

Beyond Transition: A Policy Gap Analysis of Legal Protections Against Employment
Discrimination for LGBTQ+ Workers in the United States

By

Juan G Mercado

City University of New York
School of Labor and Urban Studies
Master's Thesis 2018

Table of Contents

Chapter 1: Introduction	2-4
Statement of the Problem	2
Purpose of the Study	3
Research Questions	4
Chapter 2: Literature Review	4 -15
Introduction	4
Natural/Federal Laws/Government policies.....	6
Challenges of Employment Discrimination.....	8
Advocating for Transgender rights.....	9
Employment Experience.....	12
Summary	15
Chapter 3: Methods and Research Design	16-18
Introduction	16
Data Collection/Analysis	16
Interview Instruments	16
Procedures.....	17
Chapter 4: Findings	19-31
Findings for RQ1.....	19
Table 1 Current State Employment Non-Discrimination Laws	21
Figure 1 Percent of States with/without local gender identity protections	24
Figure 2 Map of States with and without Gender Identity Protections	24
Figure 3 United States Presidential Election Map (2016).....	25
Findings for RQ2.....	25
<i>EEOC v. R.G. & G.R Harris Funeral Homes, Inc</i>	25
<i>Wittmer v. Phillips 66 Co</i>	27
<i>Glenn v. Brumby</i>	28
<i>Etsitty v. Utah Transit Authority</i>	29
Findings for RQ3	31
Chapter 5: Conclusion and Recommendations.....	33-36
Conclusion.....	33
Recommendations.....	36
References.....	37
Appendix.....	39

Chapter 1: Introduction

The purpose of this study is to expound the current national laws that protect LGBTQ+ workers from employment discrimination. When I initially started my research project, I focused on how current policies that protect against employment discrimination (Title VII of the Civil Right Act of 1964, ENDA, proposed Equality Act 2017) impact transgender individuals. Most of the reports I have come across focus on how local states interpret these policies by using the term ‘sex’ as an argument for discrimination based on gender, which is a misnomer for the classification of gender identity. This unfavorable approach can be damaging to the understanding of gender identity and its distinction from the classification of sex. This report will address the use of sex and disability policy protections in local states, in place of the lack of federal protections against discrimination based on gender identity.

Statement of the problem

Most of my sources have shown that many, although not all, of the local states have been able to successfully argue that protections against sex is a palpable justification for protection based on gender identity. The only way this is possible is if the victims adhere to the binary classifications of sex, meaning they must meet the acceptable male and female physical traits necessary to be classified as such. This risky misinterpretation of the difference between sex and gender can lead to many social and ethical issues. Many transgender individuals vary in the degree of transition, where some classify as pre-operative and post-operative and some don’t want to transition in any formal way and identify as gender non-conforming/gender fluid. This brings me to my current argument; upon a review of my sources I realized that there is not much information on how these interpretations of employment non-discrimination policies affect people that vary on

this trans spectrum. My goal is to research just how detrimental these interpretations and language/classification substitutions are to transgender, transsexual, gender non-conforming, gender fluid, gender queer, androgynous, and non-binary individuals. A transgender person is someone whose personal/gender expression and gender identity does not correspond to their assigned sex. “Transsexuals”—an outdated term mentioned in older writings—are often individuals who have surgically transitioned (post-operative) from their assigned sex to the sex they identify with. Gender non-conforming or “gender variant” is a person that does not identify with either the male or female cultural and social gender/sex expectations and refuse to be labeled either. Genderqueer, nonbinary, and gender fluid are also gender-variant, understood as a lack of gender identity, where individuals do not identify with either masculine or feminine characteristics associated with either sex or gender identity. Sometimes people that lack gender identity may also express a combination of either feminine and masculine characteristics but do not identify exclusively with CIS normativity. CIS normativity is understood as a person who identifies and expresses normative gender characteristics that correspond to their birth sex. Lastly, androgynous is an umbrella term for a person whose appearance is considered partly male and partly female, plus characteristics of either sex, understood as the medical term intersex.” (Google Dictionary)

Purpose of the Study

I reviewed current United States labor laws and agencies that focus on workplace discrimination protections like the Equal Employment Opportunity Commission (EEOC). The focus was on finding what states provide gender identity protections for transgender workers and how those that do not have state protections, protect transgender workers. This is an important topic because in the United States there are still no concrete federal employment protections for gender-identity which adversely affects opportunities and working conditions for transgender

individuals across the nation. For this, I have formulated the following research questions I seek to address with through this research:

RQ1: What laws protect transgender workers in the United States and what states lack gender identity antidiscrimination laws?

RQ2: What is currently being done through the judicial system (courts), to help include gender identity in current local employment non-discrimination policies in the united states?

RQ3: Is the use of “sex” protections under Title VII of the Civil Rights Act of 1964, as implemented by the EEOC, an appropriate and sufficient argument for protections based on gender identity?

Chapter 2: Literature Review

Background

Over the years, the Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ+) community has faced an onslaught of discrimination around the world. In many countries, homosexuality and the trans identity is considered illegal by customary law (Isenhath, 2010). In the United States as well, people of the LGBTQ+ community have been facing issues of equality; whether fighting for marriage equality, against violence, for access to health care, and more importantly employment discrimination. Today, LGBTQ+ employment discrimination in the United States is regulated by specific jurisdictions, in individual states and localities. Many of the anti-discriminatory employment policies now only protect individuals from biases in hiring, promotions, compensations, and harassment based on sexual orientation. However, many of these local policies do not exclusively protect individuals based on gender identity. This literature review

will focus on employment discrimination based on gender identity and the implications it has for people who identify as transgender, gender non-conforming, gender fluid, gender queer, and androgynous non-binary.

When it comes to this study, it is important to understand that some transgender employees have likely experienced some form of discrimination in their lifetime. Although this assumption may or may not be true for many, it has been difficult to record how it affects all individuals among different work sectors; government, city, nonprofit, and private (Isenhath, 2010). However, not all states agree that employment anti-discrimination policies should include gender identity as a protected class, given the lack of a national antidiscrimination policy. A federal policy that protects individuals from employment discrimination based on gender identity will fully protect all people and lower the number of employment discrimination cases.

This literature review will be broken into four sections, the first addressing current local and federal policies that are designed to protect LGBTQ+ people from employment discrimination. This section focuses on specific government policies and how they are interpreted to protect or allow discrimination based on gender identity. The second section introduces the challenges states face for not protecting LGBTQ+ individuals from employment discrimination, including both moral and economic impacts. The third section highlights some of the advocacy groups that have been fighting for equal employment protection for people based on gender identity. The fourth and final section will discuss the employment experience of people that identify as transgender, gender non-conforming, and gender fluid and how employment discrimination affects their livelihood.

Natural/Federal laws/Government policies

In the last decade, LGBTQ+ issues, more specifically, discriminatory actions have been on the rise, which have led to the push for federal, state, and local protections (Isenhath, 2010). In the United States, Title VII of the Civil Rights Act of 1964 is one of the most significant federal employment non-discrimination policies, which protect individuals based on “race, color, religion, sex, or natural origin” (Isenhath, 2010, p.48). In many cases, local and state courts have shown mixed reviews on the use of current non-discriminatory policies, which argue for the protection of gender identity based on sex discrimination claims. An example of this was seen in the *Price Waterhouse v. Hopkins* case, when the Supreme Court in 1989 adopted a broad interpretation of sex under Title VII. The Supreme Court claimed that the defendant Hopkins (biological female, who presented masculine traits) had suffered discrimination based on sex, since she did not meet the stereotypical characteristics of a female as outlined by the employer (Isenhath, 2010).

The court ruled that there must be enough evidence of: “comparative evidence, gender-specific actions or conduct, and explicit or implicit proposals of sexual pursuit” (Isenhath, 2010, p.49), in order to justify a sex-based discrimination charge as a remedy for the lack of gender identity protections. The supreme court’s decision opened a whole new understanding of the Title VII jurisprudence asserting that discrimination against an employee based on not being able to adhere to gender stereotypes is blatant sex discrimination (Lee, 2012). However, other court cases have ruled that sexual orientation protections do not exclusively protect transgender people as outlined in *Maffei v. Kolaeton Industry, Inc., et al.*, 1995 and *Underwood v. Archer Management Services Inc.*, 1994 (Sellers, 2014). Until lawmakers push for direct protections for transgender employees, the only option now is for legal advocates to manipulate remedies of current employment non-discrimination policies on sex to protect transgender individuals (Lee, 2012).

When it comes to interpreting sex as an employment discrimination protection for gender identity, it is important to understand how these terms are recognized under a judicial lens. Under natural law, sex is perceived as an immutable, biological determinant, and gender is seen as a deviation from that biological classification. This causes courts to have to deal with two sets of laws that concern sex; the natural law of sex and the constructive law of gender (Byron, 2015). Some researchers have argued that sex and gender are social constructs, where they are both understood as performative characteristics from birth (Byron, 2014). This idea begs the question; why has this not been applied to employment anti-discrimination policies across the country? As we have seen, the United States has not passed a federal law that explicitly protects transgender, gender fluid, and gender non-conforming individuals from employment discrimination amongst all levels (violence, harassment, exclusion, etc.). As of 2012, 16 states including Washington, D.C. have local policies that protect all LGBTQ+ individuals with five states solely protecting individuals on the basis of sexual orientation and three local state courts have interpreted sex and disability status as protection on the basis of gender identity (Sellers, 2014). Researchers claim that the fundamental issue with the push for inclusive federal policies falls on the lack of an accurate census of the transgender population in the United States which would help them better understand the employment and economic experiences of this population (United States, 2015). They also highlight that there needs to be even more research on LGBTQ+ non-discrimination laws, as well as on the political processes for passing a specific federal employment non-discrimination policy with gender identity inclusivity.

Since most laws can be interpreted differently, they seem to evolve to accommodate social, political, and economic changes through time. Most laws are nuanced, full of multiple interpretations and the Civil Rights Act of 1964 is not an exception. For instance, Mary Swanton

discusses the impact of the decision in *Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* on the EEOC. The agency is responsible for helping overturn prior decisions that argued against gender identity as a protected category under Title VII (Swanton, 2012). The case was brought forth by Mia Macy, a former Phoenix police officer who presented themselves as a man during the application process for a position under the Department of Justice. When Macy was offered the position she mentioned that she was in the process of transitioning to female and the department decided to recant the offer claiming that the position was no longer available (Swanton, 2012). Macy appealed to the EEOC to take on her case and the agency held that “Title VII’s prohibition on sex discrimination proscribes gender discrimination, not just discrimination based on biological sex” (Swanton, 2012), which most cases have been argued under. Swanton explains that most companies and agencies must “review policies, conduct training and create gender transition plans, experts say,” (Swanton 2012), something even the most qualified Human Resources professionals need help implementing.

Challenges of Employment Discrimination

There are many economic and social issues related to employment discrimination based on gender identity. In Massachusetts, transgender individuals faced some of the highest levels of employment discrimination, which lead to job loss, lack of promotions, and not being hired for positions for which they qualified (Herman, 2011). As mentioned before, since there are no concrete federal, state, or local anti-discrimination policies that protect gender identity in the majority of the States, transgender individuals are faced with constant employment limitations. When a transgender person loses their job due to anti-transgender biases it ultimately means a significant loss of wages, health coverage, and housing stability (Herman, 2011). This, in turn,

negatively affects the commonwealth of states that do not protect employees based on gender identity. Some of the ways job losses adversely affects the budget of the commonwealth of the State, is an overall reduction of income tax revenues, even higher public assistance expenditures (food assistance, unemployment), and other living expenses (Herman, 2011).

Socially and politically, transgender individuals have been regarded as monsters often-times compared to Frankenstein, because they have unnaturally augmented their bodies (Isenhath, 2010). Most transgender individuals are judged on characteristics such as voice, height, muscle definition, surgery status, and whether they can "pass" as the gender they identify as (Sellers, 2014). This misconception of gender identity, especially in the political sphere, have solidified the lack of protections for transgender, gender fluid, and gender non-conforming individuals across all levels of society (Sellers, 2014, pg.83). Many social and political factors need to be taken into consideration when it comes to an understanding of the scope of gender-based discrimination, like proper education on gender identity in the workplace, courts, and educational institutions. To help protect transgender employees from discrimination, attorneys need to be educated on the law regarding the issue of employment discrimination based on gender identity (Isenhath, 2010). Proper interpretation of current state, local policies and addressing the lack of federal protections are crucial steps to help the United States understand the detrimental effects of gender-based discrimination. Transgender individuals face discrimination in other areas like "housing, public accommodations, credit, parenting, immigration, and prisons." (Isenhath, 2010, p.48).

Advocating for Transgender Rights

The National Center for Transgender Equality has created a fact sheet that describes how an LGBTQ+ person can address employment discrimination. This fact sheet provides

information on Title VII of the Civil Rights Act of 1964 and Executive Order 13762, which prohibit discrimination of LGBTQ+ individuals who work for federal contractors as well as organizations that have a contract with the federal government (NCTE, 2014). As of July 2014, state and local laws in the following jurisdictions prohibit discrimination based on gender identity: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, Washington State and Puerto Rico (NCTE, 2014). Additionally, as of 2015 in the United States twenty-one states and the District of Columbia have current employment protections on the basis of gender identity which includes the addition of New Hampshire, and Utah (DOL, 2015). Employees have the right to safe and adequate access to restrooms since the Occupational Safety and Health Administration (OSHA) has enforced a federal regulation that guarantees that employees cannot be denied these protections (NCTE, 2014). One of the essential steps for employees who have suffered sex-based discrimination must take is to first, file a charge with the Equal Employment Opportunity Commission before filing a lawsuit. After filing a complaint with the EEOC, the person must receive a Right-to-Sue letter before they can file a federal lawsuit (NCTE, 2014).

It has become difficult for transgender individuals to have access to income and often face other economic limitations, especially programs organized to help members of the LGBTQ+ community. The U.S. Department of Labor serves as a prime example of an agency that has become a significant resource for workers and job seekers of all backgrounds, identities, and citizenship status. They provide programs that help build skills, especially for people that are unemployed/struggling economically, by increasing economic opportunities that are open to all individuals including LGBTQ+ workers (DOL, 2015). The Department of Labor offers

progressive contemporary policies and staff training that are inclusive to ensure proper education of LGBTQ+ rights to protect members from stereotyping and discrimination based on gender identity. Some of the most significant LGBTQ+ organizations that advocate for transgender employment rights include: Family Equality Council, The GLBT National Help Center, Human Rights Campaign, Gay & Lesbian Advocates & Defenders (GLAD), Lambda Legal Defense and Education Fund, National Lesbian and Gay Law Association (NLGLA), Transgender Law Center (TLC), Advocates for Informed Choice (AIC), Gay, Lesbian, & Straight Educators Network (GLSEN), Pride at Work, among others.

The National Women's Law Center has also formulated a fact sheet which addresses the importance of ratifying a federal protection for transgender employees, like that of the Equality Act proposed in 2017. Although the Supreme Court extended marriage rights to same-sex couples in 2015—opening the doors for LGBTQ+ rights in the U.S.—it has yet to successfully provide a federal protection against employment discrimination based on gender identity. The proposed Equality Act, if passed, would amend the Civil Rights Act of 1964 by providing “explicit protection against discrimination based on sexual orientation and gender identity in employment, housing, credit, federally funded programs (including education), and federal jury service.” (Lowell, 2017) The Supreme Court, at this time, has yet to address the issue of employment discrimination based on sexual orientation or gender identity. However the EEOC certainly has, and observed through previous court cases have addressed discrimination based on gender identity as discrimination based on sex. The Equality Act would formally block any objections based on religious beliefs, outlined by the Religious Freedom Restoration Act (RFRA) of 1993 which is a broad religious exemption law. In the past many individuals and agencies (corporations and non-profit organizations) have tried to claim that many of the laws; including child labor laws, domestic

violence laws, and nondiscrimination laws do not necessarily apply to them (Lowell, 2017). However, the Equality Act would ensure that all individuals will be protected under federal law from employment discrimination and “makes clear that religion does not give employers, landlords, schools or others a license for discrimination” (Lowell, 2017).

In a recent New York Times article, writer, Robert Pear discusses the decision of a federal appeals court; the United States Court of Appeals for the Sixth Circuit in Cincinnati, rejected the position of the Trump administration holding that the civil right laws bans discrimination based on sex. As Lowell (2017) highlighted, the court of appeals held that; discrimination based on transgender identity is inherently sex discrimination. Because of this decision, the employer was not allowed to argue against the decision based on their religious beliefs; ultimately holding that “gender must be irrelevant to employment decisions.” (Pear, 2018) Jeff Sessions, the former Attorney General under the Trump administration, addressed this issue to the Justice Department Lawyers claiming that “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not include discrimination based on gender identity per se, including transgender status.” (Pear, 2018)

Employment Experiences

When it comes to gender classification, labeling someone as a trans man, trans woman, Male to Female (MTF), or Female to male (FTM) can be detrimental to ones gender identity. When researching individuals it is important to properly identify the individual based on the gender identity they identify with, not only for research data validity but for overall respect for the participants. When observing the employment experience of twenty trans participants, Connell (2014) highlighted in her review of the book *Transgender Employment Experience; Gendered*

Perceptions and the law, that the author, Kyla Bender-Baird does not explicitly label the participants in her analysis but identified the individuals as falling within the trans-masculine and trans-feminine spectrum, since the gender binary does not adequately define them. Over the years the number of studies on transgender individuals has grown significantly, as a result of the ever-growing questions and discriminatory practices that have manifested amongst all levels (employment, social, political, etc.). What is also essential to take into consideration when researching transgender individuals in the U.S. is that there are no current federal non-discriminatory policies in place to protect them. Instead, transgender employees are relying on other remedies to address discriminatory employment actions based on their gender identity. They are dependent on the use of the disability law as outlined in the Rehabilitation Act and Title I of the Americans with Disabilities Act (Connell, 2014). Also, they argue for the protection under Title VII of the Civil Rights Act which, "protects workers from discrimination on the basis of sex; and they draw on the incomplete patchwork of local and state nondiscrimination policies that do specify protections on the basis of gender identity, gender expression, and/ or transgender status." (Connell, 2014).

When analyzing the work experience of the twenty trans participants, some of the major concerns brought up by the employees were workplace policies based on dress codes, bathroom access, identity documents, and harassment (Connell, 2014). In 2011, the National Transgender Discrimination survey was conducted and found that over 90% of transgender respondents claimed they experienced harassment and mistreatment in the workplace and made sure they took steps to hide the gender identity they identified with (DOL, 2015). Connell (2014) highlights that now, many employers require legal and surgical sex changes to allow them to dress and use the restrooms based on their gender identity. This is a dangerous practice, since most federal, state,

and local requirements make it harder for transgender individuals to obtain work. It's also important to take into consideration that not all transgender individuals want to or can afford to have surgery or legal documents changed (Connell, 2014, p.663). Author Bender-Baird (2011) argues that the enactment of federal trans-inclusive employment non-discrimination policies and the enforcement of these protections is the first step to helping protect people on the basis of gender identity. The research participants also suggested that, "educational work, particularly in the form of gender diversity training, would further improve their working conditions" (Connell, 2014, p.663).

Observing the research that has been conducted in the last few decades, the Williams Institute in 2007, conducted a quantitative analysis of these research findings and organized these findings in their report. From the information that has been collected, researchers highlighted that in six of the studies that have been conducted from 1996 to 2006, the percent of transgender respondents that experience a form of employment discrimination in their lifetime was between 20% to 57% (Badgett, 2007). Included in these claims "13%- 56% were fired, 13%-47% were denied employment, 22%-31% were harassed, and 19% were denied a promotion based on their gender identity." (Badgett, 2007) Most of the research they observed dealt with convenience samples, regarding a particular population or geographic area, with only one national study. Data collected from the national study showed that 37% of transgender respondents claimed they experienced some form of employment discrimination (Badgett, 2007). However, the information collected on transgender employment discrimination surveys have been too limited in scope (since there is only one national survey collected so far) a factor mitigated by the variance in the trans identity. They observed that most of the studies focused their attention on MTFs (male to female) or only FTMs (female to male) transgender individuals. Others solely included information on

individuals that self-identified as transsexuals (an outdated terminology for trans individuals); and only one included information collected from pre-operative and post-operative trans individuals (Badgett, 2007). Lastly, others included any individual who was physically (visibly) ‘gender variant’ “including those who identify as cross-dressers, drag queens, drag kings, effeminate males and gender queers...and some studies explicitly excluded those who identify in these groups from their definition of transgender.” (Badgett, 2007)

Summary

There is very little research that has been conducted on transgender employment discrimination in the United States. There is even far less census data collected on the transgender population since a majority of the trans-identified individuals are not necessarily “out.” There is still more research that needs to be conducted on the transgender population in order to get an even better understanding of how a lack of federal protections affect the LGBTQ+ community and at all levels (social, political, and economic). Also, there is still a significant amount of research that needs to be done on transgender work experiences to illustrate just how detrimental gender-based workplace discrimination is to the success of labor in our society. It is important to foster proper workplace education; including training sessions on how employment discrimination affects the LGBTQ+ community's economic/employment experiences. The understanding of these experiences is becoming more and more transparent since some researchers over the years have made efforts to include LGBTQ+ people in their research through surveys.

Chapter 3: Methods

Introduction

This research focuses on presenting policies that protect against employment discrimination and observing how the lack of such protections affect LGBTQ+ people across the nation. There is no concrete federal anti-discrimination policy that protects members of the LGBTQ+, more specifically, the trans community on the basis of gender identity, for this reason, I reviewed federal court cases within the last twenty years that have considered cases dealing with transgender employment discrimination. Some of the courts on the state level have reviewed previous local and federal employment non-discrimination decisions considering holdings that have relied on “sex” protection under federal policies like Title VII of the Civil Rights Act of 1964. However, a few other cases have rejected the arguments that “sex” discrimination laws protect individuals based on gender identity.

Data Collection

Because this study focuses on a vulnerable population, the methods for collection of primary data were limited to interviews with local and national LGBTQ+ attorneys. The basis of this study focuses solely on gender identity employment discrimination policies in the United States, on the local and national level. The court cases reviewed in this study were limited to those decided within the last twenty years. Interviews with LGBTQ+ labor advocates were conducted in order to get a professional perspective on the current climate of employment non-discrimination policies based on gender identity in the United States.

Since the trans identity encompasses individuals that identify as transgender, gender fluid, and gender non-conforming, information on individuals that identify as cisgender as well as

information based on sexual orientation were not included. Also, the research does not include information based on age, race, class or relationship status since there is limited information collected on this particular population, especially limited statistical (quantitative) data used in this report. Lastly, for the sake of locality, this study is limited to specific states within the United States without comparison or the inclusion of international policies on employment non-discrimination in other countries/regions.

Interview Instrument

The interview questions focus on the participants' professional perspective of employment discrimination laws focusing on the LGBTQ+ community. The interview included four open-ended questions, as well as, a few follow up questions that took no longer than 15-20 minutes to answer. The majority of the interviews were conducted electronically, via email, LinkedIn messages and Facebook messenger and will only include information that pertains to this study. One of the interview subjects asked me to call to follow up with them so they can clarify any information they have provided in their answers (Appendix B).

Procedures

The participants were contacted by email at first. Because of locality issues, some of the interviews were conducted through web based applications. Prior to the interview I discussed the purpose of the interview, explaining the terms of confidentiality, describing the format of the interview, and more. Since most of this research is based on an analysis of multiple legal cases, as well as, interviews, the data will be largely qualitative. However, some statistical data may be included from secondary research, which will only be provided as background on the LGBTQ+ community in the United States and will not have any significance on the outcome of this study.

The court cases used for this case study were evaluated for relevance to the topic of LGBTQ+ employment discrimination on the basis of gender identity. An ample amount of data was collected from four federal court cases in the U.S. Each case has a distinctive outcome, all focused on whether gender identity is protected under sex-based and disability protections. This research reviewed cases in which the courts reject the argument that sex discrimination laws protect transgender individuals, as well as, cases where courts overturned rulings that reject protections for gender identity under Title VII of the Civil Rights Act of 1964, and cases where courts have ruled that sex can be used as a protective category against gender identity discrimination.

As mentioned above, the court cases involved in this study have different outcomes with regards to gender identity employment protections under sex and disability protections with some local courts accepting these protections (*EEOC v. R.G. & G.R Harris Funeral Homes, Inc. & Wittmer v. Phillips 66 Co.*), and other courts have overturned rulings that claim there are no protections for LGBTQ+ people (*Hively v. Ivy Tech Community College of Indiana*). Other courts have even rejected this argument and claim that LGBTQ+ individuals do not have access to the same employment discrimination protections of sex-based protections under Title VII (*Etsitty v. Utah Transit Auth.*). The cases are reviewed for language (interpretations of laws/policies), content/type of employment discrimination (i.e. sexual harassment, physical assault, verbal assault, etc.), and the outcome/court ruling in order to get an understanding of how these rulings affect members of the LGBTQ+ community.

Chapter 4: Results/Findings

The results of this study are organized by the three research questions which focus on highlighting the local policies, as well as court cases, and how the interpretation of national policies affect all transgender workers. The data collected consisted significantly of court cases, state gender identity protections, and interviews with LGBTQ+ professionals with results highlighting the importance of enacting an exclusive federal gender identity protection. The first research question addresses the different laws across the nation (local and national)—Title VII and the United States Constitution—and highlights the states that do have exclusive local gender identity antidiscrimination protections. The second research question addresses how the states that lack local protections handle gender identity employment discrimination cases. The third and final question examines how enacting a federal law could help to protect transgender workers in states that currently lack protections for transgender individuals. The results for these questions relied heavily on the typology of national protections, as well as current court cases, and the input of professionals with extensive experience in the field of gender identity discrimination cases which will help elucidate this matter.

RQ1: What laws protect transgender workers in the United States and what states lack gender identity antidiscrimination laws?

No current federal law exclusively protects against discrimination on the basis of gender identity. Fortunately, Title VII of the Civil Rights Act of 1964 has been used as a remedy to help protect transgender workers. The Act states under SEC. 2000e-2. [Section 703]:

“It shall be an unlawful employment practice for an employer ‘labor organization’ [emphasis added], (1) to fail or refuse to hire or to discharge any

individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or(2) 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 race, color, religion, sex, or national origin.”

Since sex is exclusively protected under Title VII, many court cases have relied on its use as a remedy to justify violations of antidiscrimination based on gender identity. This approach covers all individuals across all states, employment sectors (companies with more than fifteen employees) with no religious exceptions. The law does not allow an employer to make hiring decisions, promotional decisions, or fire an employee based on their race, religion, sex or national origin (Title VII). It also discourages employers from discriminating on these factors over recruitment, advertisements, and testing; or determining pay, benefits, retirement plans, and disability services (Title VII). Lastly, it does not allow an employer to harass an employee over race, religion, sex, or national origin (Title VII).

The United States Constitution, specifically the Equal Protection Clause under the Fourteenth Amendment has recently only been argued in federal court cases on gender-based discrimination violations by the government. Although Title VII covers employees across all levels, the Equal Protection Clause has been considered in discrimination cases involving government jobs. The Supreme Court has not yet considered whether or not the Equal Protection Clause protects transgender workers *per se*. Recent federal court cases like the Court of Appeals for the Eleventh Circuit in 2011, held in *Glenn v. Brumby*, that discrimination against a transgender person regardless of the transitional stage is a direct violation of the Equal Protection Clause whether it's discrimination based on sex or gender identity. There are not many other cases that have argued for gender or sex-based discrimination protections under the Equal Protection Clause

which means that the constitutional equality protections have yet to be fully considered—the understanding of this part of the law seems to be slowly evolving.

Table 1

Current State Employment Non-Discrimination Laws (Gender Identity) as of November 2018

State	Gender Identity	State/Local Law (Year Enacted)	Employment Sector
California	Yes	CA Fair Employment & Housing Act 2003	All Employees
Colorado	Yes	Public Accommodation Laws 2008	All Employees
Connecticut	Yes	House Bill Act No. 6599 Public Act 2011	All Employees
Delaware	Yes	Senate Bill 97 (2011)	All Employees
District of Columbia	Yes	D.C. Human Rights Act	All Employees
Hawaii	Yes	The Hawaii Fair Employment Practices Law 2011	All Employees
Illinois	Yes	Illinois Human Rights Act 2014	All Employees
Iowa	Yes	Iowa Code § 216.6 (1)(a) 2006	All Employees
Maine	Yes	The Maine Human Rights Act 2005	All Employees
Maryland	Yes	SB 212: The Fairness For All Marylanders Act 2014	All Employees
Massachusetts	Yes	Fair Employment Law H3810 2012	All Employees
Minnesota	Yes	Minnesota's Human Rights Act of 1993	All Employees
Nevada	Yes	Assembly Bill 211 2001	All Employees
New Hampshire	Yes	New Hampshire Law Against Discrimination House Bill 1319	All Employees
New Jersey	Yes	New Jersey's Law Against Discrimination 2006	All Employees
New Mexico	Yes	New Mexico's Human Rights Act 2003	All Employees
New York	Yes	New York State Human Rights Law 2002	All Employees
Oregon	Yes	Oregon Equality Act (also known as SB2) 2008	All Employees
Rhode Island	Yes	Rhode Island Fair Employment Practices law 2001	All Employees
Utah	Yes	Senate Bill Section 4. Section 34A-5-104 "Utah Compromise" 2015	All Employees*
Vermont	Yes	Vermont Fair Employment Practices Act (FEPA) 2007	All Employees
Washington	Yes	Washington House Bill 2661 2006	All Employees

At the state level, New York State has enacted the New York Human Rights Law which was created by the Division of Human Rights. The law specifically states that it is considered unlawful discrimination for:

“(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, [Effective January 19, 2016: familial status,] or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.” (Human Rights Law, Section 296(b))

For a very long time, in almost every legislative session since 2003, the Gender Expression Non-Discrimination Act (GENDA); which is a law that would extend protections for gender identity under the current New York State Human Rights Law, has yet to be passed by the Senate. As a remedy for this delay, an attorney interviewed for this study stated, “Thankfully the New York State Division of Human Rights has enacted section 466.13 *Discrimination On The Basis Of Gender Identity* under the New York Code of Rules and Regulations (9 N.Y.C.R.R § 466.13) extending gender identity protections to the New York State Human Rights Law. Because of this, we have not encountered too many cases that deal with gender identity discrimination” (Personal communication with Civil Rights attorney, 10/26/2018) This extension protects transgender workers from discrimination in employment, housing, education, as well as access to credit, and public accommodations. This act also ensures protection from sexual harassment, which includes harassment of a person based on their gender identity, and also prevents against disability discrimination; especially a person’s gender dysphoria (New York State Human Rights Law). The law defines gender dysphoria as: “...a recognized medical condition related to an individual having a gender identity different from the sex assigned to him or her at birth” (N.Y.C.R.R § 466.13). The Human Rights Law guarantees gender identity protection for any employee that works for an organization with more than four employees, and even those with less than four employees (domestic work) especially if the employee experiences sexual harassment. Ultimately, the law also protects transgender workers against actions an employer cannot take like: they can’t ask

about their gender identity during an interview; they cannot refuse to hire someone based on their gender identity; threaten to terminate them, deny any promotions, or not provide restroom accommodations; as well as refuse to address sexual harassment/hostile working environments. (Empirejustice.org)

Lastly, on the national level, there are twenty-one states (including Washington D.C) that have local state protections for transgender workers. I have created a list, seen in Table 1 which itemizes most of the state gender identity protections for transgender workers. A small number of the states have enacted protections in the twenty-first century (except for Minnesota which passed their Human Rights Act in 1993), which shows that gender identity has been an area of law that is taking some time to progress. There are still 29 states without protections based on gender-identity, 28 of which are considered Republican states—except for Massachusetts, considered a Democratic state—according to the 2016 presidential election (Figure 3). So how do states that do not have local protections measure up to states that do? According to an attorney interviewed under this study “States with state protections for gender identity don't need help since they already have the protection. As far as other states, there are various groups in those states working on lobbying the legislature to include those protections.” (Personal communication with attorney on 11/05/18) So, although some states lack local gender identity anti-discrimination policies, many victims rely on the help of support agencies to address these forms of discrimination. To clarify, although these states do not contain exclusive state protections against transgender employment discrimination, many of these states have relied on protections under Title VII as proposed by the EEOC and LGBTQ+ attorneys in these states.

Figure 1
Percent of States with and without local gender identity protections (Pie Chart)

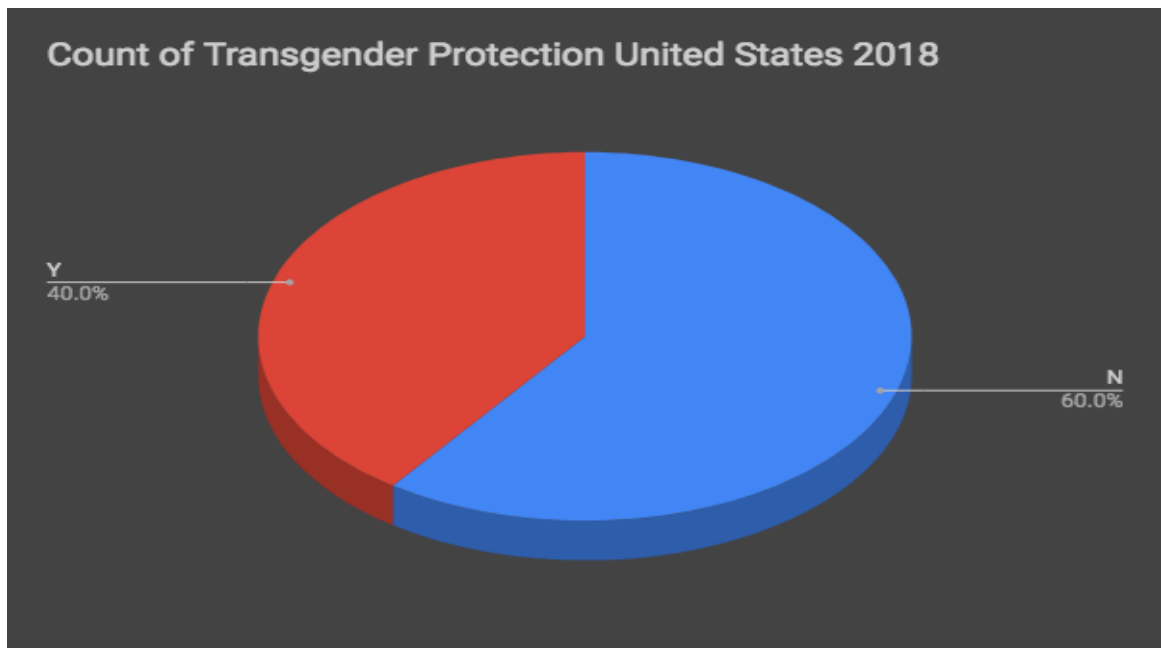


Figure 2
Map of States with and without Gender Identity Protections as of November 2018

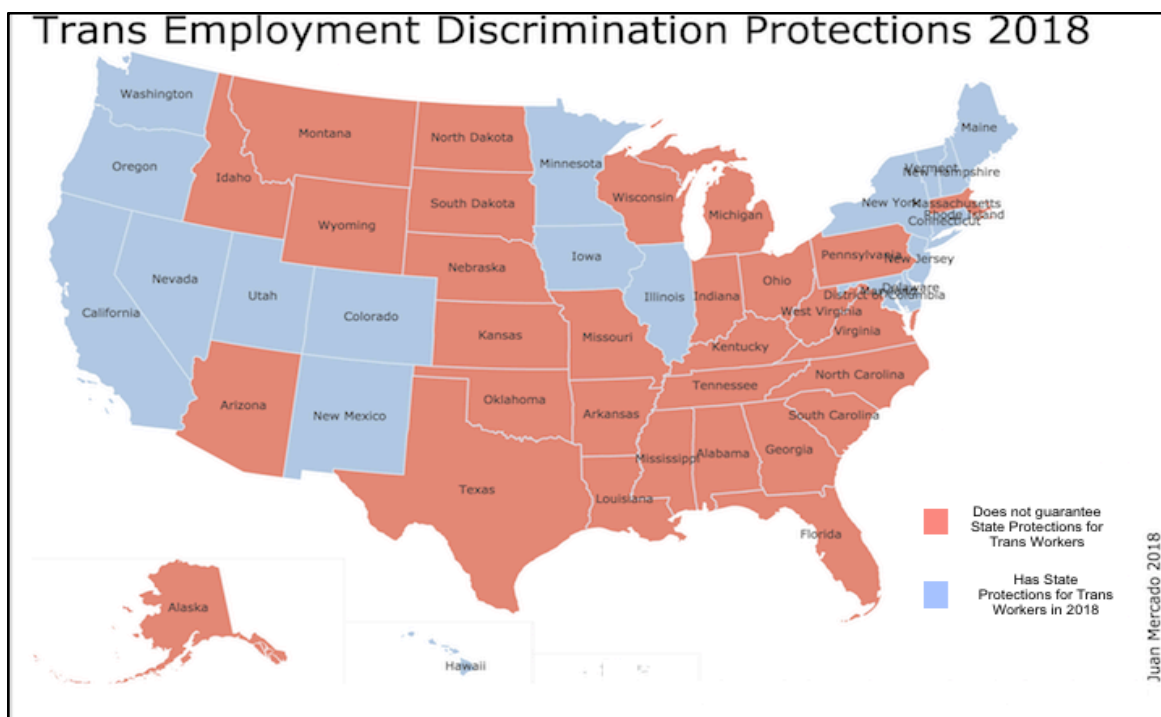
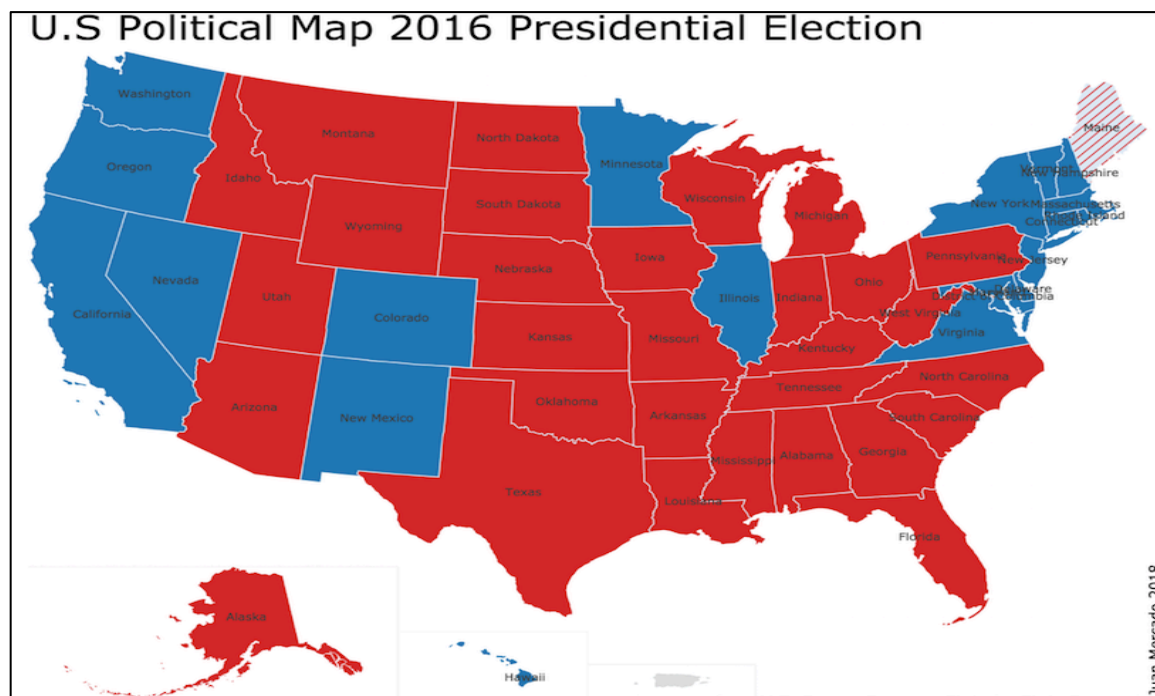


Figure 3*United States Presidential Election Map (2016)*

RQ2: What is currently being done, as observed by recent court cases, to help include gender identity in current local employment non-discrimination policies in the United States?

EEOC v. R.G. & G.R Harris Funeral Homes, Inc.

Most of the current court cases reviewed for this report show a favorable outcome for the use of sex-based discrimination under Title VII, as an appropriate remedy used to protect workers from employment discrimination based on gender identity. Most of the court cases surrounding transgender discrimination have dealt with concerns as one of the attorneys mentioned: “I have dealt the most with cases involving an employee that has been unjustly terminated from a job or

position because a supervisor or senior coworker felt uncomfortable with their gender identity.”
(interaction with attorney, 10/26/18)

In EEOC v. R.G. & G.R Harris Funeral Homes, Inc. 2018, the court held that the termination of a transgender individual who is transitioning violates Title VII of the Civil Rights Act of 1964 under the sex-based discrimination protection. In this case, Aimee Stephens began working for the Funeral Home in October of 2007 and identified/presented herself as a man under her legal birth name, William Anthony Beasley Stephens. About ten months into the job, Stephens began her transition to female. Since the Funeral home is a religious for-profit corporation which claims that it has set a standard for how workers should dress; men (a suit) and women (a dress/skirts and blouse) for workers working in public-facing roles. When Stephens wrote a letter to the owner, Thomas Rost, stating her reasons for transitioning, she claimed that she would be going on a vacation in August of 2013 and when she returns, will finally be presenting herself as a female for good. Just before her vacation, Stephens was terminated by Rost based on religious beliefs. Stephens contacted the EEOC claiming sex discrimination and the case was brought to the district court where the court found that “the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home’s ‘sex- or gender-based preferences, expectations, or stereotypes.’” *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4–5)). However, the Funeral Home filed a suit against the EEOC claiming that the EEOC had not made a legitimate claim that they discriminated against her based on her transgender status, which the Funeral Home owners did not believe was protected under Title VII. The district court agreed with the funeral home that transgender status is not protected under Title VII and felt that the EEOC could not file a suit against them. Lastly, this particular case was brought to the United States Federal Court of Appeals for the Sixth Circuit

where the court held instead that “Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII” (*EEOC v. R.G. & G.R Funeral Home, Inc.*).

Wittmer v. Phillips 66 Co.

Another case which also held that Title VII protects transgender workers against employment discrimination is observed in the 2018 case, *Wittmer v. Phillips 66 Co.* In this court case, Nicole Wittmer sued Phillips 66 Company because the company, after interviewing and offering her a position, rescinded the job offer abruptly. A bit of the background to this case shows that Wittmer was interviewed by a panel of professionals including Human Resource partners, hiring managers, and owners of the company. During the interview process, Wittmer claimed that she was recently working for another company, however, after HireRight conducted a background check they discovered that she was let go from the company days before she claims to have left her position. Since this was the case, the company felt it was appropriate to rescind her offer because she was not truthful about her employment status during the interview. Wittmer has argued that she feels the company rescinded the offer because of her trans status. With that being said, Wittmer decided to sue Phillips 66 Co., because they discriminated against her because she was trans. The United States District Court for the Southern District of Texas Houston Division observed and decided on the case. They decided to grant the defendants motion for a summary judgment holding that “Title VII prohibits employment discrimination against ‘any individual . . . Because of such individual’s . . . Sex.’ 42 U.S.C. § 2000e-2(a)(1).” (*Wittmer v. Phillips 66 Co.*) The decision to grant a summary judgment meant that the case would not progress to a trial and

that the court affirmed that she was discriminated against under Title VII based on her transsexual status. The court held that in order for them to hold the summary judgment and affirm discrimination under title VII, the defendant “...must prove that (1) she belongs to a protected class; (2) she applied for and was qualified for the position; (3) she was rejected despite being qualified; and (4) others similarly qualified but outside the protected class were treated more favorably.” (Wittmer v. Phillips 66 Co.)

Glenn v. Brumby

On a different note, a 2011 court case, the U.S Court of Appeal for the Eleventh Circuit ruled in *Glenn v. Brumby* that the Fourteenth Amendment of the United States Constitution exclusively protects transgender government workers from discrimination based on their gender identity. What is interesting about this case, is that it does not rely on the argument of Title VII of the Civil Rights Act of 1964—which has been able to protect trans workers from many sectors—but instead has been reviewed under the Equal Protection Clause of the Constitution because it protects employees from discrimination by the government. In this case, Vandiver Elizabeth Glenn, an editor who began working for the Georgia General Assembly’s Office of Legislative Counsel in 2005 began living her life as a woman outside of the workplace. The next year, Glenn informed the office supervisor, Sewell Brumby, that she was going to undergo gender transition. When Brumby found out that she was going to undergo gender transition, he fired her. Glenn, shortly after, filed a suit in federal district court in which she alleged that she was discriminated against based on her sex, violating her Fourteenth Amendment right. The court granted summary judgment in Glenn’s favor. Shortly after, Brumby filed an appeal, and the eleventh circuit court

agreed to hear the case. The district court held, after careful consideration of the facts, that as observed in the ruling in *Price Waterhouse v. Hopkins* that under Title VII, an employer cannot discriminate against an employee by their failure to adhere to socially prescribed gender roles. Although the defendant pleads discrimination under the Equal Protection Clause, the district court felt that the sex-stereotyping holding in *Price Waterhouse* was transferable to Glenn's case and held that "All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype." (*Glenn v. Brumby*) The court had to ultimately decide whether this discrimination also applied to the Equal Protection Clause, and felt that it did under "intermediate scrutiny." Intermediate Scrutiny requires that the court reviews whether or not the government can persuasively justify that the discriminatory policy was essential to an appropriate government interest. In this case, the government was not able to justify their actions, and the court held that the employer unlawfully discriminated against Glenn based on her gender identity under the Equal Protection Clause of the U.S. Constitution.

Etsitty v. Utah Transit Authority

Lastly, in a 2007 U.S. District Court of Appeals for the Tenth Circuit court case, *Etsitty v. Utah Transit Authority*, employee Krystal S. Etsitty sued the Utah Transit Authority claiming that the agency violated her Fourteenth Amendment rights to Equal Protection and Title VII because they fired her based on her trans status. Etsitty applied for a job as a bus operator at the Utah Transit Authority just four years after she was diagnosed with Adult Gender Identity Disorder where she began transitioning from male to female. During a six-week training session, she presented herself as a male and even used male restrooms. Shortly after being hired she met with

her supervisor, Pat Chatterton, and explained to him that she was undergoing hormone treatments to prepare for sexual reassignment surgery and identified as a transsexual. Chatterton expressed no concerns about her transition and fully supported her decision. Chatterton shared the information with the operations manager of the UTA, Shirley, and she expressed concerns about Etsitty using female restrooms on routes while on the job. Shirley then spoke to Bruce Cardon, the Human Resources Generalist who requested a meeting with Etsitty. During the meeting, he asked her how far into the transition she was and whether or not she still had male genitalia. Etsitty mentioned that she was in the pre-operative stage of her transition and was planning to have sexual reassignment surgery sometime in the future. Shirley and Cardon placed Etsitty on administrative leave before terminating her because it would be a “liability” for the UTA to allow her to continue working because of the bathroom usage issue.

Etsitty filed a suit against UTA and Shirley claiming that they discriminated against her violating Title VII and the Equal Protection Clause. UTA filed a motion for summary judgment declaring that “arguing transsexuals are not a protected class under Title VII or the Equal Protection Clause and that Etsitty was not terminated for failing to conform to male stereotypes” (*Etsitty v. Utah Transit Authority*). The court granted the motion, it agreed “transsexuals are not a protected class and concluded there was no evidence that Etsitty was terminated for any reason other than Shirley's stated concern about Etsitty's restroom usage.” (*Etsitty v. Utah Transit Authority*) The Court of Appeals agreed with the District Court by applying the “three-part burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, (1973). *Plotke v. White*, (10th Cir.2005).” (*Etsitty v. Utah Transit Authority*) Etsitty argued that her identity as a transsexual validates literal discrimination based on her sex or failure to adhere to stereotypically gendered norms. The court has not previously considered whether transsexuals are a protected class under

Title VII and relied on the holding of *Ulane v. E. Airlines, Inc.*, (7th Cir.1984); *Sommers v. Budget Mktg., Inc.*, (8th Cir.1982); and *Holloway v. Arthur Andersen & Co.*, (9th Cir.1977), which held that sex-based discrimination can only be considered "unlawful to discriminate against women because they are women and men because they are men." (*Etsitty v. Utah Transit Authority*) This case is one a few cases, similar to those the Court of Appeals referred to for affirming the judgment made by the district court that trans individuals are not protected under Title VII and the Equal Protection Clause.

RQ3: Is the use of “sex” protections under Title VII of the Civil Rights Act of 1964, as implemented by the EEOC, an appropriate and sufficient argument for protections based on gender identity?

The attorneys interviewed in this study each had more than ten years of experience dealing with gender identity discrimination cases both on a local and national level. Some have worked alongside other attorneys in other states allowing them to gain experience of cases from other localities. When the question above was included in the interview questionnaire, most of the respondents answered without hesitation. However, one of the attorney’s under this study expressed a bit of a concern with the language within the question and suggested that the question address not only the sex-based argument under Title VII but also the scope at which the policy has been interpreted outside of just the sex-based classification. The same attorney addressed research question 3 as follows:

“Sufficient? Not sure if that is the right term to use, [portion omitted] but we do feel that relying on the language in Title VII has been the most promising approach by agencies like the Equal Employment Opportunity Commission (EEOC). The critical thing to understand about Title VII is that it protects employees across all sectors and courts have come to realize how vital Title VII is to extending gender identity expression rights to all workers. Transgender

identity encompasses all identities, whether that be androgynous, gender non-conforming, gender queer or gender fluid which means that all identities are protected. I am glad that you have decided to highlight this point since most of these categories seem to be lost in the language under the trans identity.”

This portion of their response has been omitted, however, they stated that for the purpose of highlighting that Title VII has been argued under different circumstances it is okay to be mentioned in this section of this report. Another attorney under this study elaborated on this point when they mentioned that they agreed with the E.E.O.C’s approach because;

“...There are two arguments, one being a sex stereotyping approach, and the other is a per se discrimination approach. I prefer the second approach because it does not require evidence of perceived gender nonconformity, whereas the first approach does. Non-binary identities are also included in the protections, because it is about discrimination because of sex, not because of any particular trans identity. All of those identities involve sex.”

The *per se* approach was something new to this study, most of the cases reviewed in this study focused on the use of sex-based protection under Title VII to protect against gender identity discrimination.

Ultimately, Title VII of the Civil Rights Act of 1964 has proven to be an effective remedy for helping transgender employees fight against employment discrimination since the United States currently lacks an exclusive federal gender identity protection. However, this is not the only approach that has been taken. One of the attorneys stated the following about the use of Title VII under Civil Rights Act of 1964:

“I agree that the use of Title VII has been an effective and appropriate approach to handling gender identity discrimination matters in the United States. However, a few recent cases have argued under the Fourteenth Amendment of the United States Constitution, the Equal Protection Clause—an approach that has some current mixed reviews—proved to be successful in the federal case of Glenn v. Brumby, Eleventh Circuit of the Federal Court of Appeals...We (lawyers) feel that it is important to highlight that the Equal Protection clause

exclusively only covers any mistreatment of workers by the government (but not by private businesses or individuals).”

As they mentioned, the use of the Equal Protection Clause is a relatively new approach, and the United States Supreme Court has yet to consider or hear a case that would prove whether or not it exclusively protects against gender identity discrimination. The patchwork nature of current federal laws has led victims and courts to interpret previous court rulings and the language on different national policies leaving overall uncertainties which adversely affect opportunities and working conditions for transgender workers. This policy gap must be addressed by Congress and the United States Supreme Court. Currently, the Equality Act, a comprehensive federal policy that would guarantee protections for LGBTQ+ people especially against discrimination based on gender identity and sexual orientation has been frozen in Congress with minimal movement. Another attorney briefly mentioned the Equality Act since it has been introduced to Congress and believes that “The most effective approach is to lobby for it now and get it passed by the House, though it can't be enacted until the Democrats control both the Executive and Legislative branches. But putting it up for a vote encourages public education, a necessary component of passing the law.” This idea leads into the final section of the study.

Chapter 5: Conclusion and Recommendations

This study determined the scope at which, on the national and local level, workers have protections against employment discrimination based on their gender identity. The purpose of this research was to examine whether or not every state has employment non-discrimination protections in place for transgender workers and how successful Title VII is as a federal remedy to protect against gender identity discrimination—since no current federal law exclusively includes

gender identity/expression protections. The literature reviewed highlighted the impact previous court cases have had on current court cases and their use of Title VII's sex-based discrimination protections as a remedy to protect employees from gender-based discrimination. The *Price Waterhouse v. Hopkins* case opened up a whole new understanding of Title VII by holding that it is considered a violation of sex-based protections for an employer to discriminate against an employee because they did not fit the perceived gendered norms. This broad interpretation has been applied to many court cases within the last fifteen years. A majority of the district and appellate courts have held that sex-based discrimination protects workers against gender identity discrimination; since it is a violation to discriminate against someone because they don't adhere to gendered norms and stereotypes. The goal was to identify any national policy gaps further and to evaluate whether or not—as facilitated by the perspective of national LGBTQ+ attorneys—Title VII fully protects persons from gender identity discrimination in the workplace.

As outlined in this report, a majority of the court cases reviewed within the last fifteen years highlighted how courts have agreed to consider transgender workers as a protected identity under Title VII—when it comes to employment discrimination. Many federal district courts and appellate courts have further agreed that transgender workers are protected under Title VII because it protects them against discrimination based on stereotypically gendered norms. This is observed by discrimination cases that have shown that employers cannot: fire a transgender worker for failing to adhere to sex stereotypes (*EEOC v. R.G. & G.R Harris Funeral Homes, Inc.*), rescind a job offer based on an employee's gender identity (*Wittmer v. Phillips 66 Co.*), or fire a trans worker because of their gender status—which can also be protected under the Equal Protect Clause of the United States Constitution (*Glenn v. Brumby*). It is essential to understand that although the Price decision and a majority of the courts have agreed with the court's decision, it has not successfully

applied to all situations (*Etsitty v. Utah Transit Authority*). However, since a majority of the most current cases highlighted in this report show that Title VII has been successful, it shows that most courts are expanding their understanding of the magnitude of gender-based discrimination. It is because of unsuccessful cases like *Etsitty* that it has become imperative to address the issue of enacting a federal law that would protect against discrimination based on gender identity and will help eliminate this policy gap; especially in states that do not have exclusive gender identity protections.

Although gender identity is not an exclusively protected category under Title VII or any other federal policies, remedying gender-based discrimination with sex-based protections under Title VII to protect trans workers seems to be a successful approach, so far. However, the patchwork in the interpretation of this federal protections and the lack of local state protections put transgender workers at high risk of being discriminated against by employers because of their gender identity. Surprisingly so, a majority of the states do not have local protections for transgender workers which only further proves that there needs to be a federal protection passed soon. As of 2018, twenty-eight states still do not have local protections which makes up 60% of the US, compared to twenty-one states (including Washington D.C) that do have local protections (40%). Some groups and agencies have been advocating for a federal protection to be passed to help eliminate this policy gap which still puts transgender workers at risk of experiencing employment discrimination in these vulnerable areas. The ultimate goal is to help lobby for a federal policy, like the current Equality Act bill that was recently proposed to Congress, that if passed, will amend Title VII and exclusively protect workers from discrimination based on gender identity and expression.

Recommendations

My only recommendations are that there needs to be more research conducted on the transgender community. Especially when it comes to an understanding how employment discrimination affects their livelihood—access to income, housing, and health insurance, as well as healthy working conditions—and the Commonwealth of the state in which they live. The first step to helping protect transgender workers from employment discrimination is to properly educate employers, employees, citizens and the Trump administration about the detrimental effects of trying to take away the rights of transgender individuals. We cannot allow the Trump administration to define out gender identity as being concretely biological. Everyone deserves the right to identify themselves as they see fit. It also important continue to fight for the rights of all LGBTQ+ members because all humans regardless of color, race, class, sex, gender/gender identity, sexual orientation, or disability deserve the right to human right protections. It is our job to help educate individuals on the magnitude of employment discrimination and to help lobby for the Equality Act to be passed by the U.S. Congress.

References

- Badgett, M. V., Lau, H., Sears, B., & Ho, D. (2007). Bias in the workplace: Consistent evidence of sexual orientation and gender identity discrimination.
- Bender-Baird, K. (2011). Transgender employment experiences: Gendered perceptions and the law. SUNY Press.
- Byron, Kylie. (2014). Natural law and bona fide discrimination: The evolving understanding of sex, gender, and transgender identity in employment. *Washington University Jurisprudence Review*, 6(2), 343-369.
- Connell, C. (2014). Transgender Employment Experiences: Gendered Perceptions and the Law. *Contemporary Sociology: A Journal of Reviews*, 43(5), 662-663.
- E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich.2016)
- Empire Justice Center. (n.d.). Retrieved from <https://empirejustice.org/>
- Etsitty v. Utah Transit Auth.*, No. 2: 04CV616DS, 2005 WL 1505610, at* 1 (D. Utah June 24, 2005).
- Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. Mass. 2011)
- Herman, J. (2011). The Cost of Employment Discrimination against Transgender Residents of Massachusetts.
- Hively v. Ivy Tech Community College of Indiana*, No. 15-1720, 2017 WL 1230393 (7th Cir. 4 April. 2017)
- Isenhath, F. (2010). Federal Law Regarding Transgender Employees and Gender Identity Claims in the Workplace: An Overview. *Federal Lawyer*, 57(1), 47-51.

James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

Lee, J. (2012). Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under title VII. *Harvard Journal Of Law & Gender*, 35(2), 423-461.

Lowell, C, Martin, E. (2017). LGBTQ Equality, The Equality Act of 2017: Groundbreaking Protections Against Sex Discrimination. National Women's Law Center.

National Center for Transgender Equality (NCTE). (2014). Employment Discrimination and Transgender People. *Trans Equality*. Accessed on: www.TransEquality.org

Pear, R. (2018, March 24). Transgender Workers Gain New Protection Under Court Ruling. Retrieved August 17, 2018, from: <https://www.nytimes.com/2018/03/24/us/politics/transgender-title-vii.html>

Price Waterhouse v. Hopkins, 490 U.S. 228 (Supreme Court. 1989)

Sellers, M. (2014). Discrimination and the Transgender Population. *Administration & Society*, 46(1), 70-86.

Swanton, Mary. (2012). Breaking ground: EEOC rules that transgender employees are protected by Title VII.(LABOR). *InsideCounsel*, 28.

United States. Department of Labor (DOL), author. (2015). The U.S. Department of Labor: Advancing LGBT workplace rights

Wittmer v. Phillips 66 Co. Civil Action no. H-17-2188 (District Court. Southern Texas, Houston Division, April 4, 2018)

Appendix A

Table 1 (full list)

State	Gender Identity	State/Local Law (Year Enacted)	Employment Sector
Alabama	No	None	N/A
Alaska	No	None	N/A
Arizona	No	None	N/A
Arkansas	No	None	N/A
California	Yes	CA Fair Employment & Housing Act 2003	All Employees
Colorado	Yes	Public Accommodation Laws 2008	All Employees
Connecticut	Yes	House Bill Act No. 6599 Public Act 2011	All Employees
Delaware	Yes	Senate Bill 97 (2011)	All Employees
District of Columbia	Yes	D.C. Human Rights Act	All Employees
Florida	No	None	N/A
Georgia	No	None	N/A
Hawaii	Yes	The Hawaii Fair Employment Practices Law 2011	All Employees
Idaho	No	None	N/A
Illinois	Yes	Illinois Human Rights Act 2014	All Employees
Indiana	No	None	N/A
Iowa	Yes	Iowa Code § 216.6 (1)(a) 2006	All Employees
Kansas	No	None	N/A
Kentucky	No	None	N/A
Louisiana	No	None	N/A
Maine	Yes	The Maine Human Rights Act 2005	All Employees
Maryland	Yes	SB 212: The Fairness For All Marylanders Act 2014	All Employees
Massachusetts	Yes	Fair Employment Law H3810 2012	All Employees
Michigan		None	N/A
Minnesota	Yes	Minnesota's Human Rights Act of 1993	All Employees
Mississippi	No	None	N/A
Missouri	No	None	N/A
Montana	No	None	N/A
Nebraska	No	None	N/A
Nevada	Yes	Assembly Bill 211 2001	All Employees
New Hampshire	Yes	New Hampshire Law Against Discrimination House Bill 1319 - 2018	All Employees
New Jersey	Yes	New Jersey's Law Against Discrimination 2006	All Employees
New Mexico	Yes	New Mexico's Human Rights Act 2003	All Employees
New York	Yes	New York State Human Rights Law 2002	All Employees
North Carolina	No	None	N/A
North Dakota	No	None	N/A
Ohio	No	None	N/A
Oklahoma	No	None	N/A

Oregon	Yes	Oregon Equality Act (also known as SB2) 2008	All Employees
Pennsylvania	No	None	N/A
Rhode Island	Yes	Rhode Island Fair Employment Practices law 2001	All Employees
South Carolina	No	None	N/A
South Dakota	No	None	N/A
Tennessee	No	None	N/A
Texas	No	None	N/A
Utah	Yes	Senate Bill Section 4. Section 34A-5-104 "Utah Compromise" 2015	All Employees*
Vermont	Yes	Vermont Fair Employment Practices Act (FEPA) 2007	All Employees
Virginia	No	None	N/A
Washington	Yes	Washington House Bill 2661 2006	All Employees
West Virginia	No	None	N/A
Wisconsin	No	None	N/A
Wyoming	No	None	N/A

Appendix B

Interview Questions

- 1) Based on your knowledge, what is currently being done to help include gender identity protections in current local employment non-discrimination policies in the united states (especially states without domestic/state protections)?
- 2) Many have argued that sex protection under Title VII of the Civil Rights Act of 1964, as proposed by the EEOC, is a sufficient approach to protect individuals that identify as transgender. What is your perspective on this approach? What alternative or more appropriate method would you suggest? How do you believe this approach affects individuals who identify as Trans, gender-fluid, or gender non-conforming?
- 3) What other forms of discrimination concerning gender identity discrimination have you encountered or identified throughout your tenure as an LGBTQ+ advocate, ally and member? (outing a trans person, workplace accommodations, restroom restrictions, etc.)
- 4) Having a federal anti-discrimination policy that protects an individual based on gender identity would be necessary to prevent a patchwork of policies that would result in inconsistencies across the country (state by state basis). What do you believe would be the most effective approach to promote federal legislation on this issue? Would this approach involve strategies focused on any particular branch of government?

Appendix C

Interview Answers

LGBT+ Attorney 1

1) States with state protections for gender identity don't need help, since they already have the protection. As far as other states, there are various groups in those states working on lobbying the legislature to include those protections.

2) I agree with the EEOC. There are two arguments, one being a sex stereotyping approach, and the other is a per se discrimination approach. I prefer the second approach because it does not require evidence of perceived gender nonconformity, whereas the first approach does. Non-binary identities are also included in the protections, because it is about discrimination because of sex, not because of any particular trans identity. All of those identities involve sex.

3) Harassment and termination on a pretext, after transition on the job, are the most common scenarios.

4) The Equality Act is a bill that has been introduced in Congress. The most effective approach is to lobby for it now and get it passed by the House, though it can't be enacted until the Democrats control both the Executive and Legislative branches. But putting it up for a vote encourages public education, a necessary component of passing the law.

LGBT+ Attorney 2

1) Well, plenty is being done to address gender identity protections across the nation. A common misconception is that in conservative “red” (Republican) states, transgender employees are not a fully protected group. A false claim considering recent federal court cases, transgender persons in these states that do not have exclusive state protections, have local groups that fight to push for transgender rights. Title VII of the Civil Rights Act is an important policy that has been considered by many courts, many of which have proven to be successful for transgender employment discrimination victims.

2) I agree that the use of Title VII has been an effective and appropriate approach to handling gender identity discrimination matters in the United States. However, a few recent cases have argued under the Fourteenth Amendment of the United States Constitution, the Equal Protection Clause—an approach that has some current mixed reviews—proved to be successful in the federal case of *Glenn v. Brumby*, Eleventh Circuit of the Federal Court of Appeals. I advise you to review the case if you have not done so already. It’s also important to understand that although the supreme court has not considered this question, we (lawyers) feel that it is important to highlight that the Equal Protection clause exclusively only covers any mistreatment of workers by the government (but not by private businesses or individuals) under the First Amendment of U.S Constitution. Lastly, we believe that the transgender individuals should be protected under the Due Process Clause of the U.S. Constitution; specifically the rights to “liberty,” “privacy,” and

“autonomy” which would allow them to make decisions for self-expression, medical rights, and more without fear of discrimination or retaliation.

3) There is so much that can be said to answer this question, but I will keep my response concise. In the last 12 years as an LGBT+ lawyer, I have dealt the most with cases involving an employee that has been unjustly terminated from a job or position because a supervisor or senior coworker felt uncomfortable with their gender identity. I have never dealt with a case in which a transgender person was ever “outed” but have read cases where a trans persons gender identity was exposed to senior management which led to their unjust termination.

4) Given the recent Democratic victory in the House of Representatives, we are optimistic that Congress will help pass the Equality Act. For a long time, the Employment Non-Discrimination Act (ENDA) has been frozen in Congress with no sign of movement. On a more positive note, advocacy and policymakers alike have been very supportive of the Equality Act, and we are optimistic that it will pass soon. The Equality Act encompasses all underrepresented classifications and would set a new precedent for gender identity and sex-based discrimination protections on the federal level.

LGBT+ Attorney 3

1) This is a loaded question. There is so much that is currently being done on the local, national, and global level when it comes to LGBT+ rights and protections. I do not agree that individual states lack protections for transgender workers, in fact, most states have local protections that discourage any form of employment discrimination. Many states have local groups that fight for LGBT+ rights like the ACLU, Human Rights Commission, Law offices, and more importantly the Equal Employment Opportunity Commission (EEOC) which is a federal agency that actively enforces civil rights laws against all types of workplace discrimination by helping victims who file a claim with them.

2) Sufficient? Not sure if that is the right term to use, [portion omitted] but we do feel that relying on the language in Title VII has been the most promising approach by agencies like the Equal Employment Opportunity Commission (EEOC). The critical thing to understand about Title VII is that it protects employees across all sectors and courts have come to realize how vital Title VII is to extending gender identity expression rights to all workers. Transgender identity encompasses all identities, whether that be androgynous, gender non-conforming, gender queer or gender fluid which means that all identities are protected. I am glad that you have decided to highlight this point since most of these categories seem to be lost in the language under the trans identity..

3) Thankfully the New York State Division of Human Rights has enacted section 466.13 *Discrimination On The Basis Of Gender Identity* under the New York Code of Rules and Regulations (9 N.Y.C.R.R § 466.13) extending gender identity protections to the New York State Human Rights Law. Because of this, we have not encountered many cases that deal with gender identity discrimination. However, we have observed cases where employees have filed complaints to the EEOC claiming discrimination based on gendered stereotypes which have led to verbal and physical harassment, as well as, unfair treatment by supervisors and coworkers. Our agency, as well as the EEOC, take these matters very seriously. We believe that no one regardless of color,

race, national origin, sex, gender identity or expression should have to tolerate an unhealthy working environment. The first step is making sure that all organizations, corporations, and agencies are properly trained and informed of all current EEO policies that apply to all sensitive matters.

4) At our agency, we believe that the Transgender workers are protected by the First Amendment of the United States constitution because it protects a person's right to dress and groom themselves to fit their gender identity and expression. We believe this is so because, as we all know, it bars the government from censoring protected rights like expression and speech.