



2006 Research Paper Series

**The Gender Nonconformity Theory: A Comprehensive
Approach to Break Down the Maternal Wall and End
Discrimination Against Gender Benders**

By: Julie Greenberg

26 Thomas Jefferson Law Review 37 (2003)

*This paper can be downloaded without charge from the Social Sciences Research
Network Electronic Paper Collection at
http://ssrn.com/abstract_id=897589*

THE GENDER NONCONFORMITY THEORY: A COMPREHENSIVE APPROACH TO BREAK DOWN THE MATERNAL WALL AND END DISCRIMINATION AGAINST GENDER BENDERS

Julie A. Greenberg*

I. INTRODUCTION

Professor Williams' talk and her recent scholarship raise a wealth of issues that I would like to discuss. Originally, I had planned to comment on more than one topic that Professor Williams has raised. In this essay, however, I will not address her concerns about the double shift that women work or how to restructure the workplace to accommodate that double shift. Instead, I am limiting my commentary to one concern: how should feminists approach workplace discrimination issues to provide courts with a comprehensive coherent theory that they can use to address discriminatory acts based upon gender stereotypes.

My comments will focus on how we can develop a theoretical agenda that will provide recovery to all workers who suffer from gender discrimination at work, including female workers hitting the maternal wall and male workers fighting to break down traditional notions about the proper role for breadwinning fathers. I believe that it is critical for feminists and other groups concerned about gender discrimination to develop a theoretical approach that has the power to accomplish two important tasks. First, the theory must have the ability to unite seemingly diverse groups and move us away from a nonproductive sameness/difference debate by encouraging us to focus on our common concerns. Second, the theory must be powerful enough to persuade courts to adopt a more comprehensive view of the acts that constitute gender discrimination.

Professor Williams has expressed concern about the split among feminists that has led to the unproductive recycling of the sameness/difference debate. Professor Williams has referred to

* Associate Dean and Professor of Law Thomas Jefferson School of Law. This essay is based on commentary delivered at the Thomas Jefferson School of Law Third Annual Women and the Law Conference on April 25, 2003.

this division as a disagreement between femmes and tomboys.¹ Femmes often focus on empowering women in traditional female roles, such as motherhood.² Femmes are primarily concerned about how the ideal worker norm, which is not designed with the child bearing/child rearing mother in mind, undervalues activities typically associated with women.³ Femmes would emphasize reform that would enable women to embrace typical female roles and empower women within these roles.⁴ Tomboys, on the other hand, seek to empower women by giving them greater access to traditional masculine roles.⁵ Tomboys would assert that we should focus our energies on breaking down the glass ceiling so that women are allowed access to the same opportunities that are available to men.⁶

I agree with Professor Williams that femmes and tomboys must work together to achieve both goals, and the theoretical approach that I discuss in this essay has the ability to unite these two groups. This theory can be found in the literature relating to and recent courtroom victories achieved by sexual minorities, including gays, lesbians, bisexuals and transgendered persons (LGBTs). Recently, by focusing the analysis on a gender nonconformity theory of workplace discrimination, sexual minorities have achieved a string of victories in cases in which LGBTs had met with complete defeat for decades. I am proposing that feminist theorists and queer theorists (those working on issues related to discrimination against sexual minorities) work together to create a unified approach to combat all types of gender nonconformity discrimination in the workplace. Such an approach has the potential to more effectively combat all types of discriminatory work practices.

1. Joan C. Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279, 316 (1998).

2. Joan C. Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1452 (2001).

3. *Id.*

4. Joan C. Williams, "It's Snowing Down South": *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 815 (2002).

5. Joan C. Williams, *Fretting in the Force Fields: Why the Distribution of Social Power Has Proved So Hard to Change*, 71 UMKC L. REV. 493, 505 (2002).

6. Williams, *supra* note 4, at 815.

II. WHAT DO WORKING MOTHERS AND FATHERS HAVE IN COMMON WITH WORKING LESBIANS, GAYS, BISEXUALS AND TRANSEXUALS?

Professor Williams and I work on what may appear to be two very distinct topics. Professor Williams primarily focuses on the work/family conflict for women who are mothers or have other caregiving responsibilities.⁷ My work focuses on discrimination against gender nonconformists or transgendered people, including gays, lesbians, bisexuals, transsexuals and intersexuals.⁸ At first glance, the problems confronting each group appear to be distinct. In addition, the theories that were originally argued to protect each group from discrimination did not overlap.

Female employees have brought claims when their employers made employment decisions based upon the assumption that a mother with caregiving responsibilities would be unable to meet the employer's ideal worker expectations.⁹ For example, women have sued when they failed to receive promotions, job assignments or other job related benefits because the employer assumed that the woman's caregiving responsibilities would interfere with her workplace responsibilities.¹⁰ Similarly, male employees have brought claims when their employers failed to provide the same benefits (such as paternity leave or flex time) to

7. See, e.g., Joan C. Williams and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003); Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221 (2002); Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411 (2002); Williams, *supra* note 2, at 1452; Williams, *supra* note 4, at 815.

8. See, e.g., Julie A. Greenberg, *Legal Aspects of Gender Assignment*, 13 THE ENDOCRINOLOGIST 277 (2003); *An Interdisciplinary and Cross Cultural Analysis of Binary Sex Categories*, in TRANSGENDER RIGHTS: LAW, CULTURE AND POLITICS (Paisley Currah & Shannon Minter eds., forthcoming 2004); *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917 (2002); *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays and Lesbians*, 24 T. JEFFERSON L. REV. 149 (2002); *Definitional Dilemmas: Male or Female? Black or White? The Law's Failure to Recognize Intersexuals and Multiracials*, in GENDER NONCONFORMITY, RACE AND SEXUALITY: CHARTING THE CONNECTIONS (Wisconsin University Press 2002); *When Is A Man A Man and When Is A Woman A Woman?*, 52 FLA. L. REV. 745 (2000); *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

9. Williams and Segal, *supra* note 7, at n. 309.

10. *Id.*

fathers that they granted to mothers.¹¹ The employer's decision to deny these benefits to working fathers was based on the belief that fathers should meet the employer's ideal worker norm and not fulfill their family caregiving responsibilities.¹²

Gays, lesbians and transsexuals have brought claims when they were sexually harassed or suffered an adverse employment decision, such as firing, when their coworkers or employers learned of their homosexuality¹³ or transsexuality.¹⁴

Although these two types of actions seem to be distinct, the workplace discrimination suffered by both groups is actually two variations of the same theme. Both groups suffer from employment discrimination when employers create workplace environments or make employment decisions based upon gender related stereotypes, or a person's failure to conform to gender norms. I believe that the gender nonconformity theory, which recently has been accepted by more than a dozen state and federal courts in actions brought by sexual minorities,¹⁵ can give us cause for opti-

11. *Id.*, citing *Schafer v. Board of Public Education of the School District of Pittsburgh*, 903 F.2d 243, 244 (3d Cir. 1990).

12. *Id.*

13. *See, e.g.*, *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-333 (9th Cir. 1979); *Higgins v. New Balance*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000).

14. *See, e.g.*, *Sommers v. Budget Marketing Inc.*, 667 F.2d 748, 748 (8th Cir. 1982); *Holloway v. Arthur Andersen*, 566 F.2d 659, 661 (9th Cir. 1977); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 285-86 (E.D. Pa. 1993); *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446, *1 (D.D.C. 1985); *Terry v. E.E.O.C.*, 1980 WL 334, *1 (E.D. Wis. Dec. 10, 1980); *Powell v. Read's Inc.*, 436 F. Supp. 369, 370 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 456 (N.D. Ca. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Township Bd. of Educ.*, 1975 W.L. 302, *1 (D. N.J. 1975), *aff'd mem.*, 570 F.2d 319 (3d Cir. 1976).

15. *See e.g.*, *Rosa v. Park West Bank and Trust*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-65 (9th Cir. 2002); *Ianetta v. Putnam*, 142 F. Supp.2d 131, 133-34 (D. Mass. 2001); *Centola v. Potter*, 183 F. Supp.2d 403, 408-10 (D. Mass. 2002); *Montgomery v. Independent School Dist. No. 709*, 109 F. Supp.2d 1081, 1091-93 (D. Minn. 2000); *Ray v. Antioch Unified School Dist.*, 107 F. Supp.2d 1165, 1170-71 (N.D. Cal. 2000); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-83 (7th Cir. 1997), *vacated* 523 U.S. 1001(1998); *Samborski v. West Valley Nuclear Services*, 1999 WL 1293351, *1 (W.D. N.Y. 1999); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 965 (8th Cir. 1999); (cases allowing plaintiffs who were or were perceived as homosexual or transsexual to state a sex discrimination cause of action based upon a gender nonconformity theory.). In addition, other courts that refused to allow a particular case to proceed because of other defects accepted that gender

mism about the possibilities for workplace reform for sexual minorities as well as fathers and mothers who have caregiving responsibilities.

To understand my optimism about the potential for workplace reform based upon a gender nonconformity theory, a brief overview of the history of actions that have been brought by these groups when they have tried to rely on other theories of recovery is needed. Although both groups have brought actions under a number of federal and state statutes, I will limit my discussion to the approaches taken in the Title VII actions.

Title VII provides: "It shall be an unlawful employment practice for an employer . . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . . .sex."¹⁶ The term sex is not defined within Title VII nor anywhere in its legislative history. Although the statute clearly prohibits discriminatory treatment directed at men because they are men and women because they are women, it is unclear what else it covers. Therefore, a number of different groups have tried to bring their employment discrimination claims under the umbrella of the Act's prohibition against discrimination because of sex.

After the passage of Title VII, homosexuals and transsexuals brought a number of Title VII causes of action based upon disparate treatment or sexual harassment. Before the late 1990s, they lost every case because the courts consistently held that both types of discrimination were not within Title VII's prohibition against discrimination "because of sex."¹⁷ Courts held that discrimination against gays and lesbians was not unlawful sex discrimination, but rather was lawful discrimination based upon sexual orientation, which was not covered in the act.¹⁸ Similarly, courts held that discrimination against transsexuals was not unlawful sex discrimination, but rather was lawful discrimination

nonconformity discrimination constitutes illegal sex discrimination. *See, e.g.,* *Martin v. New York State Dept of Correctional Services*, 115 F. Supp.2d 307 (N.D. N.Y. 2000); *Spearman*, 231 F.3d at 1085; *Carrasco v. Lenox Hill Hosp.*, 2000 WL 520640, *8 (S.D. N.Y. 2000).

16. *See* 42 U.S.C. §§ 2000e-20002-17 (1994), amended by the Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071.

17. *See, e.g.,* *Williamson*, 876 F.2d at 70; *De Santis*, 608 F.2d at 329-330; *Higgins*, 194 F.3d at 259; *Simonton*, 232 F.3d at 36; *Spearman*, 231 F.3d at 1084.

18. *See, e.g.,* *Williamson*, 876 F.2d at 70; *De Santis*, 608 F.2d at 330-331; *Higgins*, 194 F.3d at 261; *Simonton*, 232 F.3d at 36-37; *Spearman*, 231 F.3d at 1085-1086.

based upon "a change of sex" which was also not covered within the act.¹⁹ In other words, when homosexuals tried to argue that sexual orientation discrimination is "sex" discrimination and transsexuals tried to argue that gender identity discrimination is "sex" discrimination, they lost every case.

The motherhood discrimination cases started out on a much better footing than did the cases brought by transsexuals and homosexuals. In 1971, in *Phillips v. Martin Marietta Corp.*,²⁰ the United States Supreme Court held that a mother who was denied a job that was open to childless women and fathers could state a valid Title VII claim because she was subjected to discriminatory treatment that fathers were not subjected to.²¹ Although these employment opportunities were available to childless women, and therefore not all women in this workplace were treated differently from men, the court still held that the differential treatment fit within Title VII's prohibition against sex discrimination.²²

Although Phillips seemed to herald protection in the workplace for mothers, subsequent cases were not always as successful. Recently, as documented in Professor Williams's work, although many courts have allowed some mothers to recover, other mothers have been denied this right.²³ Although mothers originally achieved greater protection than did transsexuals and homosexuals, recently these two later groups, by utilizing a gender nonconformity theory, have attained a string of victories that could be used by working mothers and fathers in their discrimination claims.

19. See, e.g., *Holloway*, 566 F.2d at 663-664; *Sommers*, 667 F.2d at 750; *Voyles*, 403 F. Supp. at 457; *Powell*, 436 F. Supp. at 370-371; *Grossman*, 1975 WL 302 at *1; *Dobre*, 850 F. Supp. at 285-86; *Doe*, 1985 WL 9446 at *1; *Terry*, 1980 WL 334 at *1.

20. 400 U.S. 542 (1971).

21. *Id.* at 544.

22. *Id.*

23. Williams and Segal, *supra* note 7, at 77, citing *Chi v. Age Group Ltd.*, 1996 WL 627580, at *1 (1996); *Martinez v. NBC*, 49 F. Supp. 2d 305, 309-11 (1999); *Fuller v. GTE Corp.*, 926 F. Supp. 653, 656 (1996); *Bass v. Chemical Banking Corp.*, 1996 WL 374151, at *1 (1996); *Piantanida v. Wyman Center, Inc.*, 116 F.3d 340, 341-42 (8th Cir. 1997); and *Troupe v. May Department Store*, 20 F.3d 734, 737 (7th Cir. 1994).

III. THE GENDER NONCONFORMITY THEORY: A REASON TO BE OPTIMISTIC

During the past five years, a number of courts have accepted the argument that discrimination against transsexuals and homosexuals may constitute unlawful discrimination under Title VII because the workers suffered from discrimination because of their failure to conform to gender stereotypes.²⁴ A brief discussion of queer theory, or the theoretical approach being used by scholars who write about sexual minority discrimination, is helpful to understand the gender nonconformity approach.

The theoretical support for a gender nonconformity theory is based upon scientific and social science research that shows that sex, gender, sexual orientation, and gender identity are four distinct concepts.²⁵ Sex refers to biological sex attributes, such as chromosomes and genitalia.²⁶ Gender refers to characteristics typically associated with masculinity or femininity, such as dress, tone of voice, hobbies, and personality traits.²⁷ Sexual orientation is determined by the sex of the desired object of one's affections. Gender identity refers to a person's self identity, in other words, whether the person thinks of himself or herself as a male or a female.

Although these four factors are congruent for the majority of people, millions of people have one or more of the factors that are incongruent with the other factors.²⁸ Because millions of people do not have all congruent features, queer theorists argue that the law needs to separate these concepts and not conflate one factor with another.²⁹

Courts, however, historically have conflated these concepts. This mistaken conflation has led society and legal institutions to believe:

24. See, e.g., *supra* note 15.

25. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); Greenberg, *Defining Male and Female*, *supra* note 8, at 270.

26. Greenberg, *Defining Male and Female*, *supra* note 8, at 271.

27. *Id.* at 274.

28. *Id.* at 275.

29. See Valdes, *supra* note 25, at 20; Greenberg, *Defining Male and Female*, *supra* note 8, at 278-79.

- it is acceptable to presume that men will identify as males, be masculine and prefer to have sex with women;
- it is acceptable to presume that women will identify as females, be feminine and prefer to have sex with men; and
- it does not violate Title VII to discriminate against men or women whose sex, gender, sexual orientation, and gender identity are not all congruent.

What has been underemphasized by some theorists who write about sexual minorities is that their conflation analysis must be expanded to include Professor Williams' concern about gender role performance. Gender role performance in this case relates to whether someone primarily plays the role of a breadwinner or a caregiver.

Therefore, the problem is that employers and courts inappropriately conflate not four distinct concepts, but rather five distinct concepts of sex, gender, sexual orientation, gender identity and gender role performance by assuming:

- biological men (sex) should have masculine traits (gender), desire sex with women (sexual orientation), think of themselves as males (gender identity), and meet the ideal worker norm of breadwinner (gender role performance); while
- biological women (sex), should have feminine traits (gender), desire sex with men (sexual orientation), think of themselves as female (gender identity) and are unlikely to meet employers' needs because of their caregiving responsibilities (gender role performance).

Recently, creative lawyers have made significant progress deconstructing this conflation and have been able to convince some federal and state courts that discrimination based upon gender, sexual identity, sexual orientation, and gender role performance all violate Title VII under a gender nonconformity theory.³⁰ Acceptance of a gender nonconformity theory will result in courts holding that: (1) it is unlawful sex discrimination to make an adverse employment decision based upon an individual's failure to comply with gender related stereotypes (e.g. refusing to grant a paternity leave to a father because he prefers to emphasize his caregiving role); and (2) it is unlawful sex discrimination to make an adverse employment decision based upon a presumption that all individuals will conform to gender related stereotypes (e.g. demoting a mother who has returned from maternity

30. See, e.g., *supra* note 15.

leave because the employer presumes her caregiving responsibilities will interfere with her work related responsibilities).

IV. DECONSTRUCTING THE CONFLATION

To assist courts in understanding why all “sex” discrimination claims should be viewed as gender nonconformity claims, it is important to educate courts about the inappropriate conflation of the distinct concepts of sex, gender, sexual orientation, gender identity and gender role performance. Courts must understand that millions of people do not have all congruent sex/gender features and therefore employers should not be allowed to discriminate against workers merely because their sex/gender features may not conform to the norm.

Thus far, different types of sex discrimination claims have met with different success rates. The only area in which plaintiffs have achieved complete success is when the plaintiff can claim that she was discriminated against because she had the wrong biological attributes. In other words, when a man claims that he was denied a job because he was a man and not a woman, or a woman claims she was denied a job because she was a woman and not a man, the plaintiffs are always successful.³¹ These cases are won because they are not complex. Courts have to deal with only one concept, biologic sex.

All other “sex” discrimination claims have met with mixed success because the courts are uncertain about whether the claim is really based on discrimination “because of sex”³² or discrimination based on something other than sex, which is not prohibited by Title VII.

A. GENDER DISCRIMINATION CLAIMS

In a gender discrimination claim, the plaintiff is asserting that it is unlawful to discriminate against a woman who is too

31. Biologic sex cannot be a reason for denying someone a job unless in accordance with the bona fide occupational qualification (BFOQ) defense, a single-sex job classification relates to the “essence” or “central mission” of the employer’s business. *See, e.g.*, *Olsen v. Marriott Intern., Inc.*, 75 F. Supp.2d 1052, (D. Ariz. 1999) (The “essence of the business” inquiry focuses on whether both men and women possess the skills or abilities required to perform the central tasks of the job or the central mission of the employer.); *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 203, 206 (U.S. 1991); *Dothard*, 433 U.S. at 333 (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971)).

32. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998).

masculine or a man who is too feminine. The success rate in gender discrimination actions is not consistent for masculine women and effeminate men. Since 1989, when the United States Supreme Court decided *Hopkins v. Price Waterhouse*,³³ masculine females have been able to recover. When effeminate men brought analogous sex discrimination claims, they often lost.³⁴ Many courts tended to assume that effeminate men were gay and therefore not entitled to Title VII protection.³⁵ In other words, although courts could clearly see that aggressive women were not necessarily lesbians, they had a harder time deconstructing the conflation that led to the conclusion that all effeminate men are gay. Some recent decisions have allowed recovery for effeminate males by properly viewing the action as one based on gender nonconformity.³⁶

B. SEXUAL ORIENTATION DISCRIMINATION CLAIMS

In a sexual orientation discrimination claim, plaintiffs are asserting that an employer violates Title VII if a man who sexually desires another man or a woman who sexually desires another woman is discriminated against. Traditionally, gays and lesbians lost every case because Congress did not specifically include sexual orientation in Title VII³⁷ and courts decided that sexual desire discrimination is distinct from sex discrimination.³⁸ Recently, some courts have allowed gays and lesbians to state a cause of action based on the theory that discrimination based upon sexual orientation is a form of gender nonconformity dis-

33. 490 U.S. 228 (1989).

34. For a discussion of these cases, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 50 (1995); Stephen J. Nathans, *Twelve years After Price Waterhouse and Still No Success for "Hopkins in Drag": The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 VILL. L. REV. 713, 730-732 (2001).

35. *Id.*

36. See, e.g., *Doe*, 119 F.3d 563; *Schmedding*, 187 F.3d 862; *Nichols v. Azteca*, 256 F.3d 864 (9th Cir. 2001).

37. In addition, proposals to prohibit sexual orientation discrimination have not been approved by Congress. See Employment Nondiscrimination Act of 1996, S.R. 2056, 104th Cong. (1996); Employment Nondiscrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Nondiscrimination Act of 1994, H.R. 4636, 103d Cong. (1994).

38. See, e.g., *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 663; *Dobre*, 850 F. Supp. at 286-287; *Doe*, 1985 WL 9446, at *1; *Terry*, 1980 WL 334, at *1; *Powell*, 436 F. Supp. at 370-371; *Voyles*, 403 F. Supp. at 457; *Grossman*, 1975 W.L. 302, at *1 (D. N.J. 1975).

crimination and is therefore actionable.³⁹ These courts have accepted the assertion that men who want to have sex with other men and women who desire sex with other women are just displaying another form of gender nonconformity, and to discriminate against them for being gender nonconformists constitutes unlawful sex discrimination.⁴⁰

C. GENDER IDENTITY DISCRIMINATION CLAIMS

In a gender identity discrimination claim, transsexuals have asserted that Title VII is violated when an employer discriminates against an employee who is a biologic man who self-identifies as a female or a biologic woman who self-identifies as a male. Historically, all these plaintiffs lost because Congress did not include transsexuals in Title VII and courts decided that gender identity discrimination was not the same as gender or sex discrimination.⁴¹ Recently, however, a few courts have accepted that gender identity discrimination is just another form of gender nonconformity discrimination and therefore constitutes discrimination because of sex.⁴²

D. GENDER ROLE PERFORMANCE DISCRIMINATION CLAIMS

A typical gender role performance discrimination claim would be brought by a woman with dependents who is discriminated against because her employer assumes that she will be unable to satisfy the job requirements because of her caregiving responsibilities, or a man who has been denied the ability to take advantage of flexible work alternatives or parental leave to care for his dependents. These cases have met with mixed success. Some mothers and fathers have been able to recover because courts have rejected the employer's stereotyping,⁴³ but depending upon the jurisdiction and the theory used, not all these cases

39. See, e.g., *Rene*, 305 F.3d at 1067; *Centola*, 183 F. Supp.2d at 408.

40. *Id.*

41. See, e.g., *Holloway*, 566 F.2d at 663-64; *Sommers*, 667 F.2d at 748; *Voyles*, 403 F. Supp. at 457; *Powell*, 436 F. Supp. at 371; *Grossman*, 1975 WL 302, at * 4; *Dobre*, 850 F. Supp. at 286-87; *Doe*, 1985 WL 9446, at * 2; *Terry*, 1980 WL 334, at * 3.

42. See, e.g., *Rosa*, 214 F.3d at 215; *Schwenk*, 204 F.3d at 1201-1202.

43. *Williams and Segal*, *supra* note 7; Joan C. Williams, *Beyond the Glass Ceiling: The Maternity Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1 (2003).

have been successful.⁴⁴ If an employer discriminates against a woman because the employer assumes her caregiving responsibilities will interfere with her work responsibilities or discriminates against a man because the employer believes that a man who wants to satisfy his caregiving responsibilities is not acting as a "proper man" should act, both types of discrimination should be actionable under a gender nonconformity theory.

V. CONCLUSION

It does not matter whether an individual is XX, XY, or has some other chromosomal combination. Chromosomes do not necessarily dictate gender, sexual orientation, gender identity, and gender role performance. We need to continue to educate courts about how employers mistakenly conflate sex, gender, sexual orientation, gender identity and gender role performance. This inappropriate conflation can lead to discriminatory employment practices that, regardless of their form, all constitute "discrimination because of sex" under Title VII.

If we can convince courts that Title VII's prohibition against sex discrimination should be accepted as a ban on any type of discriminatory gender nonconformity work practices, it will protect:

- mothers who hit the maternal wall and are precluded from workplace promotions when their employers presume that their gender performance role as caregivers will interfere with their work;
- fathers who run into the paternal wall when they reject the traditional stereotype of non-caregiving breadwinner;
- women and men who fail to conform to gender stereotypes of femininity or masculinity;
- lesbians, gays and bisexuals who are harassed at work or suffer disparate treatment because they fail to conform to the societal norm of heterosexuality; and
- transsexuals and other transgendered people who are harassed at work or suffer disparate treatment because they fail to conform to societal norms of gender identity.

Scholars, theorists, activists, and lawyers who seek an end to gender discrimination in the workplace should adopt a new unified approach in sex-based discrimination actions. Femmes, tomboys, and sex and gender nonconformists must end the

44. Williams and Segal, *supra* note 7, at 103-104.

dissension that exists among some groups⁴⁵ and work together to end workplace discrimination against all gender benders. We must recognize our common goals and theorize together about how best to educate employers, judges, and legislators about the harms of gender nonconformity discrimination.

45. See, e.g., Williams, *Beyond the Glass Ceiling*, *supra* note 43, for discussion of dissension among feminist groups. See, e.g., Chryss Cada, *Issue of Transgender Rights Divides Many Gay Activists, Transgender Activists Seek a Greater Voice*, BOSTON GLOBE, Apr. 23, 2000, at A8, for discussion of dissension among queer groups.