years ago that, on the record before it at that time, “because of sex” did not include transgender individuals. 502 F.3d at 1222. Thus, in addition to recognizing the possibility of a sex stereotyping theory, *Etsitty* deliberately left the door open for new arguments and new evidence on this issue, and the EEOC and Woodward intend to gather and proffer evidence to make the record suggested by *Etsitty*.

*Etsitty* did not involve a broad holding of the scope of Title VII. To the contrary, it held only that “there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.” *Id.* at 1222. The *Etsitty* court then acknowledged that “[s]cientific research may someday cause a shift in the plain meaning of the term “sex” so that it extends beyond the two starkly defined categories of male and female” and held only that “[a]t this point in time *and with the record and arguments before this court* . . . we conclude discrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex.’” *Id.* at 1222 (emphasis added). The Tenth Circuit thus repeatedly cabined its holding to the arguments presented in that appeal and its understanding of the state of scientific

research at that time.<sup>6</sup>

*Etsitty* recognized that its views may not perfectly accord with the state of science, and scientific research indicates that sex is not binary. As just one example, a binary approach to sex ignores the large number of intersex individuals who would be wholly excluded from a definition of sex limited to “male” and “female.” Intersex refers to “a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” *What is intersex?*, Intersex Society of North America, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited January 9, 2018); see also *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1108 n.1 (D. Colo. 2016). Intersex individuals are not uncommon; indeed, more than one in one thousand individuals are chromosomally intersex. See *How common is intersex?*, Intersex Society of North America, <http://www.isna.org/faq/frequency> (last visited January 9, 2018) (stating that approximately 1 of 1,666 individuals are neither “XX” nor “XY” and 1 of 1,000 have Klinefelter syndrome (XXY)). Thus, sex cannot be limited to only “male” or “female.” See also Vanessa Heggie, *Nature and sex redefined – we have never been binary*, *The Guardian* (Feb. 19, 2015) (collecting and discussing research on the fact that sex is not binary), <https://www.theguardian.com/science/the-h-word/2015/feb/19/nature-sex-redefined-we-have-never-been-binary>.

The view that sex is not binary is not limited to academic circles. Many states are now offering “the gender-neutral choice of “X” on driver licenses and identification

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<sup>6</sup> Notably, the Appellant’s brief in *Etsitty* spent only one page arguing that “because of sex” includes transgender as a matter of definition. Amended Appellant’s Brief, 2005 WL 3445815, at \*22 (10th Cir. 2005).

cards.” William Cummings, *When asked their sex, some are going with option ‘X’*, USA Today (27 June, 2017), <https://www.usatoday.com/story/news/2017/06/21/third-gender-option-non-binary/359260001/>. And there are “at least eight countries that recognize more than two genders on passports or national ID cards.” *Id.* Indeed, this Court held that the Secretary of State’s policy of only allowing M and F to designate gender on passports was arbitrary and capricious on the record before it. *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1111-14 (D. Colo. 2016).

Given the space left in *Etsitty* for arguments regarding the evolving understanding of the definition of “sex” and the allegations in the Complaints that plausibly allege discrimination based on sex, the Complaints should not be dismissed. The EEOC and Woodward intend to gather and proffer evidence along these lines to show that, consistent with *Etsitty*, a more robust record of scientific research will show that “sex” in Title VII includes transgender status. Granting the motion to dismiss would functionally erase the limiting language in *Etsitty* by foreclosing any effort to provide the evidence *Etsitty* indicates would be relevant to further evaluation of the definition of “sex.”

**C. Although not necessary to decide this motion to dismiss, the portion of *Etsitty* that addresses the definition of sex should also be reconsidered.**

The EEOC and Woodward acknowledge that *Etsitty* is binding authority upon this Court, and, as discussed above, *Etsitty* recognizes the possibility of a sex-stereotyping theory under *Price Waterhouse*—and provides space for further development of a record that the definition of sex includes transgender status. The motions to dismiss should thus be denied on either or both of these bases. The EEOC and Woodward also

submit that the authorities that *Etsitty* relied on are no longer good law and the language of Title VII is not as constrained as *Etsitty* suggests.

Although *Etsitty* acknowledged the Supreme Court’s decisions in *Oncale* and *Price Waterhouse*, the *Etsitty* court relied on three cases decided between 1977 and 1983—well before *Oncale* and *Price Waterhouse*. See *Etsitty*, 502 F.3d at 1221 (10th Cir. 2007) (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir.1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir.1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir.1977)). These cases are not only dated, “the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated by *Price Waterhouse*.” *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004). The Ninth Circuit has held that “the initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*,” and “recent decisions by the Seventh Circuit have undermined” *Ulane*. *EEOC v. Rent-A-Ctr. E., Inc.*, 264 F. Supp. 3d 952, 955-56 (C.D. Ill. 2017) (citing *Whitaker*, 858 F.3d at 1048 and *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc)).

Including transgender status under “sex” in Title VII is a straightforward application of the term sex. “[M]ale or female’ is a relatively weak definition of ‘sex’ for the same reason that ‘A, B, AB, or O’ is a relatively weak definition of “blood type”: it is not a formulation of meaning, but a list of instances.” *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 525 (D. Conn. 2016). Instead, “the word ‘sex’ refers not just to the instances, but also to the ‘thing’ that the instances are instances of.” *Id.* As a result, discrimination because of sex “is not only discrimination because of

maleness and discrimination because of femaleness, but also discrimination because of the distinction between male and female or discrimination because of the properties or characteristics by which individuals may be classified as male or female.” *Id.* (collecting dictionary definitions of sex); see also Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temp. Pol. & Civ. Rts. L. Rev. 573, 598 (2009). Put differently, the term “sex” includes “the factual complexities that underlie human sexual identity” and that includes “real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender.” *Schroer v. Billington*, 424 F. Supp. 2d 203, 212–13 (D.D.C. 2006).

Further, the term “sex” should be interpreted consistently with the other terms in Title VII. With regard to religion, for example, there is no question that Title VII protects individuals who change religion. As another court explained,

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.

*Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Similarly, Title VII forbids discrimination against “Jews,” “Muslims,” or “African-Americans,” although these terms are not listed in Title VII. And there is no question but that a complaint would state a claim of race discrimination if an employer agreed to hire

an applicant over the phone assuming the applicant was white and then, after meeting the applicant and learning she was black, rescinded the offer. Employers should receive no greater protection when it comes to sex discrimination: nothing in Title VII suggests that an employer may refuse to hire an applicant only after learning his or her birth-assigned sex was different than what the employer expected.

This approach is consistent with the Supreme Court's guidance on how to interpret the terms of Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998), the Supreme Court held "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* Thus, it is beyond dispute that Title VII's prohibition on sex discrimination encompasses sexual harassment, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and sex stereotyping, although the terms "sexual harassment" and "sex stereotyping" do not appear in Title VII.

Consistent with this approach, the *Fabian* court denied summary judgment on facts nearly identical to those alleged here. In *Fabian*, the plaintiff alleged "that she was very nearly hired . . . and relied reasonably and substantially on the impending finalization of her hiring, but that the hospital declined to hire her

because she disclosed her identity as a transgender woman who would begin work after transitioning to presenting as female.” 172 F. Supp. 3d at 512. The employer moved for summary judgment, and the district court held that the plaintiff met her prima facie case and that “discrimination on the basis of transgender identity is cognizable under Title VII.” *Id.* at 527.

Here, the Complaints allege that A&E told Woodward he was hired when its manager believed he was male; when the manager found out that Woodward was birth-assigned female, A&E did not hire Woodward. These allegations plausibly state a claim of sex discrimination under Title VII. To the extent that *Etsitty* provides for a contrary result, the EEOC and Woodward submit that it should be reconsidered in light of the plain meaning of sex, the questionable authorities it relied on, and the analysis of courts that have addressed the issue more recently.

#### **IV. Conclusion**

A&E alleges that the Complaints do not plead sufficient facts to state a claim, but, as shown above, the Complaints plead sufficient facts to establish a prima facie case. First, A&E violated Title VII by discriminating against Woodward because of his sex under a sex-stereotyping theory. Second, A&E violated Title VII by discriminating him because of his sex, and the EEOC and Woodward should have the opportunity to develop a factual record to address the questions left open by *Etsitty*. Dismissing this case before the EEOC and Woodward have the opportunity to gather and proffer

evidence supporting that theory would be inconsistent with the self-imposed limitations on *Etsitty's* holding. Finally, if the Court reaches the issue, *Etsitty* should be reconsidered based on developments in the scientific understanding of sex and case interpreting the word "sex" in Title VII. The EEOC and Woodward therefore request that A&E's motions be denied.

DATED: January 19, 2018.

*Respectfully submitted,*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2018, I submitted the foregoing document to the Clerk's Office via the CM/ECF system, for filing and for service upon the following

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# **EXHIBIT 1**



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Charge No. 541-2014- 01866

Egan Joseph Woodward



Charging Party

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Respondent

**D E T E R M I N A T I O N**

Under the authority vested in me by the Commission, I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, (TVII). Timeliness and all other requirements for coverage have been met.

Charging Party, who is male, alleged that he was discriminated against in violation of Title VII in that he was denied hire to a position he applied for and was qualified for after Respondent discovered that he was designated female at birth.

I have considered all the evidence obtained during the investigation and find that there is reasonable cause to believe that there is a violation of TVII in that the Respondent failed to hire Charging Party because of his sex, male, and/or his transgender status.

This determination is final. When the Commission finds that violations have occurred, it attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, I invite the parties to join with the Commission in reaching a just resolution of this matter. Disclosure of information obtained by the Commission during the conciliation process will be made only in accordance with the confidentiality provisions of Title VII and Commission Regulations.

The remedies for violations of the statutes we enforce are designed to make the identified victims whole, and to provide corrective and preventative relief. These remedies may include, as appropriate, an agreement by the Respondent not to engage in unlawful employment practices, placement of identified victims in positions they would have held but for discriminatory actions, back pay, restoration of lost benefits, injunctive relief, compensatory and/or punitive damages, and notice to employees of the violation(s) and the resolution of the charge.

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Letter of Determination

Woodward v. A & E Tire, Inc.

Charge No.: 541-2014-01866

A Commission representative will contact each party in the near future to begin conciliation. If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the Office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. Should the parties have questions regarding the conciliation process, we encourage them to contact the assigned Commission Representative, Sandra M. Nakata, at (303) 866-1354.

On behalf of the Commission:

June 30, 2016

Date

  
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John C. Lowrie, Director  
Denver Field Office