

MEMORANDUM

TO: Health and Human Services Committee

FROM: Amanda Mihill, Legislative Analyst *AM*
Michael Faden, Senior Legislative Attorney *MF*

SUBJECT: **Worksession:** Bill 23-07, Non-Discrimination – Gender Identity

Bill 23-07, Non-Discrimination – Gender Identity, sponsored by Councilmembers Trachtenberg, Ervin, and Elrich, was introduced on September 11, 2007. A public hearing was held on October 2.

Background

Bill 23-07 would prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity by creating a protected class for transgender persons. Bill 23-07 would define “gender identity” (©5, lines 81-84):

Gender identity means an individual’s actual or perceived gender, including a person’s gender-related appearance, expression, image, identity, or behavior, whether or not those gender-related characteristics differ from the characteristics customarily associated with the person’s assigned sex at birth.

Bill 23-07 would also require employers to allow transgender people to dress according to their gender identity (see ©12, lines 271-275).

According to the National Gay and Lesbian Task Force (NGLTF), currently 13 states, the District of Columbia, and 91 local jurisdictions have enacted legislation that prohibits discrimination against transgender individuals (see ©15). This does not include jurisdictions where court or administrative rulings have concluded that “sex” or “disability” discrimination laws protect transgender people. Maryland does not include transgender individuals as a protected class in the state discrimination law. Bills were introduced, but not enacted, to prohibit discrimination based on gender identity and expression.¹ In 2005, the General Assembly

¹ HB 945 and SB 516 (2007).

amended the existing state hate crimes law to add sexual orientation. As part of that amendment, the law included “gender-related identity” in the definition of “sexual orientation”.²

It is unclear whether the current County anti-discrimination law would cover gender identity discrimination. Staff from the County Human Rights Commission (HRC) indicated that they have pursued “a couple” discrimination claims from transgender individuals under the prohibition against sex discrimination.³ HRC staff theorized that gender identity is an issue involving sexual stereotypes, and thus could be covered by existing sex discrimination prohibition. At the public hearing, an HRC investigator indicated that in his opinion, current County law covers discrimination before and after, but not during, a person’s gender identity transition. A Utah Federal appeals court recently held that transgender discrimination is not sex discrimination under Title VII and concluded that Congress did not intend Title VII to cover transgender discrimination.⁴

Issues for Committee Discussion

1. *Should County law prohibit this type of discrimination?*

The Council received testimony from organizations, including Equality Maryland and the County Chapter of the American Civil Liberties Union, and individuals arguing that Bill 23-07 is necessary to protect transgender individuals from discrimination. Equality Maryland alleged that transsexual individuals often lose their jobs during or after their gender transitions and many transgender individuals are evicted or forced to leave their homes. According to Equality Maryland, 42% of transgender individuals are unemployed, 31% have incomes of less than \$10,000, and 19% do not have their own living space (©26).

As already noted, it is unclear whether the current County Human Rights law would prohibit discrimination against a person based on that person’s gender identity. **If the Committee wants to explicitly prohibit discrimination on the basis of gender identity, an amendment to the County Human Rights law is necessary.**

2. *How specific should the law be regarding public facilities?*

The Council received testimony and letters questioning whether Bill 23-07 is intended to let a person use public facilities (e.g., restrooms and locker rooms) consistent with that person’s chosen gender identity. Supporters of transgender anti-discrimination legislation argued that transgender individuals need access to adequate facilities. Some individuals expressed concern that if Bill 23-07 lets a person use a facility appropriate for that person’s gender identity, then a

² MD Code, Criminal Law, §10-301.

³ These cases were filed several years ago and HRC staff no longer has the specific case records. However, an investigator recalled that in one case, the transgender individual alleged that his employer terminated him because of his gender identity complaint. This complaint was settled before HRC staff completed the investigation.

⁴ See *Etsitty v. Utah Transit Authority*, 2007 U.S. App. LEXIS 22989 on ©48-72. Council staff did a short search for this issue and found several federal cases that disagreed about the proper interpretation of Title VII and Supreme Court precedent on this issue. To our knowledge, there are no decisions on point by Maryland courts.

non-transgender person may use that provision to excuse committing a crime. If enacted, **Bill 23-07 could not be used as a shield to protect a person who commits a crime in a public facility.** Any action that is a crime would remain a crime if the Council enacts Bill 23-07, regardless of the perpetrator's gender identity. For example, Maryland law specifically prohibits a person from conducting visual surveillance of another individual, with or without prurient interest, in a private place without the consent of that individual (Maryland's "peeping tom" law).⁵ Nothing in Bill 23-07 would protect a person from prosecution if that person entered a public facility and violated this law.

The County Attorney's Office concluded that Bill 23-07 as introduced would not require or prohibit restroom designation according to gender identity or biological gender (see memorandum on ©17). This means that an employer or other public facility provider could maintain, and enforce, current gender-based restrictions on public facility use. **To assist the Committee's discussion on this issue, Council staff has identified the following options,** most of which have been adopted by at least one jurisdiction with a gender identity anti-discrimination law:

1. **Remain silent.** Several jurisdictions have not specifically addressed this issue, which allows room for the implementing agency to interpret its law on a case-by-case basis. In some jurisdictions the implementing agency has issued regulations to specify how anti-discrimination provisions relate to facility use. For example, the New York City Commission on Human Rights issued guidelines regarding gender identity discrimination that provide that it is "an unlawful discrimination practice" for a provider of a public accommodation to "directly or indirectly refuse, withhold from, or deny a person accommodations, advantages, facilities, services, or privileges based on that person's gender identity." The New York City Commission on Human Rights decided that the following factors suggest discriminatory conduct has occurred:
 - Not allowing individuals to use a sex-segregated facility consistent with that person's self-selected gender identity; or
 - Requiring individuals to provide identification as a way to identify that person's gender before allowing the person to use a sex-segregated facility.⁶

The San Francisco Human Rights Commission adopted similar guidelines.⁷ The District of Columbia Office of Human Rights and Commission on Human Rights issued regulations that require a person to allow an individual to use gender-specific facilities consistent with that individual's gender identity. For gender-specific facilities where nudity is customary, a person must make reasonable accommodations to allow an individual access to the facility consistent with that person's gender identity, regardless of whether the individual has provided documentation of their

⁵ See Maryland Code, Criminal Law §§3-901, 3-902.

⁶ New York City Commission on Human Rights, "Guidelines Regarding Gender Identity Discrimination: A Form of Gender Discrimination Prohibited by the New York City Human Rights Law" (Dec. 2006).

⁷ City and County of San Francisco Human Rights Commission: Compliance Guidelines to Prohibit Gender Identity Discrimination" (Dec. 2003).

gender identity.⁸ Staff from the Baltimore City Community Relations Commission indicates the Commission believes employers should grant restroom access according to an employee's full-time gender presentation.

If the Committee is inclined to take this approach, the Committee should remember that, while HRC may interpret Bill 23-07 differently, as the County Attorney's memorandum said the County Attorney will advise the Commission that Bill 23-07 as introduced does not require or prohibit restroom designation according to gender identity or biological gender. In other words, as noted above, an employer or other public facility provider could maintain, and enforce, current gender-based restrictions on public facility use.

2. **Amend Bill 23-07 to expressly adopt the County Attorney's interpretation.** The Committee could amend Bill 23-07 to let each public facility provider determine what facility a transgender individual can use. This option would let an employer or other public facility provider decide whether to maintain restrictions based on gender identity or biological gender.
3. **Amend Bill 23-07 to specify at which stage in the transitioning process a person may use a particular gender-specific facility.** Boulder, Colorado law prohibits a person from refusing, withholding from, or denying "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation" to an individual because of that individual's "gender variance".⁹ Boulder law explicitly allows a "transitioned transsexual" (i.e., an individual who has completed genital reassignment surgery) to "use the locker rooms and shower facilities of their new sex" and a "transitioning transsexual" (i.e., an individual experiencing gender variance who is undergoing sex reassignment treatment) to be granted "reasonable accommodation in access to locker rooms and shower facilities."¹⁰
4. **Amend Bill 23-07 to let a person use facilities consistent with that person's gender identity, but allow providers of public accommodations to request documentation of gender or transitional status.** Oregon law prohibits any person from denying another person "full and equal accommodations, advantages, facilities and privileges of any place of public accommodation" on the basis of race, religion, sex, marital status, color, national origin or age if the individual is 18 years of age or older.¹¹ The cities of Portland and Salem also prohibit discrimination based on gender identity and require a person to provide reasonable and appropriate accommodations permitting all people access to restrooms consistent with their expressed gender. These cities allow entities which operate gender-specific facilities

⁸ 4 District of Columbia Municipal Regulations §§800.2.1, 805.2.

⁹ Boulder law defines "gender variance" as "a persistent sense that a person's gender identity is incongruent with the person's biological sex, excluding the element of persistence for persons under age 21 and including, without limitation, transitioned transsexuals." §12-1-1.

¹⁰ Boulder Code §12-1-4.

¹¹ Oregon Revised Statutes §659A.403.

involving public nudity (e.g., health clubs) to require an individual to document their gender or transitional status.¹² Accepted forms of documentation include a court order, physician letter, birth certificate, passport, or driver's license.

5. **Amend Bill 23-07 to let a person use facilities based on the person's gender identity publicly and exclusively expressed or asserted.** Boston's Human Rights law prohibits a person from preventing or prohibiting the use of private accommodations based on a person's gender identity "publicly and exclusively expressed or asserted by the person seeking to use" the public accommodation.¹³
 6. **Amend Bill 23-07 to let a person use facilities based on that person's gender identity.** Laws in Oakland, California and New Jersey specify that a person can use facilities appropriate for that person's gender identity. Of the options identified in this memorandum, this option is the most expansive.
3. *Should the law explicitly prohibit discrimination against ex-transgender individuals?*

At the public hearing, Dr. Ruth Jacobs and Rev. Grace Harley argued that this bill ignores or violates the rights of ex-transgender individuals and proposed that Bill 23-07 be amended to prohibit discrimination against ex-transgender individuals. As introduced, Bill 23-07 would prohibit discrimination against a person because of that person's gender identity. In Council staff's view, this language is sufficient to protect transgender and ex-transgender persons. **We do not recommend further amending Bill 23-07 in this respect.**

4. *Would this bill undercut freedom of speech and religion?*

The Council received testimony and letters from individuals concerned that Bill 23-07 would prohibit them from having and sharing personal religious beliefs. In her testimony, Rev. Harley expressed concern that the bill's prohibition against injury to personal property prevented a counselor from broaching the subject of "returning to the biological sex". Council staff does not interpret Bill 23-07 to do so. **Nothing in Bill 23-07 would prohibit an individual from holding or sharing personal beliefs.** Rather, Bill 23-07 prohibits discriminatory *practices* in public accommodations (e.g., refusing to provide services), housing (e.g., refusing to provide available housing or lend money to an individual), and employment (e.g., refusing to hire an individual) because of a person's gender identity. Additionally, current County law protects these First Amendment rights in the Human Rights law.¹⁴

¹² City of Portland Code §§23.01.070, 23.01.040C; City of Salem Code §§97.060, 97.085(c).

¹³ City of Boston Code §12-9.7.

¹⁴ The County's law against discrimination in public accommodations does not apply to accommodations that are distinctly private or personal (§27-10(c)). The provisions of County law prohibiting discrimination in housing do not apply to a dwelling in which the owner resides (§27-14(a)) or a dwelling rented by a religious corporation to a person of a particular religion if the rental is connected to the corporation's "purely religious activities". Similarly, County law prohibiting discrimination in commercial real estate does not prevent religious institutions from giving a preference to members of the same religion in a real estate contract, unless religious membership is restricted by

5. *What standard should the Human Rights Commission use to determine unlawful harassment or a hostile environment?*

The County Chapter of the American Civil Liberties Union urged the Council to adopt the following standard that the County Human Rights Commission could use to determine what constitutes unlawful harassment or a hostile environment (©25):

In determining whether there is unlawful harassment or a hostile environment, the totality of the circumstances surrounding the alleged violation of the Act must be considered, including the nature, frequency, and severity of the behavior, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the alleged victim. Ultimately the standard is an objective one, focusing on whether the behavior was sufficiently severe or pervasive to alter the conditions of the victim's employment, housing, education, access to or use of public accommodations, or relations with a Montgomery County agency or contractor, and to create an abusive environment.

This standard is similar to a standard adopted by the District of Columbia Human Rights Commission. Council staff does not object to this standard per se; however, **we recommend that the standard used to determine what constitutes harassment or a hostile environment is better left to the Human Rights Commission to develop as it interprets Bill 23-07 in the context of the entire Human Rights law.**

6. *Should dress and grooming standards be applied non-discriminatorily?*

As introduced, Bill 23-07 inserts, on ©12 lines 271-275:

An employer may require an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are not precluded by any provision of state or federal law. However, an employer must allow an employee to appear, groom, and dress consistent with the employee's gender identity.

The Office of Human Rights recommended amending Bill 23-07 to clarify that the Office must determine that an employer has not discriminated against an individual or group regarding workplace dress standards. The Office recommends the following (©20):

An employer may require an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are nondiscriminatory and not precluded by any provision of state or federal law. However, an employer must allow an employee to appear, groom, and dress consistent with the employee's gender identity.

religious corporations to hire employees of a particular religion and allows an employer to deny employment on the basis of religious creed if the observance, practice, or belief cannot be reasonably accommodated without causing undue hardship (§27-19(e)).

If the intent of this amendment is to assure that any workplace standard (1) is applied evenly to members and non-members of protected classes, and (2) does not negatively impact members of protected classes, Council staff recommends that the Committee adopt it. The Committee could confirm with the Office that their intent is so limited.

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Bill No. 23-07
Concerning: Non-discrimination-Gender Identity
Revised: 3/1/07 Draft No. 5
Introduced: September 11, 2007
Expires: March 11, 2009
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Trachtenberg, Ervin, and Elrich

AN ACT to:

- (1) prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity; and
- (2) generally amend County laws regarding discrimination.

By amending

Montgomery County Code
Chapter 8A, Cable Communications
Section 8A-15

Chapter 27, Human Rights and Civil Liberties
Sections 27-1, 27-5, 27-6, 27-11, 27-12, 27-16, 27-19, and 27-22

Chapter 53, Taxicabs and Limousines
Section 53-313

| | |
|------------------------------|--|
| Boldface | <i>Heading or defined term.</i> |
| <u>Underlining</u> | <i>Added to existing law by original bill.</i> |
| [Single boldface brackets] | <i>Deleted from existing law by original bill.</i> |
| <u>Double underlining</u> | <i>Added by amendment.</i> |
| [[Double boldface brackets]] | <i>Deleted from existing law or the bill by amendment.</i> |
| * * * | <i>Existing law unaffected by bill.</i> |

The County Council for Montgomery County, Maryland approves the following Act:

28 the conditions thus produced and creating conditions which endanger
 29 the public peace and order. Montgomery County's policy is to foster
 30 equal opportunity for all without regard to race, color, religious creed,
 31 ancestry, national origin, sex, marital status, age, disability, presence of
 32 children, family responsibilities, source of income, sexual orientation,
 33 gender identity, or genetic status and strictly in accord with their
 34 individual merits as human beings.

35 * * *

36 **27-5. Duties generally**

37 (a) The Commission must:

38 * * *

39 (2) Conduct educational and other programs to promote equal rights
 40 and opportunities of all persons regardless of race, color,
 41 religious creed, ancestry, national origin, sex, age, marital status,
 42 disability, sexual orientation, gender identity, genetic status,
 43 presence of children, family responsibilities, or source of income.

44 * * *

45 (6) Study and investigate, through public or private meetings,
 46 conferences, and public hearings, conditions that could result in
 47 discrimination, prejudice, intolerance, or bigotry because of race,
 48 color, religious creed, ancestry, national origin, sex, age, marital
 49 status, disability, sexual orientation, gender identity, genetic
 50 status, presence of children, family responsibilities, or source of
 51 income.

52 (7) Advise county residents, the County Council, the County
 53 Executive, and the various departments of County, State, and
 54 federal governments about racial, religious, and ethnic prejudice,
 55 intolerance, discrimination, and bigotry and recommend
 56 procedures, programs, and laws to promote and protect equal
 57 rights and opportunities for all persons, regardless of race, color,
 58 religious creed, ancestry, national origin, sex, age, marital status,
 59 disability, sexual orientation, gender identity, genetic status,
 60 presence of children, family responsibilities, or source of income.

61 * * *

62 (9) Initiate and receive complaints of discrimination, prejudice,
 63 intolerance, and bigotry from any person or group because of
 64 race, color, sex, age, marital status, religious creed, ancestry,
 65 national origin, disability, sexual orientation, gender identity,
 66 genetic status, presence of children, family responsibilities or
 67 source of income, that deprives that person or group of equal
 68 rights, protection, or opportunity in employment, real estate, and
 69 public accommodation. The Commission must:

70 * * *

71 (b) If the County Executive does not object, the Commission may conduct
 72 additional programs to relieve group tension or adverse intergroup
 73 actions resulting from causes other than race, color, sex, religious creed,
 74 ancestry, national origin, age, marital status, disability, sexual
 75 orientation, gender identity, genetic status, presence of children, family
 76 responsibilities, or source of income.

77 **27-6. Definitions.**

78 The following words and phrases have the following meanings, unless the
 79 context indicates otherwise:

80 * * *

81 Gender identity means an individual's actual or perceived gender, including a
 82 person's gender-related appearance, expression, image, identity, or behavior, whether
 83 or not those gender-related characteristics differ from the characteristics customarily
 84 associated with the person's assigned sex at birth.

85 * * *

86 **27-11. Discriminatory practices**

87 (a) An owner, lessee, operator, manager, agent, or employee of any place of
 88 public accommodation in the County must not, with respect to the
 89 accommodation:

90 (1) make any distinction with respect to any person based on race,
 91 color, sex, marital status, religious creed, ancestry, national
 92 origin, disability, [or] sexual orientation, or gender identity in
 93 connection with:

94 * * *

95 (2) display, circulate or publicize or cause to be displayed, circulated
 96 or publicized, directly or indirectly, any notice, communication,
 97 or advertisement that states or implies:

98 * * *

99 (B) that the patronage or presence of any person is unwelcome,
 100 objectionable, unacceptable, or not desired or solicited on
 101 account of any person's race, color, sex, marital status,
 102 religious creed, ancestry, national origin, disability, [or]
 103 sexual orientation, or gender identity;

104 * * *

105 **27-12. Discriminatory housing practices**

106 (a) A person must not, because of race, color, religious creed, ancestry,
 107 national origin, sex, marital status, disability, presence of children,
 108 family responsibilities, source of income, sexual orientation, gender
 109 identity, or age:

110 * * *

111 (b) A person must not, because of race, color, religious creed, ancestry,
 112 national origin, sex, marital status, disability, presence of children,
 113 family responsibilities, source of income, sexual orientation, gender
 114 identity, or age, discriminate in:

115 * * *

116 (c) Without limiting the general application of Subsection (b), a person
 117 must not, because of race, color, religious creed, ancestry, national
 118 origin, sex, marital status, disability, presence of children, family
 119 responsibilities, source of income, sexual orientation, gender identity, or
 120 age:

121 * * *

122 (d) (1) A person must not:

123 * * *

124 (C) make any record or formal business inquiry in connection
 125 with the prospective purchase, lease, rental, or financing of
 126 any housing;

127 indicating that race, color, religious creed, ancestry, national
 128 origin, sex, marital status, disability, presence of children, family
 129 responsibilities, source of income, sexual orientation, gender
 130 identity, or age could influence or affect any act described in
 131 subsections (a), (b), and (c).

⑥

* * *

- 132
- 133 (f) A person must not:
- 134 (1) directly or indirectly induce or attempt to induce any person to
- 135 transfer an interest in any housing by representations regarding
- 136 the existing or potential proximity of real property owned, used,
- 137 or occupied by any person of any particular race, sex, color,
- 138 religious creed, ancestry, national origin, disability, source of
- 139 income, sexual orientation, gender identity, age, the presence of
- 140 children, or family responsibilities.
- 141 (2) promote, induce, influence, or attempt to promote, induce, or
- 142 influence by the use of postal cards, letters, circulars, telephone,
- 143 visitation, or any other means, directly or indirectly, a property
- 144 owner, occupant, or tenant to list for sale, sell, remove from,
- 145 lease, assign, transfer, or otherwise dispose of any housing
- 146 having the effect of inciting neighborhood unrest or community
- 147 tension in any street, block, neighborhood, or any other area by
- 148 referring to the race, sex, color, religious creed, ancestry, national
- 149 origin, disability, presence of children, family responsibilities,
- 150 source of income, sexual orientation, gender identity, or age of
- 151 actual or anticipated neighbors, tenants, or other prospective
- 152 buyers or occupants of any housing.
- 153 (3) make or cause another person to make a statement or in any other
- 154 manner attempt to incite neighborhood unrest or community
- 155 tension in any street, block, neighborhood, or any other area to
- 156 obtain a listing of any housing for sale, rental, assignment,
- 157 transfer, or other disposition by referring to the race, sex, color,
- 158 religious creed, ancestry, national origin, disability, presence of

(7)

159 children, family responsibilities, source of income, sexual
 160 orientation, gender identity, or age of actual or anticipated
 161 neighbors, tenants, or other prospective buyers or occupants of
 162 any housing where the statement is false or materially misleading
 163 or where there is insufficient basis to judge its truth or falsity to
 164 warrant making the statement.

- 165 (4) make any representation to any prospective purchaser or lessee
 166 that any housing in a particular block, neighborhood, or area may
 167 undergo, is undergoing, or has undergone a change with respect
 168 to racial, color, religious, nationality, presence of children, family
 169 responsibilities, source of income, disability, sex, sexual
 170 orientation, gender identity, age, or ethnic composition.

171 * * *

- 172 (6) induce or attempt to induce the sale or listing for sale of any
 173 housing by representing that the presence or anticipated presence
 174 of persons of any particular race, sex, color, religious creed,
 175 ancestry, national origin, disability, presence of children, family
 176 responsibilities, source of income, sexual orientation, gender
 177 identity, or age in the area will or may result in:

178 * * *

- 179 (7) induce or attempt to induce the sale or listing for sale of any
 180 housing by representing that the presence or anticipated presence
 181 of persons of any particular race, sex, color, religious creed,
 182 ancestry, sexual orientation, gender identity, presence of children,
 183 family responsibilities, source of income, or national origin in the
 184 area will or may result in a change in the racial, color, religious,

185 age, nationality, or ethnic composition of the block,
 186 neighborhood, or area where the property is located.

187 * * *

188 (h) A person, must not because of race, color, religious creed, ancestry,
 189 national origin, sex, marital status, disability, presence of children,
 190 family responsibilities, source of income, sexual orientation, gender
 191 identity, or age deny any other person:

192 * * *

193 **27-16. Discriminatory practices in commercial real estate.**

194 (a) A person must not, because of race, color, religious creed, ancestry,
 195 national origin, sex, marital status, disability, presence of children,
 196 family responsibilities, sexual orientation, gender identity, or age:

197 * * *

198 (b) A lending institution must not, because of race, color, religious creed,
 199 ancestry, national origin, sex, marital status, disability, presence of
 200 children, family responsibilities, sexual orientation, gender identity, or
 201 age:

202 * * *

203 (c) A person must not because of race, color, religious creed, ancestry,
 204 national origin, sex, marital status, disability, presence of children,
 205 family responsibilities, source of income, sexual orientation, gender
 206 identity, or age:

207 * * *

208 (e) A person must not:
 209 (1) induce or attempt to induce, by direct or indirect methods, any
 210 person to transfer commercial real estate by representations
 211 regarding the existing or potential proximity of real estate owned,

212 used, or occupied by any person of any particular race, color,
 213 religious creed, ancestry, national origin, sex, marital status,
 214 disability, sexual orientation, gender identity, age, the presence of
 215 children, or family responsibilities;

216 (2) represent to any prospective purchaser or lessee that any
 217 commercial real estate in a particular area may undergo, is
 218 undergoing, or has undergone a change with respect to racial,
 219 color, religious creed, ancestry, nationality, marital status,
 220 disability, presence of children, family responsibilities, sex,
 221 sexual orientation, gender identity, ethnic composition, or age of
 222 occupants of the area; or

223 (3) place a sign or other display either purporting to offer for sale,
 224 lease, assignment, transfer, or other disposition, or tending to lead
 225 to the belief that a bona fide offer is being made to sell, lease,
 226 assign, transfer, or otherwise dispose of any commercial real
 227 estate that is not in fact available or offered for sale, lease,
 228 assignment, transfer, or other disposition, because of race, color,
 229 religious creed, ancestry, national origin, sex, marital status,
 230 disability, presence of children, family responsibilities, sexual
 231 orientation, gender identity, or age.

232 * * *

233 (g) A person must not because of race, color, religious creed, ancestry,
 234 national origin, sex, marital status, disability, presence of children,
 235 family responsibilities, source of income, sexual orientation, gender
 236 identity, or age:

237 * * *

238 **27-19. Discriminatory employment practices.**

239 (a) A person must not because of the race, color, religious creed, ancestry,
 240 national origin, age, sex, marital status, sexual orientation, gender
 241 identity, family responsibilities, or genetic status of any individual or
 242 disability of a qualified individual, or because of any reason that would
 243 not have been asserted but for the race, color, religious creed, ancestry,
 244 national origin, age, sex, marital status, disability, sexual orientation,
 245 gender identity, family responsibilities, or genetic status:

246 * * *

247 (d) (1) Except as provided in paragraph 2, a person must not print,
 248 publish, or cause to be printed or published, any notice or
 249 advertisement indicating any preference, limitation, or
 250 specification based on race, color, religious creed, ancestry,
 251 national origin, age, sex, marital status, disability, sexual
 252 orientation, gender identity, family responsibilities, or genetic
 253 status relating to:

254 * * *

255 (e) Notwithstanding any other provision of this division, it is not an
 256 unlawful employment practice:

257 (1) for an employer to hire and employ employees, for an
 258 employment agency to classify or refer for employment any
 259 individual, for a labor organization to classify its membership or
 260 to classify or refer for employment any individual, or for an
 261 employer, labor organization or joint labor-management
 262 committee controlling apprenticeship or other training or
 263 retraining programs, to admit or employ any individual in any
 264 program, on the basis of race, color, religious creed, age, sex,
 265 marital status, national origin, ancestry, disability, sexual

266 orientation, gender identity, family responsibilities, or genetic
 267 status based on a bona fide occupational qualification reasonably
 268 necessary to the normal operation of that particular business or
 269 enterprise;

270 * * *

271 (k) An employer may require an employee to adhere to reasonable
 272 workplace appearance, grooming, and dress standards that are not
 273 precluded by any provision of state or federal law. However, an
 274 employer must allow an employee to appear, groom, and dress
 275 consistent with the employee's gender identity.

276 **27-22. Discrimination through intimidation.**

277 A person must not: willfully and maliciously destroy, injure, or deface another
 278 person's real or personal property, or willfully and maliciously injure another person,
 279 with the intent to intimidate or attempt to intimidate any person because of race,
 280 religion, national origin, disability, [or] sexual orientation, or gender identity.

281 **53-313. Duty to accept and convey passengers.**

282 * * *

283 (b) A driver must not refuse to transport a passenger because of the
 284 passenger's disability, race, color, marital status, religious creed, age,
 285 sex, national origin, sexual orientation, gender identity, or geographic
 286 location.

287 *Approved:*

288

Marilyn J. Praisner, President, County Council

Date

289 *Approved:*

290

Isiah Leggett, County Executive

Date

291 *This is a correct copy of Council action.*

292

Linda Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Bill 23-07, *Non-Discrimination – Gender Identity*

DESCRIPTION: Bill 23-07 would prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity.

PROBLEM: It is unclear whether the current County anti-discrimination law would cover gender identity discrimination.

GOALS AND OBJECTIVES: To explicitly prohibit discrimination on the basis of gender identity.

COORDINATION: Commission on Human Rights; Department of Public Works and Transportation (Taxicab Regulation); and Department of Technology Services (Office of Cable and Communication Services).

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Michael Faden, Senior Legislative Attorney (240-777-7905); and Amanda Mihill, Legislative Analyst (240-777-7815).

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: The Commission on Human Rights may order the payment of damages (other than punitive damages) and other relief that the law warrants, such as compensation, equitable relief to prevent the discrimination, consequential damages, and any other relief necessary to eliminate the effects of any discrimination prohibited under the Article.

14

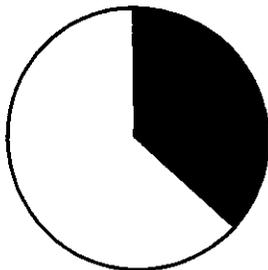
Jurisdictions with Explicitly Transgender-Inclusive Nondiscrimination Laws

National Gay and Lesbian Task Force



■ U.S. Population Covered by a Transgender-Inclusive
Nondiscrimination Law: 104,118,084 = 37%

□ U.S. Population Not Covered = 63%
(Total U.S. Population: 281,421,906)



STATE LAWS (13 and D.C.)

| | |
|--|---------------------------------|
| California – 33,871,648 | Maine – 1,274,923 |
| Colorado – 4,301,261 | Minnesota – 4,919,479 |
| District of Columbia – 572,059 | New Jersey – 8,414,350 |
| Hawai'i – 1,211,537 (housing and public accommodations only) | New Mexico – 1,819,046 |
| Illinois – 12,419,293 | Oregon – 3,421,399 ¹ |
| Iowa – 2,926,324 | Rhode Island – 1,048,319 |
| | Vermont – 608,827 |
| | Washington – 5,894,121 |

CITY AND COUNTY LAWS (91)

| | | | | |
|---|--|---|--|---|
| In Arizona Tucson: 486,699 | In Illinois Carbondale: 20,681 Champaign: 67,518 Cook County: 5,376,741 Incl. Chicago: 2, 896,016 Decatur: 81,860 DeKalb: 39,018 Evanston: 74,239 Peoria: 112,936 Springfield: 111,454 Urbana: 36,395 | In Michigan Ann Arbor: 114,024 East Lansing: 46,525 Ferndale: 22,105 Grand Rapids: 197,800 Huntington Woods: 6,151 Lansing: 119,128 Saugatuck: 3,590 Ypsilanti: 22,362 | In New York Albany: 95,658 Buffalo: 292,648 New York City: 8,008,278 Rochester: 219,773 Suffolk County: 1,419,369 Tompkins County: 96,501 Incl. Ithaca: 28,775 | In Pennsylvania Allentown: 106,632 Easton: 26,263 Erie County: 280,843 Harrisburg: 48,950 Lansdowne: 11,044 New Hope: 2,252 Philadelphia: 1,517,550 Pittsburgh: 334,563 Scranton: 76,415 Swarthmore: 6,170 West Chester: 17,861 York: 40,862 |
| In California Los Angeles: 3,694,820 Oakland: 339,337 San Francisco: 776,733 San Diego: 1,223,400 Santa Cruz County: 55,602 Incl. Santa Cruz: 54,593 West Hollywood: 35,716 | In Indiana Bloomington: 69,291 Indianapolis/Marion County ² : 781,870 | In Minnesota Minneapolis: 382,618 St. Paul: 287,151 | In Ohio Cincinnati: 331,285 Toledo: 313,619 | In Texas Austin: 656,562 Dallas: 1,188,580 El Paso: 563,662 |
| In Colorado Boulder: 94,673 Denver: 554,636 | In Iowa Decorah: 8,172 Iowa City: 62,220 Johnson County: 21,559 ³ | In Louisiana New Orleans: 484,674 | In Oregon Beaverton: 76,129 Bend: 52,029 Benton County: 78,153 Hillsboro: 70,186 Lake Oswego: 35,278 Lincoln City: 7,437 Multnomah County ⁴ : 660,486 Incl. Portland: 529,121 Salem: 136,924 | In Washington King County: 1,737,034 Incl. Burien: 31,881 Incl. Seattle: 563,374 Olympia: 42,514 Tacoma: 193,556 |
| In Florida Gulfport: 12,527 Lake Worth: 35,133 Miami Beach: 87,933 Monroe County: 79,589 Incl. Key West: 25,478 West Palm Beach: 82,103 | In Kentucky Covington: 43,370 Jefferson County ² : 693,604 Incl. Louisville ² : 256,231 Lexington-Fayette Urban County: 260,512 | In Maryland Baltimore: 651,154 | | In Wisconsin Madison: 208,054 |
| In Georgia Atlanta: 416,474 | | In Massachusetts Boston: 589,141 Cambridge: 101,355 Northampton: 28,978 | | |
| | | In Missouri University City: 37,428 | | |

¹The Oregon law takes effect January 1, 2008, but may face a challenge if opposition succeeds getting it placed on a ballot measure.

²Metro Louisville, the merged Louisville and Jefferson County government, repassed and combined these laws in 2004 to apply to Metro Louisville. Indianapolis and Marion County's shared governmental structure passed this law.

³The law passed in Johnson County only applies to unincorporated areas of the county, population 21,559, although the national statistics are unaffected because Iowa now has a statewide law.

⁴2,135 Portlanders live outside of Multnomah County and that 2,274 Lake Oswegoans live inside of Multnomah County, however this doesn't affect the national statistics because Oregon now has a statewide law.

NOTE: Only laws that reach private entities are included above. Additional states and cities have policies against discrimination against public employees. Population data from 2000 Census. Last updated July 2007.

15



OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

September 28, 2007

TO: Marilyn J. Praisner, Council President
FROM: Joseph F. Beach, Director, Office of Management and Budget
SUBJECT: Council Bill 23-07, Non-Discrimination – Gender Identity

2007 SEP 28 PM 1:31
RECEIVED
MONTGOMERY COUNTY
COUNCIL

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

Bill 23-07 would prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity and would require employers to allow transgender people to dress according to their gender identity. Bill 23-07 defines “gender identity” as:

An individual’s actual or perceived gender, including a person’s gender-related appearance, expression, image, identity, or behavior, whether or not those gender-related characteristics differ from the characteristics customarily associated with the person’s assigned sex at birth.

FISCAL SUMMARY

The Office of Human Rights has been accepting “gender identity” complaints under the “sex” discrimination category for a few years. The “gender identity” complaints were all resolved and the cases were closed. The office does not expect its current caseload to increase significantly should gender identity be added to the list of protracted classes in Montgomery County. The office does expect its printing budget to be affected as a result of the legislation because the office would have to reprint all of the employment discrimination posters that employers are required to post by Chapter 27, Article I, § 27-20, Montgomery County Code and all of the informational brochures that are distributed to the public. The office provided a rough estimate of \$20,000 to reprint the posters and informational brochures. The office would attempt to mitigate some of the printing expenses by placing the new poster on the office’s website for downloads and mail notices to employers and to the public about the new law.

Phil Weeda of the Office of Management and Budget and Michael Dennis of the Office of Human Rights contributed to and concurred with this analysis.

Jfb: pw

Office of the Director

16



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

TO: Michael F. Dennis, Compliance Director
Office of Human Rights

VIA: Marc P. Hansen *MPH*
Deputy County Attorney

FROM: Edward B. Lattner, Chief *EBL*
Division of Human Resources & Appeals

DATE: October 1, 2007

RE: Bill 23-07, Non-discrimination - Gender Identity

Bill 23-07 would prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity by creating a protected class for transgendered persons.

If this legislation is intended to prohibit the restriction of bathroom/locker room use based upon biological/physical gender, as opposed to gender identity or self-image, then the Council should make that intention clear. Otherwise, as evidenced by the cases cited below and § 27-10(c), the amendment would be interpreted by this office to permit restriction of bathroom/locker room use based on physical gender.

Two state courts have concluded that restricting transgendered individuals to bathrooms that correspond with their biological gender did not violate local gender identity discrimination laws. In *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 294 (N.Y. App. Div. 2005), the plaintiff, an organization that offers prevention and education programs regarding HIV/AIDS in the Latino communities, alleged that the defendants refused to renew its commercial lease after receiving complaints from other tenants that it allowed its transgendered clients to use common area restrooms that did not coincide with their biological gender. The plaintiff asserted that the defendant's actions violated New York City's Human Rights Law, which prohibits discrimination in real estate based upon gender. Administrative Code of the City of N.Y. § 8-107(5)(b)(1). The City defined gender as "a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or

(17)

expression is different from that traditionally associated with the legal sex assigned to that person at birth.” Administrative Code of the City of N.Y. § 8-102(23). The court dismissed the complaint.

In sum, the complaint, as it stands, alleges not that the transgender individuals were selectively excluded from the bathrooms, which might trigger one or both of the Human Rights Laws, but that they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological sexual assignment.

The New York appellate court relied upon a Minnesota Supreme Court decision that reached the same conclusion under the Minnesota state human rights law. In *Goins v West Group*, 635 N.W.2d 717 (Minn. 2001), the plaintiff, a biological male, claimed that her employer discriminated against her based upon her sexual orientation by designating restrooms and restroom use on the basis of biological gender, in violation of the Minnesota Human Rights Act (MHRA). The MHRA defined “sexual orientation” as including “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *Id.* at 722 & 724.¹ Nevertheless, the court concluded that the defendant’s designation of restroom use, applied uniformly, on the basis of biological gender rather than biological self-image, was not discrimination.

The Minnesota Supreme Court’s decision was based largely upon the absence of any evidence that the legislature intended to prohibit restroom designation based upon biological gender.

Goins does not argue that an employer engages in impermissible discrimination by designating the use of restrooms according to gender. Rather, her claim is that the MHRA prohibits West’s policy of designating restroom use according to biological gender, and requires instead that such designation be based on self-image of gender. Goins alleges that West engaged in impermissible discrimination by denying her access to a restroom consistent with her self-image of gender. We do not believe the MHRA can be read so broadly. As the district court observed, where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude that the MHRA contemplates restrictions on an employer’s ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature. We believe, as does the Department of Human Rights, that the MHRA neither requires nor prohibits

¹ The court concluded that the plaintiff was a member of a protected class under the statute. *Id.* at 724.

Michael F. Dennis
October 1, 2007
Page 3

restroom designation according to self-image of gender or according to biological gender. While an employer may elect to offer education and training as proposed by Goins, it is not for us to condone or condemn the manner in which West enforced the disputed employment policy. Bearing in mind that the obligation of the judiciary in construing legislation is to give meaning to words accorded by common experience and understanding, to go beyond the parameters of a legislative enactment would amount to an intrusion upon the policy-making function of the legislature. Accordingly, absent more express guidance from the legislature, we conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA.

Goins v. West Group, 635 N.W.2d 717, 723 (Minn. 2001) (internal citation and footnote omitted).

In addition to this case law, we note that Bill 23-07 will be grafted onto an existing human rights law that does not prohibit discrimination in providing public accommodations that are distinctly private or personal. § 27-10(c).

Thus, if the County Council intends this amendment to require employers and those providing public accommodations to permit, for example, a biological male who has a female self image use of bathrooms and other similar facilities otherwise restricted to biological females, it should express that intention in the legislation. Otherwise, this office must conclude that this amendment neither requires nor prohibits restroom designation according to gender identity/self-image or according to biological gender.

If you have any concerns or questions concerning this memorandum please call me.

ebl

Enclosure (bill)

cc: Rebecca Domaruk, EAA to the CAO
Amanda Mihill, Legislative Analyst
Michael Faden, Senior Legislative Attorney

A07-01618
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OFFICE OF HUMAN RIGHTS

Isiah Leggett
County Executive

Odessa M. Shannon
Director

TESTIMONY ON BEHALF OF THE COUNTY EXECUTIVE
BILL 23-07,
NON-DISCRIMINATION – GENDER IDENTITY

Good afternoon. I am Lois Hackey, Compliance Program Manager in the Office of Human Rights and I am pleased to speak on behalf of Isiah Leggett, County Executive, to support the passage of Bill 23-07 as an addition to the Human Rights and Civil Liberties Law, Chapter 27, Article I of the Montgomery County Code.

For many years, the Office of Human Rights has accepted, investigated and resolved gender identity complaints under our interpretation of the “sex” discrimination provision of the Human Rights and Civil Liberties Law. The addition of specific language to prohibit “gender identity” discrimination would be a welcome addition to County Code because the specific language will eliminate any ambiguity over our interpretation of the existing “sex” discrimination prohibition and clearly proclaim the County’s intention to protect all of its citizens from illegal discrimination regardless of their gender identity.

We do have one suggested amendment to the proposed language. In Section 27-9 (k) on lines 271-273, the sentence reads: “An employer may require an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are not precluded by any provision of state or federal law.” We suggest that the word “nondiscriminatory” be added so that the sentence will read: “An employer may require an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are **nondiscriminatory** and not precluded by any provision of state or federal law.”

As a human rights law enforcement agency, we try to avoid regulating disputes over subjective determinations of reasonableness. However we can determine fairly easily when a practice discriminates against an individual or group of individuals.

Thank you for the opportunity to comment.



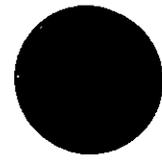
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COMMITTEE ON HATE VIOLENCE

October 1, 2007

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RECEIVED
MONTGOMERY COUNTY
COUNCIL

The Honorable Linda M. Lauer
Clerk of the Council
Office of Legislative Information Services
5th Floor, Council Office Building
100 Maryland Avenue
Rockville, MD 20850

Dear Ms. Lauer:

My name is David A. Vignolo and I am writing on behalf of the Montgomery County Committee on Hate/Violence (COHV). I would like to urge the Council to enact Bill No. 23-07 to prohibit discrimination in housing, employment, public accommodations, cable television service, and taxicab service on the basis of gender identity in Montgomery County.

In addition to our duty to advise the County Council, the County Executive, and County agencies about hate/violence in the county, we are charged with recommending policies, programs, legislation and regulations that we believe are necessary to reduce the incidences of acts of hate/violence. We strongly believe that this legislation if enacted will help our County be a place where individual differences are respected including for people who experience and/or express their gender differently from what most people expect.

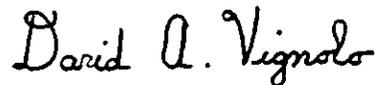
Every person in our county deserves an equal opportunity to make a life for him or herself free from discrimination and violence regardless of the chromosomes with which they were born, the hormones to which they were exposed in the womb, or the medical procedures they have undergone since. In Maryland, transgender people are not included in state laws prohibiting discrimination. Only Baltimore City has a civil rights ordinance covering gender identity and expression. When unchecked, discrimination can lead to chronic unemployment and homelessness, and in turn can render its victims more vulnerable to violence. When discrimination prevents or hinders a person from gaining or keeping employment, many other problems develop. Rent doesn't get paid, which leads to eviction. Transgender individuals may be denied access to social services like

October 1, 2007

shelters or rape crisis centers; refused treatment, ridiculed, or denied recognition of their gender identity by health care professionals; or refused service at restaurants or stores.

The Committee on Hate/Violence looks forward to continuing this dialogue with the Council, and is available to work with Councilmembers on other legislative efforts to reduce the incidences of acts of hate/violence in our county. Please do not hesitate to contact me through the Office of Human Rights at 240-777-8450 if you have any questions.

Very respectfully,



David A. Vignolo
Co-Chair
Outreach Sub-Committee
Committee on Hate/Violence

cc: Amina Makhdoom, Co-Chair, Committee on Hate/Violence
Vincent Lewis, Co-Chair, Committee on Hate/Violence

DAV: dav

**TESTIMONY OF THE
AMERICAN CIVIL LIBERTIES UNION OF MONTGOMERY COUNTY
ON
BILL 23-07, NON-DISCRIMINATION – GENDER IDENTITY
BEFORE THE
COUNCIL OF MONTGOMERY COUNTY
OCTOBER 2, 2007**

.....

The Montgomery County Chapter of the ACLU is pleased to support Bill 23-07.

As the September 11, 2007, staff introduction of this bill noted, it is “unclear whether the current County anti-discrimination law would cover gender identity discrimination.” To resolve any uncertainty, we urge the Council to adopt Bill 23-07.

The need for protection against gender identity discrimination is real. Permit me briefly to recount the story of Diane (previously David) Schroer, as it shows what can happen when the law in this area is not explicit.

Prior to gender reassignment, David had been a U.S. Army Colonel with extensive counter-terrorism experience. These were the exact skills that the Library of Congress' Congressional Research Service needed, and it offered Schroer a position as a terrorism analyst. However, when Schroer informed the Library that she would begin work as Diane, following gender reassignment surgery, the Library withdrew its offer of employment.

Except for the fact that it happened, the Library's decision is virtually unbelievable. In terms of her skills, Diane is no different than David. The only explanation is that the Library apparently did not want to have a transgender employee. Such prejudice has no place in America, and the ACLU readily agreed to bring suit against the Library in her behalf. If you would like to see some of the Court filings, they are available on our website: www.aclu-nca.org.

The Library of Congress is defending against our lawsuit on the ground that federal law does not prohibit discrimination against transsexuals. We are pleased to note that the provisions of the County's Human Rights Act apply equally to the County Government as to private parties. The adoption of Bill 23-

07 will ensure that the County will not tolerate discrimination against transgender persons in its own ranks or by private parties.

One final point: Among the issues that will arise in the implementation of this addition to the Human Rights Act is what constitutes unlawful harassment or a hostile environment because of gender identity. Because the First Amendment is implicated when gender identity discrimination is alleged on the basis of speech, we suggest that the legislative record provide guidance for the interpretation of the act. We recommend the following standard, which comes from a regulation of the District of Columbia Human Rights Commission, (adopted at our suggestion):

OTWOM 30

In determining whether there is unlawful harassment or a hostile environment, the totality of the circumstances surrounding the alleged violation of the Act must be considered, including the nature, frequency, and severity of the behavior, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the alleged victim. Ultimately the standard is an objective one, focusing on whether the behavior was sufficiently severe or pervasive to alter the conditions of the victim's employment, housing, education, access to or use of public accommodations, or relations with a Montgomery County agency or contractor, and to create an abusive environment.

Thank you for the consideration of our views.



1319 Apple Avenue
Silver Spring, MD 20910
301.587.7500
www.equalitymaryland.org

**Testimony of Dan Furmanky Before the County Council
for Montgomery County, Maryland
In Support of Bill 23-07
Non-Discrimination- Gender Identity
October 2, 2007**

My name is Dan Furmanky. I am the Executive Director of Equality Maryland and I also urge you to pass Bill 23-07.

Is this really a problem?

In a recent survey of the Metro Washington area, 42% of transgender individuals are unemployed and 31% have incomes of less than \$10,000 and 19% do not have their own living space. Transsexual individuals often lose their jobs during or after their gender transitions. Without protections from workplace discrimination many transgender individuals in Montgomery County will continue to be pressured to hide their true gender identity to keep their job.

Discrimination in housing and public accommodations is also a large problem for transgender people. Many are evicted or forced to leave home. Landlords may not want to rent to a transgender person. Public facilities such as stores, restaurants and bars may ask transgender people to leave because of the perception that other customers may be upset

The national trend is to protect transgender individuals from discrimination

There are 13 states and more than 90 local jurisdictions with transgender inclusive anti-discrimination laws. Since 2002, every state that has passed an anti-discrimination law has included transgender individuals. These states include, Oregon, Iowa, Washington, New Mexico, Hawai'i, Illinois and Maine. Additionally, New Jersey, Vermont, and the District of Columbia have recently added gender identity and expression to their existing anti-discrimination laws.

Corporate America has been a leader in protecting their transgender employees. 152 of the Fortune 500 companies include gender identity and expression in their anti-discrimination policies, this is up from only 8 of these companies having such policies in 2001. These companies span all industries and include DuPont, Walgreens, Coca Cola, Wells Fargo, CBS and General Motors. Along with these Fortune 500 companies are

more than 3,000 other companies, universities and labor unions that prohibit this form of discrimination.

As you will hear in subsequent testimony today discrimination against transgender individuals is occurring in Montgomery County. I hope we can all agree that employers should be evaluating workers based on their work performance and qualifications and that banks should be extending credit based on objective financial criteria and property managers should be renting apartments to qualified applicants. While, we may agree that this is the way we want things to operate in the county, we know that this isn't always reality. This bill will explicitly tell employers, home sellers, banks, hotels and restaurants that this kind of discrimination is wrong and will not be tolerated in Montgomery County.

I urge you to pass Bill 23-07.

October 1st, 2007

Maryanne A. Arnow
13324 Dovedale Way, Unit # I
Germantown, MD 20874

Good afternoon,

My name is Maryanne Arnow.

I am here today to help expand awareness of a very serious issue affecting the lives of residents of Montgomery County today. I am here to discuss the need for obtaining your support in passing legislation which prohibits any form of discrimination in either hiring, or in the workplace, for all transgender citizens.

I wished last night, that having to even come here to discuss this matter with you, shouldn't be necessary, but that is the whole point. It is, at least for this moment, very necessary to me to discuss this with you. I am personally compelled to try to make any difference that I as a fellow resident, and fellow citizen, can, to ensure that equal human rights for every person should never be a deniable option in the country that we live in.

I believe that it should be a given standard of decency no matter of what race, religion, culture, or background we all come from. I believe that some of you may also still believe that too. That is the vision of America that I understood, and grew up loving in my heart because it inspired me for a hope being given to all people, no matter where we came from.

I am a native resident of the State of Maryland, and have lived in Montgomery County for the last 37 years. I consider this State and this County to be my home, and I deeply love my home. I have been working as a professional Chef for more than 15 years. I have had considerable formal and professional training. By my peers, and all of my clients that have ever known me, I am considered to possess much skill, creativity, and genuine passion for my work.

Since beginning change of gender identity almost 4 years ago, things have been much more challenging in the professional world. Even with considerable background, skills, expertise, and superior qualifications, I've had a great deal more difficulty in finding work, obtaining new clientele, and staying connected with foodservice industry segments which were previously open to me without question or problem.

I have found it difficult to obtain work in more than a dozen different establishments, located right here in Montgomery County, that I have applied for various positions within the last 2 to 3 years.

I have been told repeatedly by managers, and principals of companies that were obviously in position to hire at times I have been applied, that I had a great resume, and very good qualifications. I have always been pleasant, very professional, well-spoken and well-mannered, and very comfortable with myself.

All that being said as of this time, I've been unable to obtain employment from a single one of them that I had spoken with previously. Some wouldn't take or return my calls or be available upon choosing to follow up. I've been told positions were filled, yet told by other staffers that positions were available, and yet I have not been called. I have been turned down by several potential personal Chef clients as well, upon learning that I have changed my gender identity. This is very painful and difficult, especially in light of my talents and my great desire to share those talents with others.

I believe the time for change is now, and have taken time away from work to be here today. I am here because it is important to me as a fellow citizen and a human being. I am not trying to be anything but the best person I can be. I'm still legally married more than 10 years now to a woman that I love very deeply - my best friend in the world, and one that has chosen thus far to stay with me, during the most difficult times in our lives. I risked everything to be true to myself and everyone else - marriage, professional standing, and constant exposure to more ridicule and misunderstanding than I have ever seen before in my life.

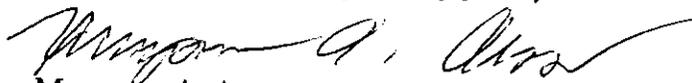
I have no interest in ill or harm towards another person, nor have any real political agenda, other than trying to understand how it may be possible to establish that equal human rights for all people no matter what skin color, race, religion, sexual orientation, or any other fellow citizen and human being, is simply the right, proper, morally, and ethically correct thing to do.

To intentionally deprive or deny any person, any citizen, of access to any equality of rights, calls into question the entire basis for maintaining any "truly" democratic society, and as well, the entire "standard" of morality, ethics, and behaviors by which we live in such a country.

This dialogue must exist in a straightforward, good natured, and intelligent manner as possible, in the hopes that better understanding between people of differing viewpoints, can and will lead to more positive outcomes for all of us.

Thank you for your time and consideration in this most urgent matter. It is greatly appreciated.

Most Sincerely and Respectfully yours,


Maryanne A. Arnou

Good afternoon President Praisner and county council members, I am very grateful for this opportunity to address you. I am Reverend J. Grace Harley, host of God's Will and Grace and GNM news TV programs. I wish to invite you to watch next Sunday at 11 p.m. channel 19 when **I am celebrating 15 years of having been delivered by the grace of God from the transgender lifestyle.**(St. Luke 13:13) please visit www.graceharley.com for more information. **I am concerned that my story and my very ministry which is to all people wanting to live a heterosexual life style could be endangered due to the anti-discrimination clauses and language of bill 23-07.**

I lived for 18 years as a transgendered man until Jesus called me to himself (St. Luke 13:11,12) I once wanted to have sex reassignment surgery. I thank God today, I could not afford it. I later while I was in my 20's I went to my Gynecologist to ask for a hysterectomy. He refused. But I was able to get testosterone injections.

Today I am all woman, body, mind, and soul. I am no longer Joe, no longer do I have the mind of a male. The transgender lifestyle is all psychological. My faith tells me I am a child of God not a creature of evolution. Genesis 1: 27 "So God created man in his own image, in the image of God created he him, male and female created he them."

With this bill, psychotherapists, ministers and pastors counseling a confused transgender youth on biblical principles could not broach the subject of returning to the biological sex because of the prohibition in the Bill against injury to "personal property" which in this case is the identity of that transgendered person. (ie see Bill 27-03 line 276 to 280 (27-22). If this bill should pass **there should be explicit language which would protect such counseling, as well as freedom of speech in this area and religious beliefs.**

Bill 23-07 directs the county to conduct education and other programs to promote equal rights and opportunities of all persons regardless of ... gender identity and to investigate conditions that could result in discrimination... because of gender identity.

If bill 23-07 should pass **there should be explicit language including the ex-transgender community in education and anti-discrimination efforts.**

Bill 23-07 requires education to promote acceptance ie "equal rights and opportunities" for gender identity and requires education against any "religious prejudice". **I am concerned that such education against "religious prejudice" is really religious intolerance.** The bill should **be** changed to correct this.

Montgomery County should not be contributing to the delinquency of minors. Young people will base life altering decisions on this bill. Throughout America's history sodomy laws have changed, psychiatry and psychological opinions have changed. But God's word has not and will never change, and will endure forever.

1 Peter 1:25 "BUT THE WORD OF THE LORD ENDURETH FOREVER".

SHOULD THIS BE PROMOTED **BY Montgomery County?**

From LYNN CONWAY'S INTERNET SITE "promoting Transgender issues."

. This loss of libidinous rewards, combined with accumulating practical, social and emotional difficulties in postoperative life, can lead to serious long-term adjustment difficulties for those who've "made a mistake: ...Renée Richards,Dani Bunten Berry
Sandra MacDougall. Samantha Kane

Summary

Renée Richards

First consider the case of Renée Richards, who transitioned and had SRS in 1975 at age 40, and who was widely outed the next year as the "transsexual tennis player".

There may also have been even deeper issues in Renée's case, as we learn from her autobiography. Renée had been a long-term intense crossdresser, and had gone back and forth about whether to transition. In one early phase, she went on hormones. Then as self-doubts began to set in, she detransitioned off of hormones and even had her new breasts surgically removed!

Furthermore, Richards had also met with a number of young postop women in Paris, and they had all warned her against transitioning. Those girls confirmed that they themselves were happy being complete women. However, they told her that there were "others who were not so lucky". They told her about "one who was not ready, who did not have the true feminine nature" and who "after the surgery went mad". ..

Dani Bunten Berry, a prominent computer game designer who underwent transsexual transition in 1992 at the age of 43:

Dani Buntten Berry Her essay contains her own honest and heartfelt words of advice to others who might be inclined to undergo SRS for the wrong reasons, as she did. Dani was a computer scientist,

Dani Buntten Berry



[1949-1998]

*"Special Note to Those Thinking About a Sex Change,
by Danielle Berry..*

[Don't do it! That's my advice. This is the most awful, most expensive, most painful, most disruptive thing you could ever do. Don't do it unless there is no other alternative. You may think your life is tough but unless it's a choice between suicide and a sex-change it will only get worse. And the costs keep coming. You lose control over most aspects of your life, become a second class citizen and all so you can wear women's clothes and feel cuter than you do now. Don't do it is all I've got to say.

That's advice I wish someone had given me. I had the sex change, I "pass" fine, my career is good but you can't imagine the number of times I've wished I could go back and see if there was another way. Despite following the rules and being as honest as I could with the medical folks at each stage, nobody stopped me and said "Are you honest to God absolutely sure this is the ONLY path for you?!" To the contrary, the voices were all cheerfully supportive of my decision. I was fortunate that the web didn't exist then - there are too damn many cheerleaders ready to reassure themselves of their own decision by parading their "successful" surgeries and encouraging others.

..Then in the final bit of irony, after surgery my new genitals were non-orgasmic ...There's any number of ways to express your gender and sexuality and the only one I tried was the big one. I'll never know if I could have found a compromise that might have worked a lot better than the "one size fits all" sex-change. Please, check it out yourself before you do likewise."

- Danielle Berry -

Sandra MacDougall

The stories of Renee and Dani are not isolated instances. There have been many TS transition failures in recent years. Ever-increasing numbers of late-transitioning intense CD's and self-proclaimed "autogynephiles" are getting letters of consent from careless counselors and then unwisely undergo SRS, without being fully prepared to live as women and without having clear notions of the other options available to them.

For example, see the 4/28/02 Scotsman.com news story about Sandra (Ian) MacDougall (49), entitled the "[Torment of sex change soldier trapped in a woman's body](#)" ([more](#))

Sandra (Ian) MacDougall



"The former member of the Scots Guards says she has suffered verbal and physical abuse since her sex swap operation almost four years ago, and wishes it could be reversed.

But MacDougall now finds herself trapped in a woman's body after she consulted doctors and was told the operation could never be reversed.

MacDougall, who has not had a relationship since going under the knife and expects to be celibate for the rest of her life, has now decided to make the best of her hard-won gender. She said: "Since I had the operation my life has been made a misery by people taunting me whenever I go out."

....Total transition failures of this type should serve as extreme warning signals to intensely fetishistic crossdressers (and to those who self-identify as "autogynephiles", i.e., as sexual paraphilics, according to their therapists) who are considering undergoing SRS.

Samantha Kane

Then we have those who "change sex" on a whim and have the financial means to do so, then afterwards have regrets and sue everyone in sight who "did this to them" - while not taking any responsibility whatsoever for their own actions.

For example, consider the case of "Samantha Kane", and then think about the damage that this impulsive person has done to himself and about the harm he is now doing to trans women everywhere by his irresponsible actions - both in transitioning and then in lashing out as those who tried to help him in the first place.

(Sam Hashimi => Samantha Kane => Charles Kane)



"Sam, as he was"



"Samantha, as he erm was?"



"Charles, as he is today!!!"

"Samantha Kane was, by anyone's standards, a hugely successful woman. She ran her own interior design company; was independent, modern and extraordinarily beautiful. She had a top of-the-range Mercedes, homes in West London and Spain and accounts at Knightsbridge's most exclusive boutiques. Her name made her sound like a character in Dynasty - and her feline looks would certainly have qualified her to be one.

She rubbed shoulders with the likes of the Crown Prince of Dubai, ran with the international set in Monte Carlo and Cannes and shared her bed with a number of fabulously wealthy men.

But something inside Samantha hated being a woman. She found the conversation superficial and the sex second rate. She loathed shopping, disliked gossip and fretted over the endless maintenance

of her face and figure. In short, Samantha Kane desperately missed being one of the boys.

For Samantha used to be Sam, a millionaire with a property empire and a husband with two children. As Iraqi-born Sam Hashimi, he brokered million-dollar deals for Middle Eastern businessmen and flared briefly in newspapers when he launched an unsuccessful takeover bid for Sheffield United FC.

Following the first Gulf War, Sam's business empire collapsed and his marriage ended. At 37, seemingly out of the blue, he decided to become a woman.

He had a sex change operation in December 1997 and spent close to £60,000 on surgery - including £10,000 on genital surgery and £3,000 on breast implants.

Within four years of the operation, Sam realised 'he'd' made a dreadful mistake and has begun the painful process of having more surgery to return to being a man again!

He was in the headlines again, claiming his sex change was 'an act against nature'. He has reported his doctor, consultant psychiatrist Russell Reid ... to the General Medical Council alleging he had a 'cavalier attitude' in recommending him for the gender realignment surgery.

He registered officially as Charles a month ago, wanting to put as much distance as he could between Sam and Samantha.

He cuts a poignant figure of a man. Charles is dressed in a pin-stripe suit and pink tie - an amalgam of man and woman. His hands are soft with clean, shaped nails. He walks and sits in the manner of a woman, but uses the men's lavatories.

He has no facial growth and little male muscle. He says it took four years of hormone treatment and surgery to feminise his body completely. It will take as much time again to return it to manhood. But Charles will never be as Sam was. His genitals will be re-constructed by plastic surgery. His body will never naturally produce testosterone and he will never again grow a beard.

Charles cannot give a convincing reason for becoming a woman. He says he was suffering from a nervous breakdown when gender change was recommended and that he should have been referred

for counselling not surgery.

'I was a traditional male. I was strong and tough in business and the provider for my family. My wife Trudi had never worked a day of her life. I shouldered the complete financial responsibility for her and the children,' he says.

'She'd think nothing of going shopping and spending a few thousand pounds on a dress. I always used to wonder what it would be like to be a woman, to have none of the responsibility I had, to have doors opened for me and have all the privileges a woman seems to have.' Until his breakdown, he was thoroughly heterosexual; a conventional, grey-suited businessman with short dark hair and a moustache.

Born in Baghdad to middle-class parents, he moved to England at 17 where he secured an HND in engineering and married Trudi, a former beauty queen, at 23. He built a property empire, negotiated deals for wealthy Arabs and ran a club in Mayfair. At one time, he says, he had £2 million in the bank.

'I was like any other man,' he says. 'I worked hard and did pretty much what I liked. I enjoyed spending time with men talking about football, the stock market and, of course, girls. I think my sex drive was above average. I had one or two affairs during my marriage...'

Regret after Sex Reassignment Surgery in a Male-to-Female Transsexual: A Long-Term Follow-Up

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This case report describes a four-decade presentation of a non-homosexual gender dysphoric male patient. The case material was collected from two main sources. One of the authors had weekly therapy sessions with the patient over a period of 2 years almost 15 years after sex reassignment surgery. Information was also gained from the patient's medical records covering the period from the early 1960s to the early 1990s. Over the years, the patient fulfilled the criteria for different diagnoses: overanxious reaction of childhood, fetishism and transvestism during adolescence, and transsexualism during adolescence and early adulthood. The purpose of this report was to shed light on aspects of regret, its manifestation in a male-to-female transsexual with psychiatric co-morbidity, and to show the complexity of the process of adjustment when regret is involved. The present case is an argument for a strict interpretation of the Standards of Care provided by the Harry Benjamin International Gender Dysphoria Association in terms of evaluating patients' mental health, apart from the evaluation of the gender identity disorder, and the patients' subsequent need for treatment interventions.

KEY WORDS: gender dysphoria; gender identity disorder; transsexualism; sex reassignment surgery; sexual orientation.

INTRODUCTION

Persistent regret after sex reassignment surgery (SRS), a treatment aimed to resolve a patient's gender dysphoria, must be considered, along with suicide, as the worst conceivable outcome of SRS. To avoid this, groups such as the Harry Benjamin International Gender Dysphoria Association (HBIGDA) provide Standards of Care regarding SRS (Meyer et al., 2001). Regret, considered the most obvious sign of dissatisfaction after SRS, can manifest itself in several ways (Landén, 1999). It may lead to application for retransformation to the original sex; however, instead of the unsatisfactory possibility of physical reversal, a transsexual may choose to stay in the

reassigned role and try to adjust to it (Weitze & Osburg, 1996). Suicide may occur when coping strategies fail.

Regret is quite a complex concept and is influenced by a number of factors including the presence of psychopathology, psychosocial adjustment, the cosmetic and functional results of SRS, the resulting ability to experience pleasure from sexual relations, the existence and quality of a partner, and other interpersonal relations. Lindemalm, Körlin, and Uddenberg (1986) found it useful to differentiate the level of regret in terms of three categories: (1) Definite Regret: patient openly regrets SRS and has applied for retransformation to original sex; (2) Some Regret: indirectly expressed regret and signs of ambivalence about SRS; (3) and No Regret.

Bentler (1976) studied 42 MF transsexuals after SRS, categorized based on their sexual orientation: HS-TS (sexually attracted to males), AS-TS (sexually attracted to neither males nor females), and HT-TS (sexually attracted to females). He found that the HS-TS and AS-TS groups believed that only a small percentage of applicants should receive SRS. According to Bentler, this finding represents a possible hint of regret about their own situation.

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Bouman (1988) found that after SRS 46% of the MF transsexuals never used the vagina for intercourse and that one of the reasons was sexual orientation. Twenty percent of persons in the sample were engaged in lesbian relationships and never used the vagina for intercourse, illustrating that sexual orientation can indirectly affect regret rates when the functional result of SRS is a failure.

The frequency rates for some regret or consistent regret reported in studies since the mid-1980s vary from 30% (Lindemalm et al., 1986) to less than 10% (Blanchard, Steiner, Clemmensen, & Dickey, 1989; Landén, 1999; Lawrence, 2003). Regret raises the question of whether or not the gender identity disorder (GID) has remitted. Marks, Green, and Mataix-Cols (2000) reported five cases of adult GID in whom remission was documented for up to 10 years in response to new sexual relationships and other events.

Factors predictive of regret after SRS have been a focus of research since the 1970s. Dissatisfaction and regret after SRS have been reported to be associated with the following factors: age over 30 years at first request for surgery (Lindemalm, Körlin, & Uddenberg, 1987; Lundström & Wälinder, 1985; Wälinder, Lundström, & Thuwe, 1978); personality disorders, personal and social instability (Bodlund & Kullgren, 1996; Lundström & Wälinder, 1985; Wälinder et al., 1978); secondary transsexualism (Landén, Wälinder, Lambert, & Lundström, 1998; Lundström & Wälinder, 1985; Sörensen, 1981); a heterosexual sexual orientation (Blanchard et al., 1989; Money & Wolff, 1973; Wälinder et al., 1978); poor surgical results (Eldh, Berg, & Gustafsson, 1997; Lawrence, 2003; Lundström, Pauly, & Wälinder, 1984; Ross & Need, 1989); and poor support from the family (Landén et al., 1998; Wälinder et al., 1978).

In-depth reports in the medical literature on the individual gender dysphoric's long-term adjustment in the desired opposite sex role and psychological adjustment after SRS are rare. The present report concerns a four-decade follow-up of a non-homosexual gender dysphoric male, and focuses on this individual's psychosexual development, experience of gender identity, and the significance of life events regarding the outcome. The presentation sheds light on aspects of regret, sources of regret, and the manifestation of regret during an almost 15-year follow-up period after SRS in a patient with psychiatric co-morbidity. The purpose of this report is to present a case belonging to the regret group in order to illustrate factors of clinical significance. Every regret case represents a major clinical and ethical problem. The present case report will hopefully contribute to a growing body of knowledge that in the future will reduce the

number of bad choices for SRS and also the number of regret cases.

CASE REPORT

The case material was collected from two main sources: (1) the first author's weekly therapy sessions with the patient over a period of two years during the late 1990s; and (2) information from the patient's medical records covering the period from the early 1960s to the early 1990s. The material was analyzed in two different ways in accordance with the information sources. The patient's narratives were analyzed by noting the typical or critical elements in her reflections and narratives. The medical records were analyzed by identifying clinical diagnoses that developed and were recorded over the years. Information from childhood, adolescence, and adulthood was obtained from the medical records. This information was often also confirmed in the weekly sessions. At follow-up, the patient's own narratives constituted the main source of information. The patient gave written informed consent.

Childhood

Tony was born in the early 1950s to a married couple in their 20s. The family history showed no known psychiatric or neurological disorders. The delivery was without complications. Tony developed normally; he walked at 13 months and spoke in complete sentences at the age of two years. He was toilet-trained at a normal age. When Tony was three years old, his mother wanted to return to work. She experienced Tony as a burden and felt envious of her husband, who was working. As a preschool child, Tony was anxious and experienced significant problems in relating to other children of the same age. He preferred to play with girls and with dolls. He also liked to dress like a girl. At the same time, he was both technically talented and had a rich fantasy life.

Tony began school at the age of seven years, which is normal in Sweden, but it soon became obvious that he had substantial learning difficulties. Testing revealed rather severe dyslexia but normal intelligence; an IQ of 90 and 98 according to the Swedish versions of the Terman-Merill (1960) scale and the Goodenough (1975) scale, respectively. At school, he received extra support in an "ordinary class", while at home Tony became increasingly aggressive towards his mother. He destroyed furniture, and his mother experienced him as difficult to manage. As she could not handle him, he was admitted to a child psychiatric clinic in the early 1960s, at the age of eight years. Observation and testing showed anxiety, regression,

helplessness, and social disinhibition in relation to others. It was concluded at a ward conference that Tony's mother had wished for a girl, which Tony had perceived, that the mother had difficulty controlling her emotional responses, and that his parents disagreed about the upbringing of their child. During Tony's three-month hospitalisation at the child psychiatric clinic, it was noticed that he wanted to dress like a girl. Tony was discharged with diagnoses of "anxiety and aggression neurosis, psycho-infantilism, and maladjusted boy with a castration complex" (quoted from the medical record).

Upon his return home, Tony wanted to sleep in his mother's bed and put on a diaper before going to bed. He also started to dress in some of his mother's clothes. Shortly thereafter, the parents decided to divorce. Tony was initially admitted to a children's home and then discharged to live with his mother. She complained, however, about his aggressiveness. When his mother remarried, her new husband would not allow Tony to live with them, so Tony consequently moved in with his father. He continued to attend school where he received extra support. In his final two years, he was placed in a special class for children with behavior problems. His teachers experienced him as fearful and anxious, and as having poor contact with other children and odd ideas. When he entered puberty at the age of 12–13, he became interested in his stepmother's underwear. These items were sexually arousing to him and he frequently used them to masturbate (with normal ejaculation).

Adolescence

A child psychiatrist was consulted and Tony's behavior was diagnosed as fetishism. Because of his increasing interest in women's clothes, especially underwear, at the age of 18 years Tony was again admitted to a child psychiatric clinic with transvestism as a possible diagnosis. During this hospitalization, Tony said that he was determined to become a woman, and he requested that his penis be removed immediately. He denied any sexual interest in either men or women. While at the clinic, Tony wore men's clothes but had women's underwear underneath. Oral fluphenazine treatment was started but it was unsuccessful, and Tony soon terminated it. He was discharged with a diagnosis of transsexualism and immaturity.

Tony received sick benefits starting at the age of 20. All efforts to help him establish a working life were unsuccessful; the diagnostic team viewed him as rather psycho-infantile (Lindberg, 1950) and odd. During some periods, Tony's preoccupation with his gender problem and his outbursts of aggression divided the family.

Adulthood

Following his 20th birthday, he visited the psychiatric clinic and for the first time he was dressed entirely as a woman. He could control his affect better, with less expressed aggression. Estrogen treatment was initiated after he started cross-dressing. Tony met a man of the same age, moved in with him, and they became engaged. This fiancé had also experienced gender dysphoria, but after meeting Tony he decided to remain a man and support him. Tony functioned as a housewife. In their sexual relationship, Tony's penis was not involved. The relationship lasted for several years, and this man supported Tony's efforts to obtain sex reassignment. During this period, Tony submitted a formal application for sex reassignment in accordance with newly established legislation regulating sex-change treatment. During the time the couple cohabited, Tony obtained a female first name and the application for sex reassignment was approved, as was the application for SRS. After termination of the relationship, the fiancé moved to another part of Sweden where he applied for sex reassignment, including SRS, which was approved and performed.

After a period of time, Tony entered a new relationship, this time with a woman of the same age. The couple cohabited for some years. Tony performed in the male sexual role in this relationship and they were sexually very active with penovaginal intercourse. Tony told the psychiatrist that she functioned well in the male sexual role. During this period, Tony was less interested in hormonal treatment and took estrogen only sporadically. When the relationship ended, Tony was still under psychiatric care. All efforts to get her into an education or work program were unsuccessful, and her disability benefits were replaced by a disability pension. In a later admission to her doctor, Tony said that she had unconsciously misled both herself and the therapists about her sexuality. She had always felt herself sexually attracted to women and she thought that the reason she wanted to become a girl was that this would give her an opportunity to get closer to girls. Tony wanted to continue in the female role and have a sexual relationship in which she performed as a man with a woman. During the years that followed, Tony wanted to wait before undergoing the approved SRS. Ten years after approval of the application for SRS, Tony wanted the request for SRS to be recalled. She claimed that this was because her transsexual friends who had undergone SRS were disappointed with the results of the surgery. About a year after that, she again applied for SRS. During the investigation for the renewed application, Tony asked that the surgery be performed with such skill that the sensitivity of her genitals would be preserved

and the results would be true to nature both in function and appearance. She also hoped that the surgery would improve her quality of life so that she would no longer need to feel like a deviant person. After the SRS, she hoped to relate better to other people.

Tony underwent SRS in 1987 at the age of 35 years. Surgery was initially postponed because Tony had taken a prescription-free medicine (acetylsalicylic acid) that prolonged bleeding time one week before the planned operation and on the day of admission. Postoperatively, Tony used a vaginal mould for a considerable period of time. She then stopped using the mould because of pain and bleeding problems. At a gynecological examination several months after removal of the vaginal mould, she did not have a functioning vagina. Less than a year after that, Tony visited the doctor dressed as a man. She preferred clothes that gave an impression of authority and power. Following that visit, Tony's contact with the health care system came to an end. After several years, Tony again consulted a doctor because of urinary tract problems. As she expressed ambivalence regarding her SRS, she was later referred to psychiatric care, where she met the first author in the late 1990s.

Follow-Up

Tony complained of a deterioration in her psychological well-being and said, "I'm not a real person." She experienced the results of the SRS as a failure. She felt she was "at the bottom of the heap" and was afraid of other people. She would have liked to feel "above all other persons" and wanted people to be afraid of her instead. Tony felt confused about the fact that before the operation she wanted to dress in women's clothes, while after the operation she wanted to dress in men's clothes. She wanted to know why she had become so fixated with men's clothes that expressed authority and strength, and why she had difficulty relating to young girls. Tony said things like, "I want to be myself, but clothes are the problem" and "I feel like a child who doesn't know up from down." She had very few memories from the time before she reached 12 years of age. However, she had clear memories about how, as a boy of 12–13 years of age, she had become interested in women's underwear, and how these clothes aroused sexual feelings that resulted in masturbation. She returned to an event that occurred when she was 12–13 years of age; it was summertime and the family was in the country. Tony was in the garden with his female cousins and his stepmother. When they started to eat, he was told to "leave the girls alone at the table." He then sat down on

a blanket on the grass, thinking, "You shouldn't be a boy because boys aren't allowed to be with the others."

Tony learned about transsexualism through a newspaper article describing a female-to-male (FM) transsexual. This was the beginning of her interest in sex reassignment. Tony said that she lied most of the time during the investigations before sex reassignment (and SRS). Her transsexual friends gave her "the right answers." Tony said she did not really want her SRS but felt "forced by society." Shortly before submitting the renewed application for SRS, Tony joined a youth group where she made sexual advances towards a young woman. In the social turmoil that resulted, Tony considered suicide but decided to go ahead with the SRS instead. She wished there "was a tunnel she could enter from which she would come out either as a complete anatomical man or a complete anatomical woman." Tony often thought about the time when she had had sexual relationships with women and was able to perform intercourse in the male role. In some of her dreams she was a man again, without female attributes, and was having sex with women. She fell in love with young women who were typically feminine. Tony had contacts with lesbian women but did not feel attracted to them. She said "I'm a man after all."

After the SRS, when Tony dressed in the kind of men's wear for which she had developed a preference, she felt a "strong sense of well-being," without any sexual feelings, and she felt like a "strong person." However, almost 15 years after the SRS, she described her situation in the following way: "I feel an endless longing to be away from here, in another time and another place, to become safe and happy, where I am a man and where I am appreciated and where the man and the woman within me are separated into the two poor people they are. I want to become two persons instead of being one body with two personalities fighting to come out. If I'd had a better life, maybe I would never have changed sex. But not feeling at peace with yourself, feeling that you are not one person but two young persons—one boy and one girl—in an old woman's body in terms of appearance and an old man's body genetically, that is a disaster." At different times during follow-up, the patient was offered psychotropic treatment with setraline and olanzapine, but she refused based on her former "bad experience" with fluphenazine.

DISCUSSION

A heterosexual orientation in biological males is common when older applicants request SRS, often after

having had a transvestitic career. These applicants could be called secondary transsexuals and are subject to several proposed risk factors for regret after SRS. In contrast, Lawrence (2003) found only a few occasional regrets in her study of 232 MF transsexuals after SRS, despite the fact that more than two thirds were aged 40 years or older at the time of SRS, two thirds had been married to a female, and nearly half had been biological parents. However, the participants in Lawrence's study were well adjusted and characterized by personal and social stability, contrary to the case under discussion. Tony had been hampered since early childhood by psychiatric symptoms and, according to her medical records, she had met the DSM-II (American Psychiatric Association, 1968) criteria for Overanxious Reaction of Childhood since her preschool years, and by puberty she met the criteria for Fetishism and Transvestism. In adolescence and early adulthood, Tony met the criteria for Transsexualism according to Wälinder (1967, 1968).

Starting in the early 1970s, Tony was treated at a psychiatric university clinic, but not at the special clinic for transsexual patients. In the 1970s, when Tony wanted to postpone the SRS and told her doctor about her satisfying sexual relationship with a woman of the same age, a leading expert in the field was consulted. He advised caution regarding further steps such as SRS. Although Tony said in the late 1990s that she "mostly lied" during the investigation before the SRS, according to the medical records she told her doctor about her heterosexual orientation, sexual function, and reasons for the sex change. After experiencing a social crisis involving a great deal of distress and anxiety, Tony decided in favor of SRS. According to the medical records, she said before the surgery that she wanted the results of the SRS to be true to nature both in "looks and function."

Poor results of SRS that remind the patient and partner of the patient's transsexual background are an important risk factor for regret (Ross & Need, 1989). Tony often complained that her failed SRS contributed to her feeling of being a "freak." Her gender identity was not stable over time; sometimes she felt like neither a man nor a woman but like a neuter, while at other times she had the feeling of being an individual with two sexes. However, she also commented, "After all, I am a man." At follow-up, Tony expressed strong feelings of being an outsider and of being abandoned by significant others. Clinically, Tony was characterized as being sensitive to stress with easily provoked anxiety, having a tendency for regression, and weak ego boundaries. She was egocentric and exhibited a sense of self that was filled with conflicts, narcissistic traits and, at the same time, strong feelings of inferiority. She had significant problems in relating to

others. Her sense of identity was weak and fluctuating. She had feelings of deprivation and emptiness and complained of being bored. At follow-up, she fulfilled the criteria for Borderline Personality Disorder according to DSM-IV-TR (American Psychiatric Association, 2000).

During follow-up, she had outbursts of regret over her SRS and attributed her painful situation to the SRS. At the same time, she was pleased with the results of epilation and estrogen treatment, resulting in no facial hair. The estrogen treatment had resulted in well developed breasts with which Tony was partly dissatisfied. She was still taking estrogen and said that during the 1990s, when she had no contact with the health care system, she had bought estrogen from transsexual friends. She did not request a prescription for testosterone. Nor did Tony take legal measures to return to the male role, although she preferred male clothing. Concerning regret, Tony appears to fit into the category of "some regret" of Lindemalm et al. (1986). This may be due to the patient's personality and how this impaired her sense of self. During the long follow-up period, the patient's gender identity fluctuated and was never stable. Her wish for SRS was mainly characterized by ambivalence but during a stressful period she decided for and underwent SRS. Her ideal condition, confirmed from the medical records and at follow-up, is living as a female, feminized by hormones, but with male genitals, i.e., she-male status (Blanchard, 1993). During the two years of follow-up, her score on the DSM-IV-TR Axis V for Global Assessment of Functioning was 35. She has never been able to work, and it is our opinion that her situation can be illustrated as follows: "Psycho-social functional capacity seems in general to be independent of whether measures for sex reassignment are taken or not" (Lundström & Wälinder, 1984).

SRS did not resolve Tony's gender dysphoria; instead, it reduced her sexual outlet and pleasure, something she deplored. In her case, SRS could be considered a mistake. At the time of the renewed request for SRS, the patient did not fulfil the criteria for transsexualism according to DSM-III (American Psychiatric Association, 1980) (no stable wish for SRS during a period of two years). According to the SOC of the HBIGDA, "clinicians have increasingly become aware that not all persons with gender identity disorders need or want all three elements of triadic therapy" ("hormones, real-life experience, surgery"). In the case of Tony, awareness of this might have prevented SRS. The present case is an argument for a strict interpretation of the SOC in terms of evaluating the patient's mental health, apart from the evaluation of the gender identity disorder, and the patient's subsequent need for treatment interventions.

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RUTH M. JACOBS, M.D.

Henry
#6

Board Certified Internal Medicine
Board Certified Allergy and Immunology
Board Certified Infectious Disease

15001 Shady Grove Road, Ste. 110
Rockville, MD 20850
(301) 315-9515

October 2, 2007

President Praisner and County Council,

Thank you, for allowing public comment on this important issue.

I am an Infectious Disease Specialist practicing in Montgomery County Maryland. I am board certified in Internal Medicine, Allergy and Immunology (99th percentile), and Infectious Disease (92nd percentile). I am a past president of Shady Grove Hospital Internal Medicine Department and I am listed as a "Top Infectious Disease Specialist" by the Washingtonian magazine.

I became involved in this issue when Montgomery County public schools began to introduce the homosexual and alternative lifestyles without discussing the risks. 46% of black men who have sex with men are HIV positive. 20% of white men who have sex with men are HIV positive.¹ HIV risks are also increased for the transgender community (60% of Black transgenders in one study were HIV positive, 24% had used crack cocaine, 13% Methamphetamine and 4% Heroin²)

There are real safety issues here. I firmly believe in tolerance for all, but such tolerance should not require anyone to suppress or ignore facts.

Because of my concerns, the Citizens for a Responsible Curriculum asked me to represent them on the MCPS committee.

Comments by the American Psychiatric Association about Transgenderism include:

... preoccupation with cross gender wishes often interferes with ordinary activities. Relationship difficulties are common and **functioning at school or work may be impaired**... The disturbance can be so pervasive that the mental lives of some individuals revolved only about those activities that lessen gender distress. They are often preoccupied with appearance... relationships with one or both parents also may be a seriously impaired... especially in urban centers, some males with **the disorder may engage in prostitution, which places them at high risk for human immunodeficiency virus (HIV) infection.** Suicide attempts and **Substance-Related disorders are commonly associated**... roughly 1 per 30,000 adult males and one for 100,000 adult females seek sex reassignment surgery.

I am personally acquainted with the unexpected problems that can result from well intentioned anti-discrimination attempts. As a member of the committee I received threatening e-mails when failing to refer to a transgender by that person's preferred pronoun.

I was further concerned that in the name of tolerance/anti-discrimination the risks of hormone therapy and sex reassignment surgery which are associated with transgenderism were hidden from the students by the MCPS curriculum.

- 1) Does bill 23-07 “create a protected class for transgender people” as per a recent Sentinel article or is it a controversial sweeping entitlement bill protecting cross dressers, transvestites, and practicers of transvestic fetishism(a mental illness) but not protecting Montgomery County residents from unforeseen consequences and complications.
- 2) The proposed bill leaves no cross dresser behind. It’s broad and inclusive Gender Identity definition includes simple behavior, appearance, expression, and image as transgendered. **The only problem is that cross-dressers, most transvestites and those with Transvestic Fetishism(all heterosexual males) do not have Gender Identity disorder.**
- 3) **This bill must not be passed without correction of these issues.** The Gender Identity definition given in the bill is not consistent with the American Psychiatric Association Definition³The APA definition in the Diagnostic and Statistical Manuel recognizes Gender Identity Disorder as a mental illness.
- 4) We all wish to be compassionate to individuals with mental disorders but there are other legitimate rights and interests which must be balanced and considered. There are probably 30 to 40 true transgenders in the county and a million Montgomery county residents.
- 5) This bill should be clarified so that individuals should not be forced unreasonably to employ the mentally ill when to quote the American Psychiatric Association discussion of Gender Identity Disorder: “preoccupation with cross gender wishes often interferes with ordinary activities.” ... “Substance-Related disorders are commonly associated” with Gender Identity Disorder.
- 6) There should be language in bill 2307 explicitly stating that the bill does not entitle male transgenders’ entry into women’s locker rooms, bathrooms, dressing rooms at school, health clubs, public swimming pools etc. The supporters of this bill will state that such is not the intent of the bill. However, the bill states that “ Any place of public accommodation..must not..make any distinction with respect to gender identity.” The ½ million women and female children of Montgomery County should be protected by the County Council explicitly in this bill on this point.

Churchill reminds us of Burke’s Dictum “If I cannot have reform without injustice, I will not have reform.”

I request that you review the following information which could not be covered in the 3 minutes allotted.

- 7) Further concerns about the policy not explicitly protecting women and children’s privacy.
 - a. Any XY male just wanting to visit the woman’s bathrooms or locker rooms would by this bills definition be exhibiting “transgender behavior” and could be protected by this bill. (while others could instead call it voyeurism)
 - b. If you are a female who has had a male inadvertently walk into your bathroom, you don’t feel safe.
 - c. **Women’s Privacy RIGHTS will be disproportionately affected** over men, because there are 3 times more male to female transgenders and thousands more male transvestites including those with transvestic fetishism, male crossdressers, homosexual dressing in drag, and male voyeurs than female. This is a womans issue.
 - d. **Verification issues are alarming.** Instead of this bill enabling the half million women of our county to monitor their own privacy as in the past, now courtesy of bill 23-07 they will be

- e. met with intimidating statements such as “Challenging someone’s gender identity is a form of harassment.”
- 8) On both a state and county level funding has been cut for psychiatric needs. A significant chill could be placed on psychiatric intervention by the bill.
 - 9) **The rights of ex-transgenders are ignored and would be suppressed by the bill.**
 - 10) Physicians and others who are concerned about the medical risks of transgenderism would be suppressed by the bill and instead the county would be forced to promote this high risk lifestyle.
 - 11) **Would Bill 23-07 force the County to promote and protect Transvestite Fetishism, a mental illness?** Under the current definition it would be included as a protected variable. In one study⁴ “almost three percent (2.8%) of men and 0.4% of women reported at least one episode of transvestic fetishism. Separation from parents, same-sex sexual experiences, being easily sexually aroused, pornography use, and higher masturbation frequency were significantly associated with transvestic fetishism. A positive attitude to this sexual practice and paraphilia indicators - sexual arousal from using pain, exposing genitals to a stranger, and spying on others having sex - were particularly strong correlates to the dependent variable”
 - 12) **No one has studied the effects of this issue on children. No one has proven that early introduction of Gender change as normal and healthy is safe for children long term health and for their own gender identity development.** We would be outraged if someone struggling with a mental illness was hired by the schools, yet this bill forces the school to hire a mentally ill person and parents to explain the body mutilation to 5 year old kindergartner when grade teacher Bill demonstrates his mental illness by becoming “Susan”. **The bill should allow reasonable accommodation and should exclude schools and other sensitive areas from mandatory employment. The children of Montgomery County should be protected.**
 - 13) **Freedom of Speech should be protected. With honesty being the best policy, obviously all will try to avoid offending, but no one should be mandated to change pronouns to “protect personal property” (identity) 27-22 line278 – The bill should be amended to protect freedom of speech in this area.**

¹<http://www.cdc.gov/hiv/topics/msm/resources/factsheets/msm.htm>

² The Rose Project summarized from previous studies researched that the African American Male to Female Transgender population have a greater than 50% HIV prevalence ..and found in their local study of 71 African American Transgenders that 60% -42 people were HIV positive. Rose Study: Valerie Rose, Dr. Ph, MPH, Susan Scheer, Ph.D. MPH. SFDPH, Center for AIDS Prevention Studies, UCSF, Sf, CA. 2002

³ The county Definition rejects the true Gender Identity Disorder definition per the Diagnostic and Statistical Manual for Mental Illness American Psychiatric Association (2000 ed) p576-582)

There are two components of gender identity disorder, both of which must be present to make that diagnosis. There must be evidence of a strong and persistent cross gender identification, which is the desire to be or the insistence that one is, of the other sex (Criterion A). This cross gender identification

must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of the sex (Criterion B). The diagnosis is not made if a he individual has a concurrent physical intersex condition (e.g., partial androgen insensitivity syndrome or congenital adrenal hyperplasia) (Criterion C). To make the diagnosis, there must be evidence of a clinically significant distress or impairment in social occupation or other important areas of functioning (Criterion D)

Comments by the American Psychiatric Association

... preoccupation with cross gender wishes often interferes with ordinary activities. Relationship difficulties are common and functioning at school or work may be impaired... the disturbance can be so pervasive that the mental lives of some individuals revolved only about those activities that less than gender distress. They are often preoccupied with appearance... relationships with one or both parents also may be a seriously impaired... especially in urban centers, some males with the disorder may engage in prostitution, which places them at high risk for human immunodeficiency virus (HIV) infection. Suicide attempts and Substance-Related disorders are commonly associated... roughly 1 per 30,000 adult males and one for 100,000 adult females seek sex reassignment surgery.,,

Only a very small number of children with gender identity disorder will continue to have symptoms meet criteria for gender identity disorder in adolescence or adulthood. Typically children are referred around the time of school entry because of parental concern with what they regard is a phase which does not appear to be passing. Most children with gender identity disorder display less overt cross gender behaviors with time, parental intervention, or response from peers. By late adolescence or adulthood about three quarters of boys who had a childhood history of gender identity disorder report a homosexual or bisexual orientation though without concurrent gender identity disorder... Gender identity disorder can (and should) be distinguished from simple nonconformity to stereotypical sex-role behavior.

3 Transvestic Fetishism in the General Population

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Abstract

We used a random sample of 2,450 18-60 year-olds in the general population of Sweden to study the prevalence as well as the social, sexual, and health correlates of transvestic fetishism (sexual arousal from cross-dressing). Almost three percent (2.8%) of men and 0.4% of women reported at least one episode of transvestic fetishism. Separation from parents, same-sex sexual experiences, being easily sexually aroused, pornography use, and higher masturbation frequency were significantly associated with transvestic fetishism. A positive attitude to this sexual practice and paraphilia indicators - sexual arousal from using pain, exposing genitals to a stranger, and spying on others having sex - were particularly strong correlates to the dependent variable.

Testimony of Ashton Phillips

1201 East West Hwy, #415; Silver Spring, MD 20910

10/02/2007

RE: In support of expanding the anti-discrimination code to include gender identity and expression

Two weeks ago, I lost my mother to breast cancer. One of the last things she told me before she died was that she was so proud of me. She also said that when she was little she would sometimes wear boys clothes, and then she shrugged. I bring this up to say that at the end of the day, we are presented now with a simple and easy question. Do we want to discriminate against people solely because of their internal sense of their presence as male or female, or don't we? Do we, in Montgomery County, want to sanction the malicious revocation of our citizens' livelihoods on the basis of something so intimate, so personal, and so *harmless* as gender identity?

In the eulogy I delivered for my mother, I thanked God for the opportunity to learn so much from her during our time together. Chief among the lessons she taught me were to be emotionally honest with myself and others, no matter how strong the pressure to lie or delude myself, and to respect and nurture hope, even in the face of the strongest adversity. Both of these values are relevant to the consideration of this legislation:

Every person who undertakes to live their life in accordance with their profound inner sense of themselves as male or female, when that sense is in conflict with the gender they have been assigned at birth, confronts an intimidating, internal and external wall of pressure to deny the most basic truths we know about ourselves.¹ I speak from personal experience in saying people do not undertake hormone therapy or gender-based surgery on a whim, we do not overcome this wall without first engaging in some serious introspection. But my mother taught me that honesty is the most important human virtue and that self-denial is unhealthy for individuals and for society. So I embraced my sense of myself, even though I knew I was risking ostracism. And I can tell you, I am a fuller, more realized person because of it. I can let go of the confusion and frustration of my adolescence and instead work to be a productive member of society, a happier and healthier person for myself and my family.

My mother also taught me to respect hope even when that which we hope for seems remote and others say it is unattainable. She fought breast cancer for four years. Her doctors told her she was unlikely to make it past a year. Because her cancer had spread to her hip, she was confined to a wheel chair 2 years ago. She told my sister she would walk at my wedding, and despite her chances, she did. I escorted her down the aisle to her seat. We danced together afterwards. She still wears the outfit she wore to my wedding.

Now, I am here today, to honor this lesson my mother taught me. I am here today because I respect hope. I know that, despite all the frailties of the human condition and the imperfections of our political process, *there is a reason for us to be here today*. That we all want to make the world, or at least the small part of it over which we have some control, a better, nobler, more fair place. And despite the impediments to that progress, I hope that together we will see that place made.

And sometimes it is just a matter of grit. The grit to walk, or the grit to do what is right, in the face of easy excuses. I don't come here to suggest that you have any hesitations in passing this legislation. I don't believe any fair minded, emotionally honest person with sufficient information would. I come just to reinforce those predilections. Sometimes, the greatest thing we can do in life is also the most difficult. Voting to amend the anti-discrimination code in Montgomery County isn't difficult in a practical sense – it won't cost the government money, it won't require weeks of labor to see this dream to fruition, it is actually quite simple. Still, I am not naïve, and I do not pretend that bigotry and ignorance do not exist in our society (against transgender people) or that that this ignorance doesn't pressure lawmakers to tolerate discrimination against us. But this, this is the paramount reason we need this legislation. Because discrimination exists, lawmakers need to take a stand, to rise above the bigotries of the ignorant, to respect and nurture the hope that positive change can succeed, to be emotionally honest with ourselves and all the citizens of this county that discrimination on the basis of gender identity is simply wrong, and to make the proper decisions that the people have trusted them with the authority to make.

¹ Science has established that all people are born with a sense of themselves as male or female and that this sense is imprinted on our brains in the womb - that a slight variation in our exposure to various "sex hormones" in the womb will change our sense of ourselves as male or female. Hormone exposure can vary based on, among other things, the external chemicals a mother is exposed to while pregnant. For a detailed discussion, see Dr. Anne Fausto-Sterling's research.

September 20, 2007

Elisabeth A. Shumaker

UNITED STATES COURT OF APPEALS Clerk of Court

PUBLISH

TENTH CIRCUIT

KRYSTAL S. ETSITTY,

Plaintiff-Appellant,

v.

No. 05-4193

UTAH TRANSIT AUTHORITY; BETTY
SHIRLEY, in her individual and official
capacities,

Defendants-Appellees.

AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION OF
UTAH; LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.; NATIONAL
CENTER FOR LESBIAN RIGHTS;
NATIONAL CENTER FOR TRANSGENDER
EQUALITY; THE TRANSGENDER LAW
AND POLICY INSTITUTE; TRANSGENDER
LAW CENTER; EQUAL EMPLOYMENT
ADVISORY COUNCIL,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. NO. 2:04-CV-616-DS)

Erik Strindberg (Ralph E. Chamness and Erika Birch, with him on the briefs),
Strindberg Scholnick & Chamness, LLC, Salt Lake City, Utah, for Plaintiff-
Appellant.

Scott A. Hagen (Michael E. Blue with him on the brief), Ray Quinney & Nebeker, Salt Lake City, Utah, for Defendants-Appellees.

Rose A. Saxe and James D. Esseks, American Civil Liberties Union Foundation and Lesbian & Gay Rights Project, New York, New York; Margaret Plane, American Civil Liberties Union Foundation of Utah, Inc., Salt Lake City, Utah; Cole Thaler, Lambda Legal Defense & Education Fund, Inc., Atlanta, Georgia; Shannon Minter, National Center for Lesbian Rights, San Francisco, California, on the brief for American Civil Liberties Union, American Civil Liberties Union of Utah, Lambda Legal Defense & Education Fund, Inc., and National Center for Lesbian Rights; as Amici Curiae in Support of Plaintiff-Appellant.

Kathryn Kendell, San Francisco, California, and Christopher W. Daley, Transgender Law Center, San Francisco, California, on the brief for National Center for Transgender Equality, Transgender Law and Policy Institute, and Transgender Law Center as Amici Curiae in Support of Plaintiff-Appellant.

Ann Elizabeth Reesman and Laura Anne Giantris, McGuinness Norris & Williams, LLP, Washington, DC, for Equal Employment Advisory Council, on the brief for The Equal Employment Advisory Council as Amici Curiae in Support of Defendants-Appellees.

Before **HENRY** and **MURPHY**, Circuit Judges, and **FIGA**,* District Judge.

MURPHY, Circuit Judge.

I. Introduction

Krystal Etsitty, a transsexual and former employee of Utah Transit Authority (“UTA”), sued UTA and Betty Shirley, her former supervisor, pursuant to 42 U.S.C. § 2000e-2(a)(1) (“Title VII”) and 42 U.S.C. § 1983. In her

*The Honorable Phillip S. Figa, District Judge, United States District Court for the District of Colorado, sitting by designation.

complaint, she alleged the defendants terminated her because she was a transsexual and because she failed to conform to their expectations of stereotypical male behavior. She alleged that terminating her on this basis constituted gender discrimination in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment. The defendants filed a motion for summary judgment and the district court granted the motion. In doing so, it determined transsexuals are not a protected class for purposes of Title VII and the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals. It also concluded that even if a transsexual could state a Title VII claim under a sex stereotyping theory, there was no evidence in this case that Etsitty was terminated for failing to conform to a particular gender stereotype. Etsitty appeals the district court's order granting summary judgment to the defendants. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the district court's grant of summary judgment.

II. Background

Etsitty is a transsexual who has been diagnosed with Adult Gender Identity Disorder. Although Etsitty was born as a biological male and given the name "Michael," she identifies herself as a woman and has always believed she was born with the wrong anatomical sex organs. Even before she was diagnosed with a gender identity disorder, Etsitty lived and dressed as a woman outside of work and used the female name of "Krystal." Eventually, Etsitty began to see an

endocrinologist who prescribed her female hormones to prepare for a sex reassignment surgery in the future. Etsitty made the decision at that time to live full time as a woman. While she has begun the transition from male to female by taking female hormones, she has not yet completed the sex reassignment surgery. Thus, Etsitty describes herself as a "pre-operative transgendered individual."

Nearly four years after Etsitty had begun taking female hormones, she applied for a position as a bus operator with UTA. She was hired and, after successfully completing a six-week training course, was assigned to a position as an extra-board operator. As an operator on the extra board, Etsitty was not assigned to a permanent route or shift. Instead, she would fill in for regular operators who were on vacation or called in sick. As a result, Etsitty drove many of UTA's 115 to 130 routes in the Salt Lake City area over approximately ten weeks as an extra board operator. While on their routes, UTA employees use public restrooms.

Throughout her training period at UTA, Etsitty presented herself as a man and used male restrooms. Soon after being hired, however, she met with her supervisor, Pat Chatterton, and informed him that she was a transsexual. She explained that she would begin to appear more as a female at work and that she would eventually change her sex. Chatterton expressed support for Etsitty and stated he did not see any problem with her being a transsexual. After this

meeting, Etsitty began wearing makeup, jewelry, and acrylic nails to work. She also began using female restrooms while on her route.

Shirley, the operations manager of the UTA division where Etsitty worked, heard a rumor that there was a male operator who was wearing makeup. She spoke with Chatterton and he informed her Etsitty was a transsexual and would be going through a sex change. When Chatterton told her this, Shirley expressed concern about whether Etsitty would be using a male or female restroom. Shirley told Chatterton she would speak with Human Resources about whether Etsitty's restroom usage would raise any concerns for UTA.

Shirley then called Bruce Cardon, the human resources generalist for Shirley's division, and they decided to set up a meeting with Etsitty. At the meeting, Shirley and Cardon asked Etsitty where she was in the sex change process and whether she still had male genitalia. Etsitty explained she still had male genitalia because she did not have the money to complete the sex change operation. Shirley expressed concern about the possibility of liability for UTA if a UTA employee with male genitalia was observed using the female restroom. Shirley and Cardon also expressed concern that Etsitty would switch back and forth between using male and female restrooms.

Following their meeting with Etsitty, Shirley and Cardon placed Etsitty on administrative leave and ultimately terminated her employment. Shirley explained the reason Etsitty was terminated was the possibility of liability for

UTA arising from Etsitty's restroom usage. Cardon similarly explained to Etsitty that the reason for her termination was UTA's inability to accommodate her restroom needs. Shirley felt it was not possible to accommodate Etsitty's restroom usage because she typically used public restrooms along her routes rather than restrooms at the UTA facility. Shirley also testified she did not believe it was appropriate to inquire into whether people along UTA routes would be offended if a transsexual with male genitalia were to use the female restrooms. On the record of termination, Shirley indicated Etsitty would be eligible for rehire after completing sex reassignment surgery. At the time of the termination, UTA had received no complaints about Etsitty's performance, appearance, or restroom usage.

Etsitty filed suit against UTA and Shirley, alleging they had engaged in unlawful gender discrimination, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. She claimed she was terminated because she was a transsexual and because she failed to conform to UTA's expectations of stereotypical male behavior. The defendants filed a motion for summary judgment, 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. The district court granted the motion. In doing so, 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.

III. Analysis

This court reviews a district court's decision to grant summary judgment de novo. *Green v. New Mexico*, 420 F.3d 1189, 1192 (10th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making the determination of whether summary judgment was appropriate, this court views all the evidence and draws all reasonable inferences in favor of the nonmoving party. *Green*, 420 F.3d at 1192.

A. Title VII

In the Title VII context, this court applies the three-part burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).¹ *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005). Under

¹Etsitty contends it is unnecessary for this court to engage in the *McDonnell Douglas* analysis because it is "undisputed" that UTA had a discriminatory motive. See *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993) (noting *McDonnell Douglas* burden-shifting analysis is inapplicable where there is direct evidence of discrimination). When viewed in context, however, the evidence directly supports only the conclusion that Etsitty was terminated because of UTA's concerns regarding her restroom usage, a motive which is not discriminatory for
(continued...)

this framework, the plaintiff must first establish a prima facie case of prohibited employment action. *Id.* If the plaintiff does so, the burden shifts to the employer to articulate a “legitimate, nondiscriminatory reason for its adverse employment action.” *Id.* (quotations omitted). If the employer satisfies this burden, “summary judgment is warranted unless the employee can show there is a genuine issue of material fact as to whether the proffered reasons are pretextual.” *Id.* Because this court concludes transsexuals are not a protected class under Title VII and because Etsitty has failed to raise a genuine issue of material fact as to whether UTA’s asserted non-discriminatory reason for her termination is pretextual, this court concludes the district court properly granted summary judgment on Etsitty’s Title VII claims.

1. Prima Facie Claim

Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1). While Title VII is a remedial statute which should be liberally construed, *see Jackson v. Cont’l Cargo-Denver*, 183 F.3d 1186, 1189 (10th Cir. 1999), it

¹(...continued)

reasons further discussed below. Because Etsitty cannot establish an “existing policy which itself constitutes discrimination,” her claim of unlawful discrimination rests on indirect evidence and the *McDonnell Douglas* analysis applies. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 752 (10th Cir. 2000) (quotation omitted).

should not be treated as a “general civility code” and should be “directed only at discrimination because of sex.” *Oncale v. Sundown Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Thus, the threshold question in this case is whether Etsitty’s claim can properly be construed as a claim that she was terminated or discriminated against “because of sex.” If it cannot, as UTA argues and the district court held, Etsitty has not presented an actionable legal claim under Title VII and summary judgment was properly granted. The question of whether, and to what extent, a transsexual may claim protection from discrimination under Title VII is a question this court has not previously addressed.

On appeal, Etsitty presents two separate legal theories in support of her contention that she was discriminated against because of sex in violation of Title VII. First, she argues discrimination based on an individual’s identity as a transsexual is literally discrimination because of sex and that transsexuals are therefore a protected class under Title VII *as transsexuals*. Alternatively, she argues that even if Title VII does not prohibit discrimination on the basis of a person’s transsexuality, she is nevertheless entitled to protection under Title VII because she was discriminated against for failing to conform to sex stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, establishing that Title VII’s reference to “sex” encompasses both the biological differences between men and women and gender

discriminations, i.e., discrimination-based on a failure to conform to stereotypical gender norms).

a. Transsexuals as a Protected Class

Etsitty first argues she is protected under Title VII from discrimination based on her status as a transsexual. She argues that because a person's identity as a transsexual is directly connected to the sex organs she possesses, discrimination on this basis must constitute discrimination because of sex.

Although this court has not previously considered whether transsexuals are a protected class under Title VII, other circuits to specifically address the issue have consistently held they are not. *See 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). In *Ulane*, the Seventh Circuit explained that the definition of sex should be given its "common and traditional interpretation" for purposes of interpreting Title VII. 742 F.2d at 1086. Based on this traditional definition, the court held the statute's prohibition on sex discrimination means only that it is "unlawful to discriminate against women because they are women and men because they are men." *Id.* at 1085. Because the plaintiff in *Ulane* could show only that she was discriminated against as a transsexual, rather than as a woman or a man, the court concluded Title VII could provide no protection. *Id.* at 1086-87.

This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII. In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII. *See Oncale*, 523 U.S. at 79 (“[S]tatutory 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.”). Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of “sex” encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.

While Etsitty argues for a more expansive interpretation of sex that would include transsexuals as a protected class, she acknowledges that few courts have been willing to adopt such an interpretation. Even the Sixth Circuit, which extended protection to transsexuals under the *Price-Waterhouse* theory discussed below, explained that an individual's status as a transsexual should be irrelevant to the availability of Title VII protection. *Smith v. City of Salem*, 378 F.3d 566,

574 (6th Cir. 2004). Further, this court has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation. *See Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005). Although there is certainly a distinction between a class delineated by sexual orientation and a class delineated by sexual identity, *Medina* nevertheless demonstrates this court's reluctance to expand the traditional definition of sex in the Title VII context.

Scientific 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. *See Schroer v. Billington*, 424 F. Supp. 2d 203, 212-13 & n.5 (D.D.C. 2006) (noting "complexities stem[ming] from real variations in how the different components of biological sexuality . . . interact with each other, and in turn, with social psychological, and legal conceptions of gender"); *cf. Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (stating that the possibility that sexual identity may be biological suggests reevaluating whether transsexuals are a protected class for purposes of the Equal Protection Clause). At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not "discrimination because of sex." Therefore, transsexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of

her status as a transsexual.² See *Plotke*, 405 F.3d at 1099 (requiring plaintiff to show she belonged to a protected class as part of her prima facie showing).

b. Price Waterhouse Theory

Etsitty next argues that even if transsexuals are not entitled to protection under Title VII as transsexuals, she is nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear.³ She argues that although courts have previously declined to extend Title VII protection to transsexuals based on a narrow interpretation of “sex,” this approach has been supplanted by the more recent rationale of *Price Waterhouse*. Etsitty contends that after *Price Waterhouse*, an employer’s discrimination against an employee based on the

²This court is aware of the difficulties and marginalization transsexuals may be subject to in the workplace. The conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals. See *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”). If transsexuals are to receive legal protection apart from their status as male or female, however, such protection must come from Congress and not the courts. See *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (“[I]f the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”).

³Although Etsitty identifies herself as a woman, her *Price Waterhouse* claim is based solely on her status as a biological male. Etsitty does not claim protection under Title VII as a woman who fails to conform to social stereotypes about how a woman should act and appear.

employee's failure to conform to stereotypical gender norms is discrimination "because of sex" and may provide a basis for an actionable Title VII claim.

In *Price Waterhouse*, the plaintiff was a woman who was denied partnership in an accounting firm at least in part because she was "macho," "somewhat masculine," and "overcompensated for being a woman." 490 U.S. at 235 (quotations omitted). One partner advised her she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (quotation omitted). In concluding the plaintiff had met her burden of establishing gender played a motivating part in the employment decision, a plurality of the court explained that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250; *see also id.* at 272-73 (O'Connor, J., concurring in the judgment) (shifting burden to employer where plaintiff established her failure to conform to stereotypes was a substantial factor in the employment decision). The court stated 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." *Id.* at 251.

A number of courts have relied on *Price Waterhouse* to expressly recognize a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms. *See, e.g., Bibby v. Philadelphia Coca*

Cola Bottling Co., 260 F.3d 257, 262-64 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998). In fact, the Sixth Circuit recently relied on *Price Waterhouse* to recognize a cause of action for a transsexual claiming protection under Title VII. See *Smith*, 378 F.3d at 572-75; *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005). In so holding, the court explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, “employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.” *Smith*, 378 F.3d at 574; cf. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (concluding a transsexual could state a claim for sex discrimination under Equal Credit Opportunity Act by analogizing to Title VII); *Schwenck v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (relying on Title VII case law to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act).

This court need not decide whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination “because

of sex” and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex. Instead, because we conclude Etsitty has not presented a genuine issue of material fact as to whether UTA’s stated motivation for her termination is pretextual, we assume, without deciding, that such a claim is available and that Etsitty has satisfied her prima facie burden.

2. Legitimate Nondiscriminatory Reason

Assuming Etsitty has established a prima facie case under the *Price Waterhouse* theory of gender stereotyping, the burden then shifts to UTA to articulate a legitimate, nondiscriminatory reason for Etsitty’s termination. *Plotke*, 405 F.3d at 1099. At this stage of the *McDonnell Douglas* framework, UTA does not “need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.” *EEOC v. Flasher Co.*, 986 F.2d 1312, 1316 (10th Cir. 1992). Rather, UTA need only “explain its actions against the plaintiff in terms that are not facially prohibited by Title VII.” *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (quotation omitted).

UTA has explained its decision to discharge Etsitty was based solely on her intent to use women’s public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia. The record also reveals UTA believed, and Etsitty has not demonstrated otherwise, that it was not possible to accommodate

her bathroom usage because UTA drivers typically use public restrooms along their routes rather than restrooms at the UTA facility. UTA states it was concerned the use of women's public restrooms by a biological male could result in liability for UTA. This court agrees with the district court that such a motivation constitutes a legitimate, nondiscriminatory reason for Etsitty's termination under Title VII.

Etsitty argues UTA's concern regarding which restroom she would use cannot qualify as a facially non-discriminatory reason because the use of women's restrooms is an inherent part of Etsitty's status as a transsexual and, thus, an inherent part of her non-conforming gender behavior. Therefore, she argues, terminating her because she intended to use women's restrooms is essentially another way of stating that she was terminated for failing to conform to sex stereotypes.

Title VII's prohibition on sex discrimination, however, does not extend so far. It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual. As discussed above, however, Etsitty may not claim protection under Title VII based upon her transsexuality *per se*. Rather, Etsitty's claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. However far *Price Waterhouse* reaches, this court cannot conclude it requires

employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes. *Cf. Nichols*, 256 F.3d at 875 n.7 (explaining that not all gender-based distinctions are actionable under Title VII and that "there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards").

The critical issue under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (quotation omitted). Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, UTA's proffered reason of concern over restroom usage is not discriminatory on the basis of sex. Thus, it is not "facially prohibited by Title VII" and may satisfy UTA's burden on the second part of the *McDonnell Douglas* framework.

3. Pretext

Once UTA has advanced a legitimate, nondiscriminatory reason for Etsitty's termination, the burden shifts back to Etsitty to "show there is a genuine issue of material fact as to whether the proffered reason[] [is] pretextual." *Plotke*, 405 F.3d at 1099. "A plaintiff demonstrates pretext by showing either that a

discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1218 (10th Cir. 2003) (quotation omitted). Such a showing may be made by revealing "such weaknesses, implausibilities, inconsistencies, incoherence, or contradictions, in the employer's proffered legitimate reasons for its action that a reasonable factfinder could . . . infer that the employer did not act for the asserted non-discriminatory reasons." *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1267 (10th Cir. 2007) (quotation omitted). Although this court must resolve all doubts in Etsitty's favor, "[m]ere conjecture that the employer's explanation is pretext is insufficient to defeat summary judgment." *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

In support of Etsitty's contention that she was terminated for failing to conform to gender stereotypes and not because of UTA's concern regarding her restroom usage, she relies primarily on the testimony of Shirley and Cardon. Specifically, she points to Shirley's deposition testimony in which she stated, "We both felt that there was an image issue out there for us, that we could have a problem with having someone who, even though his appearance may look female, he's still a male because he still had a penis." Additionally, Cardon testified, "We have expectations of operators and how they appear to the public. . . . [I]f we see something that is considered radical or could be interpreted by the public as being inappropriate, we talk to the operators about that and expect them to

have a professional appearance.” Etsitty argues these statements provide sufficient evidence to allow a rational jury to conclude she was terminated because she was a biological male who did not act and appear as UTA believed a man should.

If these statements stood alone, they may constitute sufficient evidence of pretext to preclude summary judgment. A complete review of the deposition testimony, however, indicates otherwise. Although the specific statements cited by Etsitty address Etsitty’s appearance, they fall within the larger context of an explanation of UTA’s concerns regarding Etsitty’s restroom usage. Immediately after Shirley mentions Etsitty’s appearance, she explains the problem with this appearance is that she may not be able to find a unisex bathroom on the route and that liability may arise if Etsitty was using female restrooms. When Cardon was asked what he found unprofessional about Etsitty’s appearance, he similarly responded with concerns about her restroom usage. Thus, the isolated and tangential comments about Etsitty’s appearance are insufficient to alone permit an inference of pretext. Instead, the testimony of Shirley and Cardon, viewed in its entirety and in context, provides further support for UTA’s assertion that Etsitty was terminated not because she failed to conform to stereotypes about how a man should act and appear, but because she was a biological male who intended to use women’s public restrooms.

In addition to the statements made by Shirley and Cardon, Etsitty argues UTA's asserted reason for her termination must be pretextual because UTA had no reason to be concerned regarding her use of women's restrooms. In support of this claim, Etsitty makes the following arguments: (1) UTA could not be subject to liability, as a matter of law, for allowing a male-to-female transsexual employee to use women's restrooms; (2) UTA had received no complaints regarding Etsitty's restroom usage; (3) UTA made no attempt to investigate whether there were unisex restrooms available; and (4) because Etsitty looked and acted like a woman, no one would know she was not biologically female and therefore could not take offense to her use of women's restrooms.

None of the arguments raised by Etsitty is sufficient to raise a genuine issue as to whether UTA's asserted concern regarding her use of the women's restrooms is pretext. Although Etsitty states in her brief that there is no evidence she intended to use female restrooms, she admitted at oral argument that she was required to use female restrooms and that she informed Shirley of this at their meeting prior to her termination. Thus, UTA's belief that Etsitty intended to use female restrooms was well-grounded. While Etsitty contends this fact should not have given rise to her termination, her argument is more akin to a challenge to UTA's business judgment than a challenge to its actual motivation. Nevertheless, "[t]he relevant inquiry is not whether [the defendant's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in

good faith upon those beliefs.” *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1138 (10th Cir. 2004) (quotation omitted) (alterations in original).

While this court may disagree with UTA that a male-to-female transsexual’s intent to use women’s restrooms should be grounds for termination before complaints have arisen, there is insufficient evidence to permit an inference that UTA did not actually terminate Etsitty for this reason. To the contrary, all of the evidence suggests UTA did in fact terminate Etsitty because of its concerns about her restroom usage. Both at the time of Etsitty’s termination and in subsequent deposition testimony, Shirley consistently explained the termination decision in terms of her concerns regarding liability for UTA and the inability of UTA to accommodate Etsitty’s restroom needs. Although Shirley and Cardon specifically asked Etsitty whether she possessed male genitalia, such an inquiry is not the “smoking gun” Etsitty suggests. Rather, the record is clear that this inquiry was only relevant to UTA’s evaluation of whether Etsitty’s restroom usage could become a problem.

UTA’s legitimate explanation is not made implausible by any of the circumstantial evidence relied on by Etsitty in her brief. The fact UTA had not yet received complaints about Etsitty’s restroom usage at the time of the termination does not mean UTA could not have been concerned about such complaints arising in the future, especially where Etsitty had only recently begun using the women’s restroom. Similarly, Etsitty has pointed to nothing in the

record to indicate the feasibility of an investigation into the availability of unisex restrooms along each of UTA's routes or the likelihood complaints would arise. Therefore, in this case, Shirley's failure to conduct such an investigation has little, if any, bearing on the veracity of her stated concern.

Etsitty's reliance on *Cruzan v. Special School District #1* to call into question UTA's asserted motivation is also misplaced. 294 F.3d 981 (8th Cir. 2002). In *Cruzan*, the Eighth Circuit held that a male-to-female transsexual's use of the women's employee restroom does not create a hostile work environment for purposes of a Title VII sexual harassment claim. *Id.* at 984. Even if such a rule were to be adopted in this circuit and applied to actions arising outside the employment context, however, it would say nothing about whether UTA was nevertheless genuinely concerned about the possibility of liability and public complaints. The question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant. *See Exum*, 389 F.3d at 1137 ("To show pretext, the plaintiff must call into question the honesty or good faith of the [employer].")

Finally, Etsitty argues that because UTA typically resolves complaints about its employees' restroom usage simply by requiring the employees to stop using the restroom for which the complaint was received, Etsitty was treated differently than similarly situated employees. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000) (noting plaintiff may show

pretext “by providing evidence that he was treated differently from other similarly-situated, nonprotected employees”). The prior complaints received by UTA, however, involved problems with the cleanliness of the restrooms and with UTA employees congregating around a hotel swimming pool. An employee’s use of bathrooms designated for the opposite sex is sufficiently different from these prior problems as to make UTA’s treatment of restroom complaints in the past of little significance to the question of pretext in the case at bar.

Thus, there is no evidence in the record of any “weaknesses, implausibilities, inconsistencies, incoherence, or contradictions” in UTA’s asserted legitimate, nondiscriminatory reason for Etsitty’s termination. *Jencks*, 479 F.3d at 1267 (quotation omitted). Etsitty has therefore failed to raise a genuine issue as to whether UTA’s proffered reason is pretextual and the district court properly granted summary judgment on Etsitty’s Title VII claim.

B. Equal Protection

With respect to Etsitty’s Equal Protection claims brought pursuant to § 1983, she makes no arguments aside from her Title VII claim that she was discriminated against because of sex. Instead, she simply makes the conclusory statement that the elements of a disparate treatment claim are the same whether the claim is brought under § 1983 or Title VII. *See Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir. 2006), *overruled on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414-15 (2006) (“In

disparate-treatment discrimination suits, the elements of a plaintiff's case are the same whether that case is brought under §§ 1981 or 1983 or Title VII." (quotation and alterations omitted)). Because Etsitty does not argue there was a violation of the Equal Protection Clause separate from her Title VII sex discrimination claim, her Equal Protection claim fails for the same reasons discussed above. *Cf. Brown*, 63 F.3d at 971 (holding transsexual plaintiff was not a member of a protected class for purposes of the Equal Protection Clause).

IV. Conclusion

For the foregoing reasons, this court **affirms** the district court's grant of summary judgment to the defendants.