UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

DANNY LEE MITCHELL, **Docket No. 05-CV-0243 (GL)**

Plaintiff,

v.

AXCAN SCANDIPHARM, INC.,

Defendant.

BRIEF OF *AMICI CURIAE* WOMEN'S LAW PROJECT AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Women's Law Project ("WLP") is a non-profit women's legal advocacy organization with offices in Pittsburgh and Philadelphia. Founded in 1974, WLP works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. For over thirty years, WLP has played a leading role in the struggle to protect women from invidious sex discrimination. WLP served as co-counsel for plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). WLP's work has included litigation under Title VII and Title IX addressing sexual harassment, sex discrimination, and equal opportunity for women.

Amicus Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and people living with HIV, through impact litigation, education, and public policy work. Founded in 1973, Lambda Legal has headquarters in New York and regional offices in Los Angeles, Chicago, Atlanta, and Dallas. Lambda Legal has appeared as counsel or amicus curiae in numerous landmark cases in federal and state courts involving the interpretation and application of national, state, and local anti-discrimination laws, including *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (permitting same-sex sexual harassment claims under Title VII) (*amicus*); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (holding that people infected with HIV are protected against discrimination under the Americans with Disabilities Act) (*amicus*); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that Colorado's ban on laws protecting lesbians and gay men from

discrimination violated the federal equal protection clause) (co-counsel for plaintiffs-respondents); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068, 1072 (9th Cir. 2002) (majority of en banc panel accepting sex stereotyping as a viable theory of sex discrimination under Title VII) (amicus); *Jespersen v. Harrah's Operating Company, Inc.*, 392 F.3d 1076 (9th Cir. 2004) (holding that sex-specific employer make-up requirements did not impose an unequal burden on the sexes), *petition for en banc review granted*, 409 F.3d 1061 (9th Cir. 2005) (counsel for plaintiff-appellant). Because transgender people are frequent targets of employment discrimination on the basis of sex,[1] and because advancing the rights and freedoms of transgender people is an integral part of Lambda Legal's mission (*see, e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (*amicus*); *In re Maloney*, 774 N.E.2d 239 (Ohio 2002) (*amicus*); *Brandon v. County of Richardson*, 653 N.W.2d 829 (Neb. 2002) (co-counsel for plaintiff-appellant)), Lambda Legal has a strong interest in the correct decision of this motion.

[1] For example, a joint study of the transgender community conducted by the Transgender Law Center and the National Center for Lesbian Rights in 2003 found that nearly one of every two respondents had experienced sex-based employment discrimination and that the transgender population was significantly under-employed. Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities* (2003), available at http://www.transgenderlawcenter.org.

SUMMARY OF ARGUMENT

Title VII protects all employees – including transsexual employees – from sex discrimination in the workplace.[2] The Pennsylvania Human Relations Act not only provides similar protections against sex discrimination, but also protects against the disability discrimination that is alleged here.

This case involves an employee who was terminated shortly after she informed her employer of her transsexualism and began her workplace transition from male to female. The complaint alleges that, after Ms. Danny Lee Mitchell ("Plaintiff" or "Ms. Mitchell") adopted an appearance that did not conform with the Defendant's rigid sex stereotypes of how its employees should appear and act, the Defendant subjected Ms. Mitchell to harassment, increased scrutiny, and, ultimately, termination based on pretextual grounds. Such allegations set forth cognizable claims of sex and disability discrimination.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the United States Supreme Court held that Title VII prohibits discrimination against employees who are perceived as not conforming to their employers' narrow sex stereotypes. This form of sex discrimination has been recognized by courts throughout the country, including the Third Circuit. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F. 3d 257, 262-63 (3d Cir. 2001) (holding that claims of sex discrimination under Title VII can be based upon evidence that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender").

[2] The terms "transsexual" and "transgender" often are used interchangeably to describe individuals whose innate sense of being male or female differs from the sex that was assigned to that person at birth. *See* Stedman's Medical Dictionary 1865 (27th ed. 2000) (defining a transsexual person as "[a] person with the external genitalia and secondary sex characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex"). By contrast, a transvestite or crossdresser is simply a man or woman who wears clothing

Courts that have held otherwise base their conclusions on a pre-*Price Waterhouse* line of cases that has been "eviscerated" by *Price Waterhouse* and its progeny. *See Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that male-to-female transsexual employee stated a viable claim of sex discrimination under Title VII). As the Defendant does not dispute that the Pennsylvania Human Relations Act (the "PHRA") provides at least as much protection against sex discrimination as Title VII, Ms. Mitchell also should be found to have stated a valid claim of sex discrimination under the PHRA.

Furthermore, the PHRA's prohibition on discrimination on the basis of handicap or disability, 43 P.S. § 955, in the absence of an explicit exclusion of transsexualism or gender identity disorder, allows transsexual plaintiffs to state valid claims of disability discrimination under that statute. A number of courts and human rights commissions have held that transsexual plaintiffs may sue under state disability protections, and that transsexualism or Gender Identity Disorder can constitute an impairment that substantially limits major life activities.

For these reasons, as well as those contained in the Plaintiff's Opposition to Motion to Dismiss and Supporting Memorandum of Law, *Amici Curiae* Women's Law Project and Lambda Legal Defense and Education Fund, Inc. urge this Court to deny the Defendant's Motion to Dismiss.

ARGUMENT

I. Federal Case Law Clearly Establishes that Transsexual Employees Are Protected Against Sex Discrimination under Title VII.

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer … to discriminate against any individual with

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normally worn by members of the other sex. *See Phillips v. Mich. Dep't of Corrections*, 731 F. Supp. 792, 796 n.5 (W.D. Mich. 1990).

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII is a remedial statute that should be liberally construed. *See Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 181 (3d Cir. 1997). Title VII does not merely prohibit discrimination by men against women, nor is it limited to the specific manifestations of discrimination Congress had most clearly in mind when it enacted Title VII. Rather, Title VII must be construed broadly to address "reasonably comparable evils" such as discrimination involving same-sex harassment or based on sex stereotyping. *See Oncale,* 523 U.S. at 79 (holding that, even though Congress likely was not thinking of male-on-male harassment when it enacted Title VII, the statute must be construed broadly to effectuate its purpose of eradicating sex discrimination in employment); *Price Waterhouse,* 490 U.S. 228 (Title VII prohibits discrimination against a person because he or she fails to conform to sex stereotypes).

In the past, some courts held that transsexual individuals were not protected under Title VII's prohibition of sex discrimination on the grounds that Congress did not intend to cover transsexuals when it enacted Title VII, and that the term "sex" should be narrowly construed to mean a person's biological sex at birth. *See Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) ("we are constrained to hold that Title VII does not protect transsexuals"); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (holding that the term "sex" refers only to a person's biological identity as male or female). In the decades since *Ulane* and *Holloway* were decided, however, a number of both federal and state courts have rejected the reasoning of these older cases as archaic and contrary to the expansive interpretation of Title VII adopted by the United States Supreme Court in *Price Waterhouse* and *Oncale*.

A. All Employees Are Protected Against Discrimination Based on Perceived Non-Conformity with Sex Stereotypes.

In *Price Waterhouse*, the Supreme Court held that punishment for perceived failure to conform to sex stereotypes, including stereotypical norms about dress and appearance, is a form of sex discrimination actionable under Title VII. 490 U.S. at 251. The plaintiff in that case, a female senior manager in an accounting firm, was denied partnership in part because she was considered to be too "'macho'" for a woman. *Id.* at 235. Her employer advised her that she could improve her chances for partnership if she were "to take 'a course at charm school,'" "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* The Supreme Court held that, "[i]n the specific context of sex stereotyping, 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. The Court emphasized 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. In ruling that the type of discrimination faced by the plaintiff was barred by Congress in Title VII, the Supreme Court determined that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (citations omitted).

Similarly, in *Oncale*, the Supreme Court rejected the notion that the scope of Title VII is limited to the particular fact patterns that the enacting Congress specifically intended to cover, as opposed to what the language and purpose of the law reasonably may be construed to cover. 523 U.S. at 79. Noting that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," the Supreme Court instructed lower courts to apply Title VII expansively to cover any situation in which a plaintiff can show discrimination because of sex. *Id.*

Following the Supreme Court's precedents, the Third Circuit has held that plaintiffs can prove claims of sex discrimination by demonstrating that their employer subjected them to adverse employment actions or harassment based on their perceived non-conformity to sex stereotypes. The plaintiff in *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), alleged that he was the victim of same-sex sexual harassment. The court held that claims of sex discrimination under Title VII can be based upon evidence that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender." *Id.* at 262-63. The court ultimately upheld the district court's grant of summary judgment in favor of the employer, in part because Bibby "did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave." *Id.* at 264. The Third Circuit noted that "the gender stereotypes argument is squarely based on *Price Waterhouse*," *id.*, and observed that the sex stereotyping form of sex discrimination has been acknowledged throughout numerous federal circuit and district courts. *Id.; see also Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 862 (3d Cir. 1990) (holding that, "[t]o the extent that [the employer's] comments support a finding that employment decisions were being made on the basis of sexual stereotypes, they support a sex discrimination claim" under Title VII).

Federal district courts within the Third Circuit likewise have followed *Bibby*'s and *Drinkwater*'s holding that discrimination on the basis of perceived non-conformity with sex stereotypes constitutes an impermissible form of sex discrimination under Title VII. *See Kay v. Independence Blue Cross*, 2003 WL 21197289, *4,*5-6 (E.D. Pa. May 16, 2003) (holding that Title VII prohibits "adverse treatment of an employee because his or her appearance or conduct is perceived as not conforming to gender stereotypes," and finding evidence that plaintiff was

discriminated against "for not conforming with norms for the male gender"); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 736-37 (E.D. Pa. 2002) (declining to find evidence of same-sex sexual harassment where plaintiff failed to "raise the inference that his harassers targeted him because he failed to conform with their ideal of masculinity" and failed "to point to anything referring to gender stereotypes and his failure to live up to them").

These rulings are in accord with those of other federal courts around the country that have recognized that employers may not discriminate against employees who do not conform to traditional stereotypes of masculinity or femininity. *Rene*, 305 F.3d at 1068, 1072 (majority of en banc panel accepting sex stereotyping as a viable theory of sex discrimination under Title VII); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex in violation of Title VII); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) (holding that Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles and explaining that "a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex'"), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998)[3]; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (acknowledging that, "just as a woman can ground an action on a

[3] As the Third Circuit explained, "The judgment in *City of Belleville* was vacated and the case remanded by the Supreme Court for further consideration in light of *Oncale* …. It would *see*m, however, that the gender stereotypes holding of *City of Belleville* was not disturbed …. Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question." *Bibby*, 260 F.3d at 263 (internal citation omitted).

claim that men discriminated against her because she did not meet stereotyped expectations of femininity … a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity").[4]

B. There Is No "Transsexual Exception" to the Law Protecting All Employees Against Prohibited Sex Discrimination.

In the wake of *Price Waterhouse* and *Oncale*, a growing number of federal courts rightly have concluded that *Ulane* and its progeny are no longer good law. Recently, for example, the Sixth Circuit decided a case with facts very similar to those alleged in the case at bar. In *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), a firefighter began treatment for Gender Identity Disorder. When he began "'expressing a more feminine appearance'" at work, as prescribed by his doctors, his co-workers harassed him, and his employer subjected him to three separate psychological evaluations and later suspended him. *Id.* at 568-69. *In* upholding Smith's claim of sex discrimination under Title VII, the Sixth Circuit wrote:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that 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.

Id. at 574 (internal citations omitted).

The Sixth Circuit rejected the argument that an individual who is transsexual cannot assert a claim of sex stereotyping, writing that courts that do so "superimpose classifications

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[4] Federal district courts in other circuits similarly have held that employers violate Title VII when they discriminate due to perceived gender non-conformity. *See Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (holding that Title VII prohibits harassment based on a perception that a person does "not conform with … ideas about what 'real' men should look or act like"); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (holding that Title VII prohibits harassment based on a perception that the person "did not conform to [the defendant's] stereotype of how a woman ought to behave").

such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Id.* In holding that the transsexual classification does not preclude a claim that an individual has suffered discrimination based on sex stereotypes, the Sixth Circuit held that *Ulane* and its progeny contained "analyses [that] cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 574-75. The court recognized that Smith's claims were the same as those the Supreme Court found actionable under Title VII: "[D]iscrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." *Id.* at 575. Earlier this year, the Sixth Circuit echoed its holding in *Smith* in another employment discrimination case involving a transsexual plaintiff. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that plaintiff, a male-to-female transsexual, "established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes").

Although the Defendant relies upon the Ninth Circuit's decision in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), that holding has been expressly renounced by the Ninth Circuit in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000). In *Schwenk*, the Ninth Circuit held that transsexual individuals are protected under the Gender Motivated Violence Act ("GMVA") by analogizing to the Supreme Court's interpretation of Title VII in *Price Waterhouse* and *Oncale*. Crystal Schwenk was a transsexual prisoner who sued after being

assaulted by a guard. On appeal, the guard argued that sex discrimination laws do not protect transsexuals. The defendant relied upon the Ninth Circuit's 1977 decision in *Holloway*, which, like *Ulane*, held that the term "sex" in Title VII refers only to a person's biological identity as male or female. *Schwenk*, 204 F.3d at 1201. The Ninth Circuit rejected the guard's argument and repudiated its prior reasoning in *Holloway*:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse*, … the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman" – that is, to conform to socially-constructed gender expectations…Thus, under *Price Waterhouse*, "sex" under Title VII encompasses both sex – that is, the biological differences between men and women – *and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.

Id. at 1201-02 (emphasis in original).[5] Accordingly, the Ninth Circuit concluded that Schwenk had stated a viable sex discrimination claim under GMVA and that "the evidence offered by Schwenk tends to show that [the guard's] actions were motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor." *Id.* at 1202. Similarly, the First Circuit applied the principles in *Price Waterhouse* in reinstating a claim brought under the Equal Credit Opportunity Act by a biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was dressed in "traditionally feminine attire." *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000).

[5]"'Gender' has often been used to distinguish socially- or culturally-based differences between men and women from biologically-based sex differences, but we have not considered 'sex' and 'gender' to be distinct concepts for Title VII purposes." *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3rd Cir. 1999).

Post-*Price Waterhouse*, only one federal district court in the Third Circuit has addressed the issue of whether a Title VII claim may be brought by a transsexual employee discriminated against on the basis of sex. *Dobre v. National Railroad Passenger Corporation*, 850 F. Supp. 284 (E.D. Pa. 1993), involved an AMTRAK employee who notified her employer that she intended to transition from male to female. She asserted that AMTRAK discriminated against her "while [she was] in the process of transforming her body to conform with her psychological sexual identity" by, *inter alia*, requiring her to dress as male, demanding that she provide a doctor's note in order to dress as female, and moving her desk out of the view of the public. *Id.* at 286. In its decision, the district court relied solely on the *Ulane* and *Holloway* line of cases to support its holding that "Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism." *Id.* at 286-87. The court made no reference to *Price Waterhouse* in its decision, nor did it acknowledge the existence of Title VII's prohibition on discrimination based on perceived failure to conform to sex stereotypes. This decision predated *Bibby* and failed to cite any post-*Price Waterhouse* case law from within the Third Circuit that recognizes harassment or adverse employment actions taken as a result of perceived failure to conform to sex stereotypes as forms of sex discrimination under Title VII. As the Sixth Circuit wrote in *Smith*:

> [T]he approach in *Holloway* … and *Ulane* … has been eviscerated by *Price Waterhouse*…. By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.

Smith, 378 F.3d at 573 (collecting cases, including *Bibby*).

The *Dobre* court's holding is not binding on this court and must be rejected. More recent case law following *Price Waterhouse*, including *Bibby* and *Bianchi*, properly recognizes the viability of Title VII claims of discrimination based on perceived non-conformity with sex stereotypes. Furthermore, a growing number of circuit court decisions demonstrate that transsexual plaintiffs who are subject to adverse employment actions or harassment after they commence transition from the sex they were assigned at birth to the sex with which they identify properly may sue for sex discrimination under Title VII.

As the case law cited above amply demonstrates, plaintiffs who present evidence that they were subjected to adverse employment action based on an employer's belief that they "did not conform to the stereotypes of [their] gender," *Bibby*, 260 F.3d at 262-63, state a claim of sex discrimination under Title VII, and no exception exists for workers who are transsexual. It is not necessary for the complaint in this case to specifically allege that the Defendant terminated Ms. Mitchell due to its perception that she failed to conform to sex stereotypes. Notice pleading requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *see also Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985) (courts must liberally construe the allegations of the complaint).[6] Moreover, a grant of the Defendant's Motion to Dismiss on Ms. Mitchell's Title VII claim could be construed as an indication that no plaintiffs who are transsexual can present a valid claim of sex discrimination under Title VII, creating an extraordinary and unjust barrier for such plaintiffs. Ms. Mitchell has alleged discrimination on the basis of sex sufficiently, and should be allowed to present evidence in support of that allegation.

[6] At the very least, Ms. Mitchell should be granted leave to amend her complaint in order to allege in greater specificity that the Defendant terminated her due to its perception that she failed

II. The Pennsylvania Human Relations Act Also Protects Employees Against Discrimination Based on Perceived Non-Conformity with Sex Stereotypes.

Post-*Price Waterhouse* case law applying the Pennsylvania Human Relations Act's proscription of sex discrimination, 43 P.S. §§ 951-963 (hereinafter "PHRA"), likewise has affirmed the viability of sex-stereotyping claims of sex discrimination under that statute. *See Bianchi*, 183 F. Supp. 2d at 734 (simultaneously examining plaintiff's Title VII and PHRA sex discrimination claims for evidence of sex stereotyping); *Kocsis v. Levitz Home Furnishings, Inc.*, 2004 WL 1175535, *1 (E.D. Pa. May 25, 2004) (holding that whether harassment was motivated by a belief that plaintiff "did not conform to stereotypes of his . . . gender" constituted a material dispute to plaintiff's Title VII and PHRA sex discrimination claims); *Collins v. TRL*, 263 F. Supp. 2d 913, 919 (M.D. Pa. 2003) (noting that both Title VII and PHRA can be violated by taking adverse action based on perceived non-conformity to sex stereotypes). These rulings are consistent with a growing body of judicial and administrative decisions from other jurisdictions recognizing that state anti-discrimination statutes that prohibit sex discrimination can protect transgender people from discrimination. *See, e.g., Lie v. Sky Publ'g Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002); *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super.), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. 2000); *Millett v. Lutco, Inc.*, 2001 WL 1602800 (Mass. Comm'n Against Discrimination 2001); *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div.), *cert. denied*, 785 A.2d 439 (N.J. 2001); *Rentos v. OCE-Office Sys.*, 1996 WL 737215 (S.D.N.Y. 1996); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

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to conform to sex stereotypes. *See Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984) (noting federal courts' "liberal amendment philosophy" for complaints).

It is undisputed that the sex discrimination provisions of the PHRA offer at least as much protection as Title VII, and that a similar framework governs judicial analysis of both laws. Furthermore, it cannot be gainsaid that federal courts within and beyond the Third Circuit recognize that harassing an employee or taking adverse employment actions based on perceived non-conformity to sex stereotypes constitute forms of sex discrimination prohibited by Title VII, and that federal district and circuit courts have held that transsexual plaintiffs may bring such claims under sex discrimination laws. *Dobre*'s holding to the contrary, that a transsexual plaintiff cannot make out a claim under the PHRA, is infected with the same error as its Title VII holding. *Dobre* relies entirely upon *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987), a case that predated *Price Waterhouse* by two years and based its holding that the term "sex" in the PHRA does not include transsexuals upon *Ulane* and *Holloway*, a line of cases with no vitality after *Price Waterhouse*. Therefore, for the same reasons that the Defendant has failed to show that Ms. Mitchell has not stated a claim of sex discrimination under Title VII, the Defendant likewise has failed to meet its burden of showing that Ms. Mitchell states no sex discrimination claim under the PHRA.

III. Plaintiff's Claim that the Defendant Terminated Her on the Basis of Her Gender Identity Disorder States a Valid Claim of Disability Discrimination under the Pennsylvania Human Relations Act.

The PHRA prohibits disability discrimination, which encompasses the claims made by the Plaintiff here. The PHRA prohibits discrimination on the basis of an individual's non-job related handicap or disability. 43 P.S. § 955. A "non-job related handicap" is "a handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in." 16 Pa. Code § 44.4. A "handicapped or disabled person" is one who has "a physical or

mental impairment which substantially limits one or more major life activities"; "a record of an impairment"; or who is "regarded as having an impairment." *Id.* The PHRA's definition of a "handicapped or disabled person" is substantially identical to the definition of an individual with a disability contained in the federal Americans with Disabilities Act (hereinafter "ADA").[7] However, the ADA explicitly excludes from its coverage "transvestism," "transsexualism" and "gender identity disorders not resulting from physical impairments," 42 U.S.C. § 12211(b), while the PHRA contains no similar exclusion.

Ms. Mitchell avers that she has been diagnosed with Gender Identity Disorder (hereinafter "GID"). The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994) (hereinafter "DSM-IV") recognizes GID as a mental health condition. According to the DSM-IV, there are three components of GID: (i) "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex"; (ii) "[t]here must also be evidence of that persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex"; and (iii) "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Gender dysphoria, a term used interchangeably with GID, refers to the generalized discomfort or unease many transsexuals experience with the sex assigned to them at birth.

Pennsylvania is one of several states that protects against disability discrimination and does *not* exclude GID as a potential disability, as the ADA does. A number of courts and agencies in jurisdictions where disability discrimination laws do not contain GID exclusions have interpreted those laws to be inclusive of transsexual plaintiffs who have a disability as a

[7] 42 U.S.C. § 12102 defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

result of GID. *See Enriquez*, 777 A.2d at 376 (holding that "gender dysphoria is a recognized mental or psychological disability that can be demonstrated psychologically by accepted clinical diagnostic techniques and qualifies as a handicap under the [New Jersey Law Against Discrimination]"); *Doe v. Boeing Co.*, 846 P.2d 531, 536 (Wash. 1993) (holding that gender dysphoria "is a medically cognizable condition with a prescribed course of treatment" and thus may be covered by state disability discrimination law); *Doe v. Bell*, 194 Misc. 2d 774 (N.Y. Sup. 2003) (holding that plaintiff's GID was a disability within the meaning of New York Human Rights Law).[8]

Furthermore, at least one court with a definition of disability identical to that contained in the PHRA has held that GID can constitute an impairment that limits major life activities. *See Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397, at *6 (Mass. Super. 2002) (holding that plaintiff's contention that her GID substantially limited her major life activities "is supported by the DSM-IV…. Even putting aside the diagnosis of gender identity disorder, the need for ongoing medical care in the form of psychotherapy and hormone treatments may qualify as a substantial limitation on its own…. [W]hether an individual's gender identity is characterized as psychological, neurological, or endocrinological, it is certainly a health condition for some transsexuals"); *see also Doe v. Electro-Craft Corp.*, 1988 WL 1091932, *5 (N.H. Sup. Ct. 1988) ("it goes without saying that securing happiness and pleasure, avoiding depression, insuring one's personal safety, and preserving one's life are vital major life

[8] *See also Jette v. Honey Farms*, 2001 WL 1602799 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (holding that transsexual people are protected by state law prohibition against disability discrimination); *Evans v. Hamburger Hamlet & Forncrook*, 1996 WL 941676 (Chi. Comm'n on Human Relations 1996) (denying defendant's motion to dismiss disability claim brought by transsexual plaintiff); *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hearings 1991) (holding that an individual with gender dysphoria was within the

activities. They are the very sort of activities which DSM III suggests are impaired by the characteristics of transsexualism").

The *Dobre* court considered the application of the PHRA's disability protections to a transsexual plaintiff, but determined that the plaintiff in that case lacked any physical impairment because she "did not allege in the complaint that she suffers from any organic disorder of the body."[9] 850 F. Supp. at 289. This reasoning overlooks a growing body of scientific research indicating that transsexualism may be caused by biological or physiological factors that are not yet fully understood.[10]

Dobre also rejected the argument that the plaintiff suffered from a mental impairment as that term is defined in the PHRA. Although conceding that transsexualism is a "diagnosable condition," *id.*, the court concluded that transsexualism was not "inherently prone to limit major life activities," and is distinguishable on that basis from the specifically enumerated mental impairments in 16 Pa. Code § 44.4(ii)(A), such as learning disabilities. *Id.* This reasoning reveals a misapprehension of the effects of GID and of the "major life activities" it often implicates. For example, caring for one's self is a major life activity under the PHRA. 16 Pa. Code § 44.4(ii)(B). Many transsexuals require regular and ongoing medical management, including daily or weekly hormone treatment. Without such medical care, these individuals

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disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability).

[9] *Dobre*'s holding that the PHRA excludes transsexualism is echoed in *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 694 A.2d 1134 (Pa. Commw. Ct. 1997). However, *Holt*'s analysis is even more cursory than that in *Dobre*; the court summarily concludes that transsexualism does not affect any bodily function or limit any major life activity, and omits all discussion of the diagnosis or treatment of the plaintiff's transsexualism.

[10] *See*, e.g., J.-N. Zhou, M.A. Hoffman, L.J. Gooren, D.F. Swaab, *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 Nature 68-70 (1995) (concluding that "gender identity alternations may develop as a result of an altered interaction between the development of the brain and sex hormones [in utero]").

would suffer serious, adverse effects from their condition, including detriment to their physical and psychological health.[11] The need for regular health care over the course of a lifetime as the result of having an impairment is likely to substantially limit the major life activity of caring for one's self.[12] Moreover, the Supreme Court has recognized that statutory language regarding substantial limitation of a major life activity is "broad" and encompasses more than "traditional handicaps." *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5 (1987).

Furthermore, *Dobre* incorrectly held that a mental impairment must "inherently" limit a major life activity in order to establish a prima facie case under the PHRA. 850 F. Supp. at 289. There is no such requirement. All that is required is that a mental or physical impairment be present and that, in that individual, the impairment substantially limit a major life activity. *See City of Pittsburgh, Dep't of Personnel and Civil Service Comm'n v. Pa. Human Relations Comm'n*, 630 A.2d 919, 922 (Pa. Commw. Ct. 1993). Many conditions cause a wide range of health consequences, and judicial determination of whether such conditions constitute mental or physical impairments that substantially limit major life activities must be undertaken on an individualized basis. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999) (holding that

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[11] *See* Harry Benjamin International Gender Dysphoria Association, *Standards of Care for Gender Identity Disorders, Version Six* (Feb. 2001) (available online at http://www.hbigda.org/soc.cfm). First published in 1979, the Standards of Care provide a consensus of current sound medical practice regarding hormonal therapy regimens, surgical strategies, and related treatment of patients with gender identity disorder. *See also Kosilek v. Maloney*, 221 F. Supp. 2d 156, 158 (D. Mass. 2002) (recognizing Harry Benjamin Standards as legitimate protocols used by qualified professionals to treat GID).

[12] *Dobre*'s assertion that the ADA's exclusion of transsexuals is merely a clarification that should be imported into interpretations of the PHRA ignores the fact Congress must have believed that the general language defining disability could permit claims brought by transsexuals or it would have had no reason to insert an exclusion, and that the Pennsylvania legislature could have added a similar exclusion to the PHRA, but declined to do so. *See Lie*, 15 Mass. L. Rptr. at *6 (finding it "compelling … that this state's legislature has never *see*n fit" to exclude transsexualism from state disability nondiscrimination law).

"whether a person has a disability under the ADA is an individualized inquiry"); *City of Pittsburgh*, 630 A.2d at 922 (reviewing medical evidence and holding that plaintiff's "back abnormality" did not constitute a physical impairment that substantially limited any of his major life activities under PHRA); *Pennsylvania State Police v. Pennsylvania Human Relations Comm'n*, 457 A.2d 584, 589 (Pa. Commw. Ct. 1983) (upholding Commission's determination that plaintiff's allergic rhinitis did not limit any of her major life activities).[13]

Finally, Ms. Mitchell's complaint should be found to have stated a claim under the provision of the PHRA that prohibits discrimination against those who are "regarded as having an impairment." 16 Pa. Code § 44.4(ii)(D). As the U.S. Supreme Court recognized in the ADA context, even where an impairment does not itself diminish an individual's capabilities, it "could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *See Arline*, 480 U.S. at 283. Ms. Mitchell sufficiently has alleged that the negative reactions of her employer to her transsexualism resulted in adverse employment action and constituted impermissible discrimination under the PHRA.

For the reasons described above, the Plaintiff's complaint should be found to have stated a claim for which relief can be granted under the section of the PHRA prohibiting discrimination on the basis of disability. The Defendant's motion to dismiss this claim accordingly should be denied.

[13] This Court's dismissal of Ms. Mitchell's disability discrimination claim could be construed as an indication that Gender Identity Disorder can never be considered a disability under the PHRA, a holding that is clearly out of line with the requirement that courts undertake an individualized determination of whether an impairment substantially limits a plaintiff's major life activities.

CONCLUSION

In ruling upon the Defendant's Motion to Dismiss, this Court should be guided by the Supreme Court's conclusion that Title VII must be interpreted to fulfill Congress's intent to strike at the entire spectrum of forms of discrimination based on sex. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). *Price Waterhouse* and *Oncale* unequivocally reject the notion that the scope of Title VII is limited to what the enacting Congress specifically intended to cover. The narrow interpretation urged by the Defendant – that "sex" means no more than an individual's biological sex at birth – runs contrary to widespread jurisprudence in the wake of those cases. In the words of the Sixth Circuit, "discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." *Smith*, 378 F.3d at 575. As a result, the Plaintiff should be found to have stated viable sex discrimination claims under both Title VII and the PHRA. Furthermore, Ms. Mitchell should be found sufficiently to have pled that her Gender Identity Disorder constitutes a disability and that the Defendant's actions violated the PHRA's prohibitions on disability discrimination.

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