Appeal No. 10-14833-D/No. 15015-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SEWELL R. BRUMBY,

Defendant/Appellant

v.

VANDIVER ELIZABETH GLENN, f/k/a/
GLENN MORRISON

Plaintiff/Appellee

On Appeal from the United States District Court
For the Northern District of Georgia, Atlanta Division

Brief of Appellee Vandiver Elizabeth Glenn

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1and Fed. R. App. 26.1, and 28(a)(1).1, Plaintiff/Appellee Vandiver Elizabeth Glenn certifies that the following is a complete list of the Trial Judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party.

- Brumby, Sewell, Defendant/Appellant
- Glenn, Vandiver Elizabeth, Plaintiff/Appellee Vandiver Elizabeth Glenn
- Hair, Nichole L., counsel for Defendant/Appellant Sewell Brumby
- Hall Booth Smith & Slover, P. C., Counsel for Defendant/Appellant Sewell Brumby
- Lambda Legal, Counsel for Plaintiff/Appellee Vandiver Elizabeth Glenn
- Nevins, Gregory, Counsel for Plaintiff/Appellee Vandiver Elizabeth Glenn
- Sheinis, Richard N., counsel for Defendant/Appellant Sewell Brumby
- Story, Richard, United Stated District Court Judge

There are no publicly traded companies that have an interest in the outcome of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

ARTICLES

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellee Vandiver Elizabeth Glenn submits that oral argument is appropriate in this case, pursuant to the presumption that oral argument is proper absent the applicability of one of the exceptions set forth in Federal Rule of Appellate Procedure 34(a)(2). *See also* 11th Cir. Rule 34-3(b).

JURISDICTIONAL STATEMENT

Glenn concurs with Defendant/Appellant's jurisdictional statement, with this addition: Glenn timely filed her Notice of Appeal on October 27, 2010. Fed. R. App. P. 4(a)(3).

STATEMENT OF THE ISSUES

The issue before the Court is whether the District Court correctly determined that defendant/appellant Sewell R. Brumby's firing of Glenn because she intended to present as a female at work was based on sex. There are no other issues to consider regarding Brumby's appeal, because Brumby agreed that heightened scrutiny applied to a claim of sex discrimination, and Brumby never advanced any argument to meet the standard, on which he bore the ultimate burden of proof at trial, and thus on summary judgment.

The issue raised in the cross-appeal is whether the District Court erred in granting summary judgment to Brumby on Glenn's claim for discrimination based on her medical condition.

STATEMENT OF THE CASE

Relevant Procedural Background. Pursuant to 11th Cir. Rule 28-2, Glenn concurs with Appellant Brumby's recitation of the relevant procedural history, with the following corrections and clarifications.

Glenn's complaint included two claims of discrimination under the Equal Protection Clause. First, Glenn alleged that Brumby "discriminat[ed] against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex Defendant[] perceived her to be." (Doc. #1, ¶ 38). Second, Glenn alleged that Brumby "discrimnat[ed] against her because of her medical condition, GID" because "[r]eceiving necessary treatment for a medical condition is an integral component of living with such a condition, and blocking that treatment is a form of discrimination based on the underlying medical condition." *Id*., ¶ 45.[1]

Glenn and Brumby filed cross-motions for summary judgment. **(Doc. #37, Doc. # 46-3).** Both parties agreed with the District Court's holding, in its order

[1] Glenn refers to herself as a woman, in accordance with not only her gender identity and years of full-time presentation, but also with the respectful practice observed by both sides and the District Court in the proceedings below.

denying the motion to dismiss, that Glenn's termination, if based on sex, would have to satisfy the heightened scrutiny standard set forth in *U.S. v. Virginia*, 518 U.S. 533 (1996). (Doc. #31, p. 17); (Doc. #37, p.8). However, as the District Court recognized, Brumby never argued that his termination of Glenn could satisfy a heightened scrutiny standard. (Doc. #70, p. 35-36).

The District Court granted summary judgment to Glenn on her sex discrimination claim, and granted summary judgment to Brumby on Glenn's medical discrimination claim. Both sides timely appealed to this Court.

Relevant Factual Background. Pursuant to 11th Cir. Rule 28-2, Glenn concurs with the first four paragraphs of Appellant Brumby's statement of facts regarding her work history at the Office of Legislative Counsel ("OLC"), and her diagnosis of and treatment for Gender Identity Disorder ("GID"), prior to October 31, 2006.

Brumby's Objection to Glenn's Presentation as a Female. Other than Halloween 2006, Glenn presented as a male every other day while working at OLC, and Glenn was perceived by Brumby to be a male. Plaintiff's Statement of Material Facts at 14-15 (hereinafter "PF"). Specifically, Glenn had a shaved head, wore no makeup, wore attire that generally consisted of men's sweaters, men's slacks, and men's dress shoes, and used the masculine name "Glenn." PF at 14.

The OLC had no formal dress code. Plaintiff's Statement of Additional Material Facts at 1 (hereinafter "PAF").

On Halloween 2006, Glenn came to work dressed as a woman. PF at 38. When Brumby saw Glenn, Brumby told her that her presentation was inappropriate and that she would have to go home. PF at 39-41. Another OLC employee dressed up as a rabbit; Brumby deemed her presentation to be "inappropriate," but "in a very different way," and that employee was not asked to go home. PAF at 2-4. No OLC employee in the office that day told Brumby that he or she felt uncomfortable about Glenn's presentation. PAF at 5.

As Brumby points out, he was not aware on October 31, 2006, that Glenn is a transsexual; Beth's immediate supervisor Beth Yinger relayed that information to Brumby after that date.[2] Brumby Opening Brief at 7 (hereinafter "Brumby Open. Brf."); (Doc., #39, p.35.) Brumby testified that his sending Glenn home from work that day was based on his view of what is acceptable for how a man should appear. See PF at 41 ("Q: . . . but why did you feel that the way Glenn was appearing that day as inappropriate? A: Because he was a man dressed as a woman and made up as a woman."); PF at 43 ("I think it's unsettling to think of someone dressed in

[2] In this brief, "transgender" is an umbrella term for a wide range of individuals who purportedly do not conform to gender stereotypes, while "transsexual" is limited to one who has undergone, is undergoing, or has committed to undergoing sex reassignment surgery.

women's clothing with male sexual organs inside that clothing."); PF at 45 (stating his belief that a male in women's clothing is "unnatural.").[3]

After October 31, 2006, Glenn presented as a man at work every day he remained employed at OLC. Yinger informed Brumby that Glenn intended to transition from male to female. (Doc., #39, p.35.) It was Brumby's understanding that this was an action under consideration for some undetermined time in the future but was not expected to occur in the immediate future. Brumby took no further employment action against Glenn until he terminated her.

In the fall of 2007, after Glenn's treating therapist recommended that the real-life experience was appropriate for her, Glenn told Yinger that she was planning to proceed with her transition from male to female, and that she would begin working as a woman. PF at 49-50. Glenn provided Yinger with written materials about facilitating workplace gender transitions and photographs of herself "as a woman." PF at 52. Yinger provided the photos and written material to Brumby (Doc. #39, p. 53-54). Brumby believed that Glenn looked professional as a woman in the photographs, and also that had he not known her previously, he

[3] While displeased with the fact of Glenn's female presentation, Brumby emphasizes the largely irrelevant point that he was impressed with the execution. See (Doc. 40, p. 32, 34), (Brumby believed Glenn's female presentation that day was the result of "some apparent degree of practice and expertise" in doing so , because she "looked much more like a woman than I think most males would know how to look like a woman" to such an extent that, had he not known it was Glenn, he believes he would have thought Glenn was a woman).

would have believed the person in the photos to be a woman . PF at 61; (Doc #39, p. 55).

Brumby's Discussions With Others at OLC and the Capitol Concerning Glenn. After learning that Glenn would be presenting as a woman at work imminently, Brumby reached out to legislative leaders and two OLC attorneys for their thoughts. Brumby testified that he was concerned that "some members of the legislature would view that taking place within our office as perhaps immoral, perhaps unnatural, and perhaps, if you will, liberal or ultraliberal." (Doc. #39, p. 51). House Speaker Glenn Richardson and Lieutenant Governor Casey Cagle conveyed to Brumby their thoughts, specifically that Brumby knew his office's needs and that they would defer to the decision he made. PF at 77. Senate President Pro Tempore Eric Johnson testified that his sole focus was "do we have the right to terminate somebody for a sex-change operation or not? I think that was all that was in my mind." PAF at 12. Brumby replied that Georgia is "a right-to-work state. We are on solid legal ground." PAF at 13.[4]

[4] Brumby believed that there was a "strong likelihood" he would be sued for terminating Glenn. PAF at 14. Indeed, the budgetary ramifications of such a suit was one of the purposes for his discussing his contemplated termination of Glenn with Speaker Richardson. PAF at 15 In describing the results of the research conducted by OLC attorney Shawn Marie Story regarding liability for terminating Glenn, Brumby testified that it would be a wrongful firing under a Sixth Circuit decision and a decision from the District Court for the District of Columbia, that there were "other legal authorities which cut the other way," and that there was no final conclusion as to how the Eleventh Circuit would rule. PF at 73. By contrast,

Brumby also asked OLC attorneys Shawn Marie Story and Wayne Allen, another OLC attorney whose opinion he respected, about how the office would react to Glenn's working there as a woman, specifically what their "fellow employees would think about this if we allow this to happen?" (Doc. #39, p. 60-61). Despite the pointed nature of the question, and the past history of Brumby sending Glenn home from work for dressing as a woman on Halloween, the attorneys were "evasive" and unwilling to state opinions, according to Brumby. *Id.* Yinger expressed to Brumby that she was satisfied with Glenn's work, and that she thought Glenn should not be fired.

Brumby's Termination of Glenn. Brumby testified that he eventually concluded that "the sheer fact of the transition" seemed "impossible to accomplish in our workplace in an appropriate manner;" thus, Brumby ruled out alternatives that would allow Glenn to continue working at OLC, because he "did not give consideration to how to best facilitate that which I believed to be impossible." (Doc. #39, p. 100-101). Brumby told others working at the Capitol that Glenn's termination was not performance-based but was because of her intention to present herself as a woman in the workplace. PF at 83, 80-81.

Brumby did not view a lawsuit by a coworker if Glenn were to be retained as "very likely" or "likely to be successful." PF at 93, PAF at 16.

On October 16, 2007, Brumby summoned Glenn to his office, asked her whether she indeed had formed a "fixed intention" to transition to female and thus to start presenting as a female at work. When Glenn said yes, Brumby fired Glenn, explaining to her that her transition would be seen as immoral, would make others uncomfortable, and would be unacceptable in the Office of Legislative Counsel. PF at 85-88. She was required to leave the office immediately.

Bathroom Usage. Brumby contends that he was concerned about the expense of lawsuits arising out of Glenn's bathroom usage, irrespective of whether such an imagined suit would be meritless. Brumby Open. Brf., at p. 8-9. The OLC suite of offices had four restrooms, each of which was a gender-neutral, single-occupancy room with no sign on the door. PF at 8. Brumby contends that "When presenting himself as a woman, Glenn uses women's restrooms," Brumby Open. Brf. at 9. Glenn did testify she uses women's restrooms, but in response to the question "do you use the men's room or the ladies' room?" that did not include single-occupancy restrooms (Doc. #40, p. 83).

Brumby never discussed Glenn's bathroom usage with anyone, including Glenn during the conversation in which he terminated her. PAF at 9. Thus, there was no discussion about alternatives to termination, despite Ms. Glenn's specifically asking about the possibility of an accommodation to avoid termination, to which Brumby replied "I don't think so." PAF at 11.

SUMMARY OF ARGUMENT

Brumby can prevail on appeal if – and only if – this Court accepts his invitation to be the first court since *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 U.S. Dist. LEXIS 17417 (E. D. La. 2002) to hold that an employer who fires an employee for gender-nonconforming presentation is not acting because of sex under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), if the employee is a transsexual. Every court to consider the issue since *Oiler* has rejected its holding, which Brumby presses here, that one's gender nonconformity can only go so far before one loses the protection against sex discrimination recognized in *Price Waterhouse*. And it is difficult to imagine a case in which an employer more clearly has expressed in word and deed that gender-conforming appearance, dress, and mannerisms are unacceptable in the workplace at any time for any reason -- whether it is at Halloween seemingly just for fun on a lark, or whether it is pursuant to a prescribed treatment for a medical condition and undertaken with advance consultation with supervisors as part of a theoretically constructive process.

While some post-*Oiler* cases involving transsexual employees have ruled in favor of the employer, none of those cases helps Brumby because those employers prevailed only because the courts accepted their justifications under standards not available to Brumby due to his admissions and failure to make any showing on

heightened scrutiny before the District Court. Brumby explicitly "acknowledges that if gender stereotyping motivates an adverse employment decision, it can be considered discrimination based on sex" and explicitly agrees with the District Court's holding that a sex-based adverse employment action would have to satisfy the heightened scrutiny standard of *U.S. v. Virginia*, 518 U.S. 533 (1996). Brumby Brf. at 15. Because Brumby had the burden at trial to meet the heightened scrutiny standard, and he conceded an inability to do so on summary judgment by not even arguing that his actions could meet that standard, summary judgment was proper if the firing of Glenn was based on sex. See (Doc. #70, p. 36-37).

This Court can and should affirm the District Court's sex discrimination holding and not reach the cross-appeal regarding Glenn's medical condition claim, given that Glenn will have obtained all relief sought.[5] If reached, this Court should reverse the grant of summary judgment on Glenn's claim of medical discrimination claim. The District Court incorrectly excused intentional discrimination, where the action taken both furthered a system of irrationality and was so disproportionate to any real or imaginary problem that it cannot be explained by any reason other than animus.

[5] See *Beaven v. United States DOJ*, 622 F.3d 540, 547 (6th Cir. 2010) ("Because the Plaintiffs raise the three remaining cross-appeal issues only as alternative grounds for relief, should this court overturn the district court's Privacy Act decisions, we need not reach these issues."); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 919 (8th Cir. 1999).

ARGUMENT AND CITATIONS TO AUTHORITY[6]

I. THE HOLDING THAT GLENN'S FIRING WAS SEX DISCRIMINATION SHOULD BE AFFIRMED.

Brumby's argument that no sex discrimination occurred here has two major flaws: the facts and the law. Brumby's actions and sworn testimony demonstrate that gender-nonconforming presentation in the workplace is always objectionable to him simply because it is gender-nonconforming and irrespective of whether a transition is involved. Legally, every court since 2002 has rejected Brumby's attempt to place transsexuals outside the rule that an employer cannot take action against employees based on their gender nonconformity.

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[6] Glenn concurs with Brumby's statement of the general standard of review for summary judgment motions with the following clarifications. This court can "affirm a district court's decision to grant or deny a motion for any reason, regardless of whether it was raised below. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007), *quoting Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001). As to any issue in which a party bears the burden of proof of trial, a district court should grant, and an appellate court should affirm a grant, of summary judgment in favor of a moving party who points out an absence of evidence supporting the issue on which the nonmoving party bears the burden of proof, if such party does not refute the moving party's contention or fails to adduce admissible evidence sufficient to sustain a verdict on its behalf at a trial. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1251 (11th Cir. 2001); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251 (1986).

A. Brumby Can Prevail In His Appeal Only By Showing that His Firing of Glenn Was Not Because of Sex.

Two important concessions by Brumby, both below and before this Court, have narrowed the scope of his appeal. Brumby agrees that if his firing of Glenn was based on her failure to conform to gender stereotypes, a claim for sex discrimination is stated. Brumby also concedes that he, as a government employer, would have to satisfy the heightened scrutiny standard of *U.S. v. Virginia* in order to prevail. But as the District Court acknowledged, Brumby did not even argue that he could meet the standard. See (Doc. #70, p. 36-37), (Brumby's summary judgment papers did "not even argue in the alternative that [his] actions survive intermediate scrutiny. Defendant based his entire defense on the argument that Plaintiff was not a member of a protected class and therefore his actions must only survive the rational relationship test.") citing (Doc. #46, p. 9); (Doc. #50, p. 2). Because the government bears the burden of justifying its action, its failure on summary judgment to contest the issue is fatal. *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1251 (11th Cir. 2001) ("Simply put, "'the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"); *id*. at 1251 (affirming summary judgment against government defendant that "fail[ed] to meet its burden of showing" that the challenged policy "is narrowly tailored."); *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251 (1986).

Because the only legal issue is whether a sex-based classification occurred, and not what justifications by the employer are acceptable, the post-*Oiler* cases that Brumby cites do not support him, and in fact support Glenn. Brumby mistakenly relies on *Etsitty*. There, the District Court's opinion supports Brumby, as it is the only court after *Smith v. Salem* to endorse the rationale of *Oiler* over *Smith v. Salem*, and the only court after *Oiler* to cite, as does Brumby, the DSM-IV definition of GID in an attempt to exclude transsexuals from the scope of Title VII.[7] However, the Tenth Circuit flatly rejected the District Court's exclusion of transsexuals from Title VII protections: "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

[7] See *Etsitty v. Utah Trans. Auth*., No. 2:04CV616 DS, U.S. Dist. LEXIS 12634 (D. Utah June 24, 2005). Many courts that have recognized that *Price Waterhouse* applies to transsexual employees have done so while specifically recognizing that the employee's nonconformity to sex stereotypes derives from GID, as set forth in DSM-IV. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir 2004); *Creed v. Family Express Corp*., 2009 U.S. Dist. LEXIS 237 (Jan. 5, 2009) at *2; *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 655 (S.D. Tex. 2008) at 655; *Kastl v. Maricopa County Cmty Coll. Dist.*, 2004 U.S. Dist. LEXIS 29825 (D. Ariz. June 3, 2004) *3 at n.2. Also, while the court in *Schroer v. Billington*, 575 F. Supp. 2d 293 (D.D.C. 2008) initially expressed skepticism of a transsexual's ability to state a claim for sex stereotyping discrimination, it eventually not only held that Diane Schroer could state such a claim but awarded her judgment on that claim. *Compare* 424 F. Supp. 2d 203, 209-11 (D.D.C. 2006) with 577 F. Supp. 2d 293, 303-05 (D.D.C. 2008).

labeling them as transsexuals." *Etsitty*, 502 F.3d at 1222 n.2 (*citing Smith v. Salem*, 378 F.3d at 575); *see also Etsitty*, at 1223 (*Smith v. Salem* "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.'" (quoting *Smith v. Salem*, 378 F.3d at 574).

In *Kastl v. Maricopa County Cmty Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 U.S. Dist. LEXIS 29825 (D. Ariz. June 3, 2004), the court denied the employer's motion to dismiss, holding that, except in the rare situation in which sex is a bona fide occupational qualification for a job, a transitioning employee's physical appearance and anatomy generally cannot serve as the basis for an adverse employment action: "neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be [fired] by reason of that nonconforming trait." *Id*. at *9. The Ninth Circuit agreed with this position: "After *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women. *Smith v. City of Salem, OH*, 378 F.3d 566, 575. Thus, *Kastl* states a prima facie case of gender discrimination." *Kastl v.*

Maricopa County Community College Dist., 325 Fed. Appx. 492, 493 (9th Cir. 2009);[8] *see also Creed v. Family Express Corp*., 2009 U.S. Dist. LEXIS 237 (Jan. 5, 2009) at *20, *27 (holding that employee failed at the **third stage** of the *McDonnell-Douglass* test of establishing that employer's nondiscriminatory justification was pretextual).[9]

If this Court agrees that a classification based on sex occurred, it should affirm, as Defendant failed to meet its burden under Rule 56 (or even try) to

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[8] In *Kastl*, the District Court granted the employer's motion for summary judgment, because the plaintiff male-to-female transsexual insisted on maintaining her allegation that she was a "biological female" despite the court's ruling that she had no supporting evidence. *Kastl v. Maricopa County Community College Dist.*, No. CV-02-1531-PHX-SRB, 2006 U.S. Dist. LEXIS 60267, *19 n.7 (D. Ariz. Aug. 22, 2006). This ruling, irrelevant to Glenn's assertions, was overruled on this point when the Ninth Circuit explicitly held that Kastl made out a prima facie case of sex discrimination based on sex stereotyping. 325 Fed. Appx. at 493.

[9] That these courts eventually ruled for the defendants lends no support for Brumby's argument that sex stereotyping of transsexuals is not actionable sex discrimination. All three courts assumed or held that the employee made out a prima facie case of sex discrimination, but held that the proffered justifications satisfied the applicable **Title VII standard** for what constituted a legitimate nondiscriminatory business justification for the termination. *Creed* at *27 ("To prove pretext, Ms. Creed must establish that Family Express gave a dishonest explanation for its actions. . . . Ms. Creed hasn't shown that Family Express's decision to terminate her was a lie or had no basis in fact."). Each case is factually and legally distinguishable from this case. *Compare Creed*, at *5 (discharge for failure to comply with company's formal, written dress code that was "strictly enforced and evenly applied"' and "vital to the company's competitive advantage" constituted a legitimate nondiscriminatory business justification under Title VII); PAF 1 (OLC had no written dress code). Plaintiff discusses *Kastl* and *Etstitty*'s reliance on the absence of single-occupancy bathrooms and litigation risk in Section III., *infra*.

establish an exceedingly persuasive justification that firing Glenn was substantially related to achieving important governmental objectives.[10]

B. Under *Price Waterhouse v. Hopkins* and Its Progeny, Brumby's Firing of Glenn Was Based on Sex.

The remarkable deposition of Brumby is the proverbial exception that proves the rule that it is rare that an employee will secure an admission of a discriminatory motive from the decisionmaker. His testimony, and his discipline of Glenn for dressing as a woman on Halloween 2006, demonstrate that Brumby always views certain gender-nonconforming conduct as inappropriate and unacceptable.

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[10] While this Court need not reach the justification issue, it is notable that Krystal Etsitty never argued to the Tenth Circuit that Supreme Court precedent foreclosed her employer's reliance on a concern about costs from potential tort liability to justify intentional sex discrimination. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), *Los Angeles Department of Water & Power v. Manhart* 435 U.S. 702 (1978); *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 523 (7th Cir. 2001) (en banc) ("arguments that expense justifies discriminatory conduct met their Waterloo in *Los Angeles Department of Water & Power v. Manhart*" and *Johnson Controls* applied this principle to hold that an employer cannot justify intentional sex discrimination out of concern that the plaintiff's continued employment's could "lead to costly liability in tort"); *Peralta v. Chromium Plating & Polishing Corp.*, 2000 U.S. Dist. LEXIS 17416, 23-25 (E.D.N.Y. Sept. 5, 2000) ("*Johnson Controls* mandates a decision that Chromium's stated concern about future tort-liability cannot constitute a BFOQ for its discriminatory employment decision."); *Dimino v. New York City Transit Auth.*, 64 F. Supp. 2d 136, 147 (E.D.N.Y. 1999); *Martinez v. Labelmaster*, 1998 U.S. Dist. LEXIS 8499 (N.D. Ill. May 29, 1998).

Brumby essentially argues that there is a transsexual exception to protections against sex stereotyping; the District Court was one of many courts to reject this argument. See (Doc. #37, p. 13), ("the Equal Protection Clause forbids sex discrimination no matter how it is labeled") (quoting *Back v. Hastings on the Hudson Union Free Sch. Dist*., 365 F.3d 107, 118-19 (2d Cir. 2004)); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007) (courts should not "allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals."); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 660 (S.D. Tex. 2008) ("There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII and *Price Waterhouse*.").

Brumby also confuses the relevant issue regarding conformity with sex stereotypes. When an employer takes action against an employee perceived to be male based on nonconformity with masculine stereotypes, it is irrelevant that the employer may have thought the employee conformed very well to the employer's feminine stereotypes. *Price Waterhouse* itself demonstrates this point, as does its progeny. Brumby also contends that, so long as an employee's colleagues do not

harass her, there is no discrimination if the boss fires her for gender-nonconformity that he tells her is "inappropriate." Such is not the law.

1. Firing an Employee Perceived to be Male To Prevent Her Working as a "Convincing" Female Is Sex Discrimination.

Brumby testified unequivocally that he viewed Glenn's appearance as a female to be inappropriate for the sole reason that Glenn is a male. PF at 41, 43; PAF at 7. Brumby testified that Glenn's feminine appearance on Halloween and in pictures provided was professional for a female but was per se objectionable because Glenn was a man in Brumby's eyes. PF at 41, 43; PAF at 6-7. Brumby's admissions and his statements to Glenn demonstrate that his objection to Glenn's presentation as a woman is based on his perception of her as a man. Indeed, as the District Court pointed out, Brumby conceded this point below, acknowledging that Plaintiff's "'intended feminine appearance' was at least 'one issue' contributing to her termination. See (Doc. #70, p. 35); (Doc. #50, p. 2), ("The issue was not *merely* one of Plaintiff wearing jewelry, make-up or a wig to have a feminine appearance.") (emphasis added); *id*. at 3 ("Plaintiff cannot divorce her intended feminine appearance, *as if that were the only issue*, from her stated intention to completely transition from male to female.") (emphasis added). The court correctly noted that Brumby thereby "concedes that gender was a motivating role

in his termination of Plaintiff, because part of the reason that she was terminated was her lack of conformance to stereotypes he had about how males should dress and act." (Doc. #70, p. 35-36), citing *Price Waterhouse*, 490 U.S. at 250. A plaintiff need not "identify the precise causal role played by" the "illegitimate motivations" she challenges, as compared to any other motivations. *Price Waterhouse*, at 241. Instead, the plaintiff is "obligate[d] . . . to prove that the employer relied upon sex-based considerations in coming to its decision." *Id.* at 242.

The District Court's holding finds overwhelming support in the words and actions of Brumby. He testified that the thought of someone with male sexual organs in women's clothing was "unsettling" to him, was "something I don't like to think about," and was something he viewed as "unnatural." PF at 43-45. When he saw Glenn "dressed and made up as a woman," he thought she "looked much more like a woman than I think most males would know how to look like a woman." PF at 42. Upon seeing her this way in person, he immediately told her that her appearance was inappropriate and sent her home. PF at 40. A year later, upon seeing photographs of her again "dressed and made up as a woman" and learning that she intended to present herself as a woman every day at work, he fired her. PF at 60, 86-87. When asked about his reaction to a "male employee who comes to work male in every respect except full makeup," Brumby responded

that it was "simply common sense that that's inappropriate." (Doc. #39, p. 94-95). In short, it was explicitly due to Glenn's intention to shift her workplace gender expression from masculine to feminine, beyond the boundaries of his sex stereotypes, that Brumby fired Glenn.[11]

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[11] Brumby wrongly criticizes the District Court for attributing to him a bias against gender nonconforming appearances, when he was asked a question about Glenn's transition. But it was Brumby himself who brought the issue back to gender nonconformity, as a full view of the exchange reveals:

> Q You also testified that you thought the transition might be disagreeable and perhaps emotionally upsetting to some employees; is that correct?
>
> A I don't recall if those were my exact words.
> I think I recall testifying to that effect, yes.
>
> Q But is that something that you had a concern about?
>
> A Yes.
>
> Q And why did you think it might be potentially emotionally upsetting? In what way?
>
> A I think it would have made it very uncomfortable and emotionally upsetting for me to communicate with Mr. Morrison under those circumstances, and I imagined that some number of our other employees would feel likewise.
>
> Q Why for you?
>
> A It makes me think about things I don't like to think about, particularly at work.
>
> Q And my intention is not to make you uncomfortable with my questions today, but I do want to ask you: What kinds of things are you referring to?
>
> A Well, that's your privilege. I think it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing.

(Doc. #39, p. 47-48).

Viewing someone's gender nonconformity as "inappropriate" is exactly what courts describe as paradigmatic sex stereotyping. *See Smith*, 378 F.3d at 574 (6th Cir. 2004) (sex stereotyping discrimination resulted from employee's "appearance and mannerisms, which Defendants felt were *inappropriate* for his perceived sex") (emphasis added); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1076 (9th Cir. 2002) (en banc plurality) (*Price Waterhouse* "held that a woman, who was denied partnership in an accounting firm in part because she did not conform to what some of the partners thought was the *appropriate* way a woman should act, had an actionable claim under Title VII."); *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 580 (7th Cir. 1997) (evidence that employee's personality "did not conform to his coworkers' view of appropriate masculine behavior supplies that proof" necessary for Title VII liability), *vacated on other grounds*, 523 U.S. 1001 (1998); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3rd Cir. 2001).

Apparently, Brumby mistakenly believes that employers can discriminate against employees perceived to be male whose presentation so fully conforms to the employer's feminine gender stereotypes that the employer concedes a grudging respect, even while firing the employee for it. Of course, the law is to the contrary. Ann Hopkins was not criticized for being insufficiently convincing in her supposedly masculine persona – she was criticized for having a supposedly

masculine persona. Brumby draws attention to his largely irrelevant view that, when presenting as a woman, Glenn conformed well to Brumby's view of how a woman should present, while ignoring the unanimous evidence that he deemed the mere fact of her presenting as a woman highly objectionable.

2. The District Court Correctly Rejected Brumby's Attempt to Exclude Transsexuals From the Protections Against Sex Discrimination That Everyone Enjoys.

Brumby's purported defense to liability rests on an *ipse dixit* assertion that it was Glenn's "transition" that motivated the firing.[12] Principles of logic would suggest that Brumby's assertion that the "transition" motivated the firing is a defense only to the extent that there is an aspect of the transition unrelated to Glenn's gender nonconforming appearance that motivated the firing. But Brumby does not explain what the other aspect is, a failing the District Court noted. (Doc. #70, p. 3), ("Brumby has failed to identify any concerns that existed at the time of Plaintiff's termination not related to her intention to come to work as a woman."). Brumby's vague assertion that other unspecified aspects of Glenn's transition motivated his decision is not supported by the record, and indeed is rebutted. Additionally, the legal inquiry is complete now that Glenn has established sex-stereotyping discrimination; Glenn need not disprove the existence of every other

[12] See n.16 and accompanying text, *infra*.

hypothetical motivating factor nor prove that Brumby required only men to conform to gender stereotypes.

a) The Factual Record Refutes Brumby's Contention That Glenn's Firing Was Based on Anything Other Than Her Failure to Conform to Sex Stereotypes Concerning How a Man Should Look and Behave.

The factual record in this case definitively rebuts Brumby's argument that this case is not about sex stereotyping. Here, it is undisputed that Brumby sent Glenn home from work for dressing and presenting as a woman on Halloween 2006. His reaction that her presentation that day was unacceptable had nothing to do with Glenn's transition – because Glenn's supervisor, Beth Yinger, did not tell Brumby about Glenn's GID diagnosis and plan to transition until after that Halloween. (Doc. #39, p. 30); PAF at 47. Indeed, Brumby's testimony confirms that he views men presenting as women to be inappropriate, irrespective of the underlying reasons for the presentation. When asked whether he would have fired Glenn if Glenn were merely going to have genital reassignment surgery but no change in workplace appearance, Brumby replied that he would consider the effect of that scenario on Plaintiff's performance and others' performance, and that those facts would be "unlikely to have a whole lot of impact on either one." (Doc. #39, p. 86). This is buttressed by the actual facts here, where Glenn's appearance on Halloween 2006 was objectionable despite Brumby's having no knowledge of

Glenn's transition, while Glenn's continued employment after that, presenting as a man, posed no problems until Glenn notified Yinger that she would begin presenting as a woman full-time in accordance with her transition.[13] Moreover, when asked whether he would fire an employee who he found out had transitioned years ago, he replied, "I doubt it." *Id.*[14] The record in this case is clear that Brumby fired Glenn because of her failure to conform to Brumby's view of how a man should look and behave.

[13] Glenn, Brumby, and Beth Yinger all testified that Glenn presented as a man every day of his employment except for Halloween 2006. (Doc. #39, p. 27-29); (Doc. #42, p. 37); (Doc. #40, p. 40). Brumby testified that, based on his visual observation, Glenn "came to work as a man" throughout his employment at OLC, with the exception of Halloween 2006. Brumby Dep. at 27 [39]; *see also id.* at 28 ("Q. Did Glenn Morrison look like a man to you?" A. Yes."). While Glenn did have some surgeries intended to feminize her appearance, there no evidence regarding the effect of these surgeries to the casual observer. But even assuming that her appearance was more feminine and did not draw verbal criticism, there is no support for the principle that acceptance of some gender-nonconformity immunizes an employer from liability for discriminating should the gender nonconformity manifest itself in a different way or to a greater extent.

[14] Additionally, Glenn is the only transsexual he recalls knowing (Doc. #39, p. 82); yet, Brumby admitted to having thought previously about men in women's clothing, and that it was "not something I enjoy thinking about" PF at 44.

b) Brumby's Alleged Reliance on Aspects of Glenn's Transition Unrelated to Her Appearance Is Legally Irrelevant.

The District Court correctly held that, in light of Brumby's admission that sex played some role in his firing of Glenn, the burden then fell on Brumby to justify his action under heightened scrutiny, which he declined to do. (Doc. #70, p. 35-36, 32-33). It should go without saying that any bias Brumby has against transsexuals does not operate to provide him immunity for sex discrimination. Courts repeatedly have rejected employers' attempts to defeat employees' sex discrimination claims by arguing that an additional form of discrimination was present (generally a category that receives lesser legal protection). *See Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus."); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 594 (7th Cir. 1997) ("The fact that one motive was permissible does not exonerate the employer from liability under Title VII . . . [if] sex played a motivating role in the employer's decision."), *vacated on other grounds*, 523 U.S. 1001 (1998); *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) ("Centola does not need to allege that he suffered discrimination on the basis of his sex alone or that sexual orientation played no part in his treatment. . . . Thus, if Centola can demonstrate

that he was discriminated against 'because of ... Sex' as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.").

3. The Civility of Glenn's Colleagues Is Legally Irrelevant.

The discriminatory act giving rise to this suit was Brumby's termination of Glenn. Glenn did not allege some pattern of harassment; thus, it is baffling as to why Brumby emphasizes a general absence of derogatory comments by OLC employees. To use employment law parlance, this case is about an adverse employment action, not a hostile work environment. Moreover, the evidence in this record is the gold standard of intentional discrimination – the sworn (and repeated) testimony of the sole decisionmaker that the adverse employment action was taken based on the proscribed criterion, here, Glenn's gender-nonconforming presentation. *See Tiggs-Vaughn v. Tuscaloosa Hous. Auth.*, 385 Fed. Appx. 919, 922 (11th Cir. 2010) ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption."). Therefore, Brumby turns employment law on its head by arguing that this Court should disregard the direct evidence of his sex discrimination as the

undisputed sole decisionmaker, in favor of the absence of any disparaging remarks about Plaintiff from her coworkers.[15]

Brumby's confusion on this issue is illustrated by his citing the very paragraph from *Price Waterhouse* that establishes that liability depends on his reaction, and not those of Glenn's other coworkers: "Gender stereotyped remarks, such as those made to Hopkins, can be evidence that gender was relied upon to make the employment decision, but it does not inevitably prove that gender played a part in a particular employment decision. 'The plaintiff must show that the employer actually relied on his gender in making its decision.'" Brumby Open. Brf., p. 15, quoting Price Waterhouse, 490 U.S. at 251. The Court explained that the reason that stereotyping remarks do not "inevitably prove" sex discrimination is that sometimes they are "stray remarks" made by a coworker not involved in the decisionmaking process. *Id*. The Court held that such was not the case with the reviews of Ms. Hopkins submitted by partners as part of the process to evaluate her candidacy for partnership. *Id*. Cases are legion holding that a statement of discriminatory intent by a decisionmaker constitutes the most compelling evidence

[15] Moreover, even in the hostile environment context, this Court has repeatedly held that "[t]he fact that many of the epithets were not directed at [the plaintiff] is not determinative." *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 n.2 (11th Cir. 1982); see also *Busby v. City of Orlando*, 931 F.2d 764, 785 (11th Cir. 1991) (reversible error to exclude evidence of statements if plaintiff "did not hear these slurs or if they were not directed toward" plaintiff).

possible – direct evidence of discrimination – while discriminatory statements by people who are not decisionmakers do not so qualify. *E.g., Bass v. Bd. of County Comm'rs, Orange County, Fl,* 256 F.3d 1095, 1112 (11th Cir. 2001).[16]

C. Brumby's Firing of Glenn is Sex Discrimination if He, as He Contends, Fired Ms. Glenn Because of Her "Transition From Male to Female."

As explained in Section I.B., Brumby fails in his attempt to have the holding of *Price Waterhouse* declared off-limits for transsexuals. But Brumby fares no better under his alternative view that *Price Waterhouse* is inapplicable, and that Ms. Glenn was terminated because of her "transition from male to female." See Brumby Open. Brf., p. 3 (termination was "based on Glenn being transgender and transitioning from male to female within the workplace").[17] The factual scenario

[16] *Kastl*, *Etsitty*, *Lopez*, and *Schroer* did not discuss coworker comments, or the absence thereof, and each of those courts held or assumed that the employee stated a claim for sex stereotyping discrimination based solely on management's actions Moreover, in *Price Waterhouse*,with one exception, it is unclear which of the partner's negative comments based on gender stereotypes were communicated to Ann Hopkins and which were not. *See* 490 U.S. at 234-35. It is apparent that many comments were on the confidential evaluation forms that the partners completed and sent to the committee making the partnership decision. *Id.* Whether the remarks or the gist of them were relayed to Hopkins (prior to discovery in the litigation) is not specified; more importantly, it is obviously irrelevant to the Court's holding, given that Ms. Hopkins, like Ms. Glenn, based her suit on an adverse employment action, not a hostile work environment.

[17] *Accord Id*., p. 8 (Brumby was motivated by "the imminent nature of Glenn's transition"); *id*., p. 9; *id*., p. 10 ("Brumby specifically told Glenn that his concern

proffered by Brumby is nearly identical to *Schroer*, where the employer "revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination 'because of ... sex.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008). The *Schroer* court explained the straightforward proposition that one who discriminates against someone based on a change in sex or religion is plainly engaging in discrimination based on sex or religion:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

Id.

The *Schroer* court considered this proposition manifestly self-evident; however, there is ample authority holding that the government simply has no business engaging in or preventing religious conversion, and neither does a employer *vis a vis* its employees (let alone someone operating in both capacities). *Colombrito v. Kelly*, 764 F.2d 122, 131 n.5 (2d Cir. 1985) (reversing trial court decision holding civil rights lawsuit to be meritless; court held that lawsuit by a

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was the transition from male to female."); *id*. ("the issue was the transition from male to female"); *id*., p. 13; *id*., p. 21, 22, 24, 26, 27.

recent Unification church convert had a "reasonable chance" of successfully enjoining defendant "from preventing him from practicing [his new] beliefs"); *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (employee stated discrimination claim when the only reason she quit "was her resolution not to attend religious services which were repugnant to her conscience"); *Yisrayl v. Walker*, 2010 U.S. Dist. LEXIS 6785 (S.D. Ill. Jan. 27, 2010); *Panchoosingh v. Gen. Labor Staffing Servs.*, 2009 U.S. Dist. LEXIS 29109 (S.D. Fla. Apr. 8, 2009); *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 849-850 (S.D. Ind. 2002); *Weiss v. Ren Labs. of Fla., Inc.*, 1999 U.S. Dist. LEXIS 23587, 25-26 (S.D. Fla. Sept. 24, 1999); *Long v. Katzenbach*, 258 F. Supp. 89, 93, 94 (M.D. Pa. 1966), *vacated on other grounds*, *Long v. Parker*, 390 F.2d 816, 818 (3d Cir. 1968); *see generally Remmers v. Brewe*r, 361 F. Supp. 537, 542 (S.D. Iowa 1973) (government should not question the legitimacy or sincerity of the conversion of even convicts perceived to be unscrupulous), *aff'd*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974).[18] Indeed, Glenn's transition should be given at least the respect due a co-worker's religious conversion, given that it was prescribed by her treating therapist for her G.I.D., and it is prescribed by

[18] An exception to the rule against the relevance of a conversion could obtain if the sex or religion of the plaintiff were a bona fide occupational qualification. *cf. Kern v. Dynalecton Corp.*, 577 F. Supp. 1196, 1198, 1200 (N.D. Tex. 1983) (company could require pilots based in Jeddeh, who would be required to fly into Mecca, to convert to Islam or refrain from abandoning the conversion process, because Saudi Arabian law prescribed death for non-Moslems entering into Mecca.").

Georgia law as necessary for her to change the gender marker on her Georgia birth certificate. O.C.G.A. § 31-10-23(e).

Brumby's arguments to the contrary are not availing. First, Brumby misleadingly suggests that *Schroer* relied on a conclusion that gender identity is a component of sex. Second, Brumby mistakenly contends that any individual alleging sex discrimination must show that the other sex was not similarly mistreated. Finally, Brumby relies on a new theory, not raised below, that the District Court bootstrapped the claims of all transgender individuals into sex discrimination claims. This Court either should decline to address or should reject this ill-conceived argument, which relies only on Title VII cases, misapplies even those cases, and does not fit the facts of this case, where Brumby's words and actions demonstrate that he disapproves of gender-nonconforming dress and appearance in the workplace for nontransitioning employees and takes no action against employee for whom a transition is in their past, present, or future – unless and until their workplace presentation meets a certain level of gender nonconformity.

1. *Schroer* Did Not Rely On a Conclusion that Gender Identity Is a Component of Sex.

Brumby attempts to mislead this Court by arguing that *Schroer* is distinguishable because "Schroer's theory was that gender identity is a component

of sex." Brumby Open. Brf., p. 19. While Diane Schroer made that contention, and that court found both her showing on that point and the defendant's counter-presentation to be "impressive," the court specifically held that "deciding whether Dr. Bokting [sic] or Dr. Schmidt is right turns out to be unnecessary" because discrimination based on a change of sex "was discrimination 'because of sex.'" *Schroer*, 577 F. Supp. 2d at 306 (internal ellipses omitted). The court pointed out the *legal* folly of the defendant expert's position that chromosomes determine sex by analogizing a gender transition to a religious conversion:

> Even if the decisions that define the word "sex" in Title VII as referring only to anatomical or chromosomal sex are still good law -- after that approach "has been eviscerated by Price Waterhouse," *Smith*, 378 F.3d at 573 -- the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination "because of . . . sex." fr

Schroer, 577 F. Supp. 2d at 307-308. Indeed, far from relying on the theory that gender identity is a component of sex, the *Schroer* court eventually rested its holding on an alternative, common-sense proposition that one who fires someone for transitioning from male to female is discriminating because of sex.

2. Glenn Needed to Establish Only That She Was Mistreated Based on Sex and Did Not Have to Show That Anyone Else Was Treated More Favorably.

Brumby argues that the *Schroer* court erred by failing to consider whether members of one sex were exposed to disadvantageous conditions that members of the other sex was not. Brumby Open. Brf., p.20. For this proposition, Brumby cites *Etsitty*, which misunderstood the holding of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). *See* Brumby Open. Brf., p. 20. The error of Brumby's premise was pointed out by the Eighth Circuit last year in *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033 (8th Cir. 2010). Applying the view of *Oncale* that Brumby urges, the district court in *Lewis* rejected a sex discrimination claim because "there must also be an accompanying showing that the other sex is not so disadvantaged by similar gender stereotyping." *Lewis v. Heartland Inns of Am.*, L.L.C., 585 F. Supp. 2d 1046, 1058 (S.D. Iowa 2008), *rev'd*, 591 F.3d 1033 (8th Cir. 2010). The Eighth Circuit reversed, specifically relying on *Oncale*: "*Oncale* illustrates how an employee may prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently. *Oncale* was part of an eight man ship crew[. . . and could not show any female crew were treated differently since there were none." *Lewis*, 591 F.3d at 1040. The Eighth Circuit properly returned the focus to the relevant question of whether the plaintiff was discriminated against based on sex: "Lewis need only offer evidence that she was discriminated against because of her

sex. The question is whether Cullinan's requirements that Lewis be 'pretty' and have the 'Midwestern girl look' were because she is a woman." *Id*. at 1041.

Lewis is in accord with other courts that have rejected the notion that an employer is immunized from liability for sex discrimination if it mistreats men and women because of sex. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) ("[t]he Court in *Oncale* held that 'discrimination … because of … sex' can occur entirely among men . . . [D]iscrimination is any disadvantageous difference in treatment 'because of … sex.' . . . Thus, Oncale did not need to show that he was treated worse than members of the opposite sex."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 304 n.5 (D.D.C. 2008) ("The Supreme Court did not require *Oncale* to show that he had been treated worse than women would have been treated."); *see also Jespersen v. Harrah's Operating Co*., 444 F.3d 1104, 1112 (9th Cir. 2006) ("If a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under *Price Waterhouse*."); see also *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 598 (1999) (rejecting argument that a discrimination claim must fail where the plaintiff "identifie[s] no

comparison class, *i.e.*, no similarly situated individuals given preferential treatment.").[19]

In a decision that foreshadowed *Oncale*, this court explicitly rejected the position that a discrimination claim lies only when the "workplace environment is hostile to the other gender, *i.e.*, treats members of the other gender as inferior" or where there is "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." (citation omitted), *Fredette* at 1509. Instead, in rejecting the Fifth Circuit's decision in the *Oncale* litigation (as the Supreme Court also would do a year later), the court held that employees' discrimination claims are not defeated "simply because they work in an environment dominated by members of their own gender"

[19] To support his mistaken premise that one must show the other sex was treated better, Brumby curiously cites *Harper v. Blockbuster Entertainment Corp*., 139 F.3d 1385, 1388 (11th Cir. 1998) for the proposition that "grooming standards that do not create an unequal burden on either sex are permissible." Brumby Opening Brf. , p. 20. *Harper* never discussed relative burdens – and could not have issued the holding Brumby suggests, because Blockbuster's hair-length policy imposed a burden only on male employees, which the Harper court felt did not deny anyone an "employment opportunity." 139 F.3d at 1389. *Harper* held simply that an on-point en banc decision of the Fifth Circuit in 1975 "squarely foreclose[d] the plaintiffs' discrimination claim" based on the employer's different hair-length requirements for male and female employees. *Id*. at 1387, citing *Willingham v. Macon Telegraph Pub. Co.*, 507 F.2d 1084, 1092 (5th Cir.1975) (en banc). The employees cited three intervening Supreme Court cases in arguing that *Willingham* was no longer good law, but neither *Price Waterhouse* nor sex stereotyping was argued by plaintiffs or addressed anywhere in *Harper*. *See* 139 F.3d at 1388-89. Of course, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994).

and thus cannot show that employees of that gender are generally disadvantaged. *Fredette*, *Id*.

Outside the sex discrimination context, directly analogous is this Court's holding in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), which specifically rejected the argument that a white man could not claim he was discriminated against for having a black wife, because the evidence was clear that a black man with a black wife also would have been rejected. *Id*. at 892. *Parr* held that "it would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."[20] *Parr* held that the inquiry ended when the plaintiff established that he was discriminated against because of race, rendering unnecessary any showing regarding how a member of another race would have been treated: "Had Parr been black, he would not have been hired, but that is a lawsuit for another day.

[20] There is language from a decision of this Court suggesting that one might escape liability by engaging in "equal opportunity" discrimination. *Henson v. Dundee*, 682 F.2d 897, 903-05 and n.11 (11th Cir. 1982). However, such language has been recognized by this Court and others as dicta. *Fredette*, 112 F.3d at 1509; *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996), Note: Kyle F. Mothershead, *How the "Equal Opportunity" Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 Vand. L. Rev. 1205, 1216 (May 2002). More importantly, the holdings of this Court in *Parr* and *Fredette* are clearly to the contrary. *Fredette*, 112 F.3d at 1509; *Parr*, 791 F.2d at 892.

Parr alleged that he was discriminated against because of his interracial marriage," which the court held to be "by definition" to be discrimination based on race. *Id*.

Lewis, *Fredette*, and *Parr* instruct that Glenn needed to establish only that she was discriminated against because of sex, and did not have to make a showing of how others were treated.

3. This Court Either Should Refuse to Address or Should Reject the Argument that the District Court Improperly Held That All Claims of Transgender Discrimination Are Sex Discrimination Claims.

Brumby argues that a ruling for Glenn would allow every transgender employee to "use a gender stereotyping claim to bootstrap protection for transgenders into the definition of sex." Brumby Open Brf., p. 24. This argument was not raised below and should be deemed waived. *Crawford v. Comm'r of Soc. Sec*., 363 F.3d 1155, 1161 (11th Cir. 2004). On the merits, it fails both factually and legally. Brumby became aware of Glenn's GID diagnosis some time after Halloween 2006 and specifically determined that this posed no problem until Glenn confirmed that she imminently would begin presenting as a woman at work. Legally, aside from various conceptual problems arising from applying the logic to a constitutional claim, the "bootstrapping concern" adds nothing to the analysis: if an employee is citing instances of conduct that constitute discrimination based on another characteristic, but not sex discrimination, the allegation should be ignored

for that reason alone. On the other hand, it is impermissible to ignore sex discrimination against a transsexual because also present was animus against her based on her transsexuality, a principle recognized in many cases Brumby cites.

As indicated above, Brumby's actions and testimony demonstrate that gender nonconformity in appearance was his concern, not the transitioning process itself. See pp. 24-25, *supra*. Indeed, in pleading her medical condition discrimination claim, Glenn specifically cited Brumby's objection to her following the course of treatment for GID, not her diagnosis itself, in accordance with the facts of this case.[21]

Legally, the bootstrapping concern adds nothing, because the legal focus of a sex discrimination claim always should be on whether the plaintiff in fact suffered sex discrimination, and not whether particular conduct also might support a different claim, nor whether plaintiff belongs to another class of individuals not afforded heightened scrutiny nor covered by Title VII. The cases cited by Brumby also emphasize that sexual orientation and nonconformity with gender stereotypes

[21] One can imagine many alternative scenarios where an employee who is fired upon the employer learning of a GID diagnosis, or an employee who is fired for presenting as the other gender at work, would not have a sex discrimination claim, although might have various other claims, such as if incongruity with the employer's religious beliefs were the sole basis for an adverse employment action. *See Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir.1997).

can be very distinct concepts; in contrast, transsexualism shares a definitional overlap with nonconformity to gender stereotypes.

Brumby's authority acknowledges this point (see Brumby Open. Brf., p. 24-25); for example, the Sixth Circuit recognized this in reaffirming its holding in *Smith v. Salem* that transsexuals can allege sex discrimination based on gender stereotyping and in stressing that its holding was based on the absence of evidence supporting sex discrimination:

> In *Smith*, the court made explicit that a plaintiff cannot be denied coverage under Title VII for sex discrimination merely based on a classification with a group that is not entitled to coverage. See [*Smith v. Salem*, 378 F.3d] at 575 ("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."). The point is well-taken; we do not suggest that Vickers' claim fails merely because he has been classified by his co-workers and supervisor, rightly or wrongly, as a homosexual. Rather, his claim fails because Vickers has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work.

Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763-764 (6th Cir. 2006). Similarly, in *Anderson v. Napolitano*, the court endorsed the principle that "a gay man can bring a claim for sex discrimination under Title VII if he alleges that he suffered harassment based on exhibiting female characteristics" and that such claim "should not be dismissed if his allegations show both types of discrimination." *Anderson v.*

Napolitano, 2010 U.S. Dist. LEXIS 10422, 12, 14-15 (S.D. Fla. Feb. 8, 2010). The court dismissed the plaintiff's claims only because "his allegations consist solely of instances of harassment and discrimination based on his sexual orientation." *Id*. at *15; *accord Kiley v. ASPCA*, 296 Fed. Appx. 107, 110 (2d Cir. N.Y. 2008).[22]

In sum, the actual facts of this case demonstrate unequivocally that Brumby objected to a feminine presentation by Glenn in the workplace, irrespective of whether it was transition-related. Even in Brumby's alternative reality of his objecting to the "transition itself" divorced from any gender nonconformity, his firing of Glenn would still have been sex-based. Because Brumby has waived any opportunity to justify sex-based conduct, this Court should affirm the judgment.

[22] Brumby continues to invoke the holding of *Rush v. Johnson*, 565 F. Supp. 856, 868-69 (N.D. Ga. 1983), but the District Court properly recognized that there is nothing inconsistent with *Rush*'s holding that a claim of discrimination against transsexuals is evaluated using rational basis, and acknowledging that a claim of whether the plaintiff is transsexual or not. (Doc. #70, p. 30-31); (Doc. #31, p.14), citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). As the District Court recognized, *Rush v. Johnson* did not consider the issue of whether transsexuals can allege sex discrimination. (Doc. #70, p. 30), ("Rush alleged that Georgia, in denying Medicaid coverage for certain procedures, was "invidiously discriminating between transsexuals who require inpatient hospital services and physicians' services for such condition, and others who require such services for other conditions." *Rush*, 565 F. Supp. at 868. Rush was based on a government classification between transsexuals and non-transsexuals. There was no allegation of discrimination based on sex or sex stereotyping in *Rush*. *Id*.").

II. ATHOUGH THIS COURT SHOULD AFFIRM THE SEX DISCRIMINATION RULING AND NOT REACH THE ISSUE, THE DISTRICT COURT ERRED BY EXCUSING INTENTIONAL DISCRIMINATION BASED ON MEDICAL CONDITION.

This Court can and should affirm the District Court's holding that Glenn's firing was based on sex and thus need not reach Glenn's cross-appeal challenging the District Court's grant of summary judgment on her claim of medical condition discrimination. If reached, that holding should be reversed. While the District Court properly saw through Brumby's fear of legislators' losing "confidence" in his office as a shorthand for validating negative prejudices,[23] the District Court incorrectly approved of intentional discrimination based on Brumby's purported concern about exposure to litigation over Glenn's bathroom usage, when all of the four OLC bathrooms were single-occupancy, gender-neutral bathrooms.[24] The

[23] While not directly reaching the issue on summary judgment ([Doc. 70] at 49), the District Court did cite *Cleburne*, a rational basis case, in holding that "avoiding the anticipated negative reactions of others cannot serve as a sufficient basis for discrimination and does not constitute an important government interest." [Doc. 70] at 42. In rejecting Brumby's motion to dismiss, however, the District Court held that Glenn's firing would fail rational basis review if Brumby's position was only that the transition "could not happen appropriately in the workplace in which Glenn worked, and would make other employees uncomfortable" and not that the "transition would have rendered her unable to do her job" because "[a]nticipated reactions of others are not a sufficient basis for discrimination." Order Denying MTD at 17-18.

[24] Brumby also invokes the specter of a transphobic coworker filing suit over Glenn's continued employment. Brumby Open. Brf. at 30. It seems impossible not only to view such a lawsuit as anything other than a written version of

Supreme Court, under rational basis review, properly allows state actors broad discretion in choosing among many rational solutions to the real problems they confront. Rational basis review does not purport to rubber-stamp intentional discrimination against politically unpopular groups, by approving of measures so disproportionate to any real or imaginary problem that they cannot be explained by any reason other than animus. Even outside the realm of animus, the Supreme Court has been careful to ensure that governmental systems retain some measure of rationality when viewed as a whole, such that how it treats various classes is not unjustifiably arbitrary.

"[p]rivate biases," but also to deem a court's consideration of such a suit as the legal system directly giving legal effect to such a suit, which is impermissible. *Cleburne* at 448 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"), *quoting Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). In this regard, the District Court's holding that fear of even a "meritless" lawsuit can be a valid basis for discrimination is disconcerting, as it could be a broad license for mistreating people based on education, income, marital status, veteran's status, and a wide range of other characteristics unrelated to their abilities, yet generally not subject to heightened scrutiny under current federal law. See, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (despite legitimate interest in recouping expenses of its judicial system, it violated equal protection to require payment of transcript fees in parental termination proceedings, citing the effect on the poor).

A. Brumby's Firing of Glenn Was Irrational Under the Facts of This Case.

Although Brumby relies heavily on *Etsitty* and *Kastl* to support his purported concern about bathroom usage,[25] the legal and factual differences between those cases and this one only underscore how irrational Brumby's firing of Glenn was. *Etsitty*'s holding that the litigation concern could be meritless and still constitute a valid defense to **Title VII liability** for sex discrimination so long as the defendant was "genuinely concerned about the possibility of liability" is irrelevant here. *See* 502 F.3d at 1227; *see also Kastl*, 325 Fed. Appx. at 494 (applying Title VII standard to all of the employee's claims).[26] Rather, under rational basis review, defendants need not have had the concern at the time, but the concern must be rational. *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) (internal citations omitted).

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[25] Glenn in no way concedes that Brumby actually had a concern about her bathroom usage when he fired her. That factual issue is irrelevant to Brumby's appeal, because he waived his opportunity to make a showing that any justification met heightened scrutiny by failing to argue the point. On Glenn's appeal, the issue has relevance when viewed with a host of other factors. While generally a legislature's actual motive is irrelevant under rational basis review, the Supreme Court has refused to credit rationales when a politically unpopular group was targeted, and when the harshness of the measure was disproportionate to the interest invoked to such an extent that the action taken was inexplicable by anything other than animus. *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

[26] Moreover, even under Title VII, those courts almost certainly erred in allowing sex discrimination based on concern about litigation risk. See n.10, *supra*.

Factually, both *Kastl* and *Etsitty* differ from this case in that each court both was fixated on the absence of available single-occupancy restrooms and also was convinced that the employer did not bear all responsibility for ignoring that option. The Ninth Circuit expressed solicitude both for the college's response to student concerns about Kastl's use of the women's room and for Kastl's concern about her safety if she used the men's room. *Kastl*, 325 Fed. Appx. at 493 and n.1. In that context, the court's frustration "that the parties do not appear to have considered any type of accommodation that would have permitted Kastl to use a restroom other than those dedicated to men" can only be referring to the use of single-occupancy restrooms. *Id*.[27] Similarly, *Etsitty* focused on the fact that no single-occupancy bathrooms had been shown to be available. 502 F.3d at 1224, 1219 ("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. . . . 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."). Moreover, in both *Kastl* and *Etistty*, the employer clearly was not using

[27] *Kastl* differs from this case in many significant ways: the employer retained Kastl for months after she began her transition; the employer received actual complaints about Kastl's bathroom usage; even then, the employer was willing to retain Kastl if the bathroom issue could be resolved, and finally, the employer apprised Kastl of the bathroom issue, and her response was a refusal without proposing the single-occupancy bathroom alternative. *Kastl*, 2004 U.S. Dist. LEXIS 29825 at *1. None of those facts applies here.

the bathroom usage as a post hoc excuse to justify a precipitous firing, as each employer explicitly welcomed the plaintiff's continued employment after completing gender reassignment. *Kastl*, 2004 U.S. Dist. LEXIS 29825 at *1; *Etsitty*, 502 F.2d at 1219. Thus, these cases stood in stark contrast to *Lopez* and this case, where the employer fired the plaintiff despite "admit[ting] that the facility in which [the plaintiff] would have worked was equipped with a unisex restroom that she could have used with 'absolute privacy.'" *Lopez*, 542 F. Supp. 2d at 664 n.15.

The District Court acknowledged the questionable nature of Brumby's concern, given that all four of the bathrooms in the OLC were single-occupancy. [Doc. 70] at 46-47. But the court then excused the irrationality in a complete non sequitur, stating that "in applying rational scrutiny, '[t]he government has no obligation to produce evidence to support the rationality of its statutory classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.' *Hadix*, 230 F.3d at 843." [Doc. 70] at 47.[28] But

[28] Just as the District Court ignored the part of *Hadix* relevant to this case, so Brumby does with the relevant part of *FCC v. Beach Communications*, in that each decision recognized that rational basis scrutiny is deferential "absent a reason to infer antipathy," *FCC v. Beach Commc'ns*, 508 U.S. 307, 314 (1993), but does not permit "a rubber stamp" where "the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [legislature's] actions were irrational." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000), quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979). When applying rational basis review, the concern

Glenn stressed the availability of the OLC bathrooms not to challenge the classification made, but the rationality of the government measure to further its purported interest.[29] *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008) (cited in Brumby Open. Brf. at 28) (applying rational basis and approving inquiry into possibly pretextual motives for government discrimination against

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that courts should be careful not to sanction invidious discrimination has been echoed frequently. *Cleburne* at 450 (permit requirement "appears to us to rest on an irrational prejudice against the mentally retarded"); *id*. at 453 n.6 (Stevens, J., concurring) (courts "must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor'."); *Romer*, 517 U.S. at 634 ("[A] bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *see also Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) ("[A] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.").

[29] Exhibiting a newfound concern for compliance with discrimination laws, Brumby attempts to justify Glenn's firing by arguing that requiring Glenn to use single-occupancy restrooms could have been considered sex discrimination. Brumby Open. Brf. at 29. This insincere argument is another example of attempting to justify intentional discrimination by ignoring the facts of this case in favor of invoking the specter of implausible litigation risk. Brumby does not explain how an employee who refuses an accommodation proposal and is terminated would suffer more damages than one fired without being given any option. On the other hand, some courts, rightly or wrongly, have absolved an employer when it implemented a bathroom usage policy and the employee balked. *Kastl*, 325 Fed. Appx. at 494; *Johnson v. Fresh Mark, Inc*., 337 F. Supp. 2d 996, 999-1000 (N.D. Ohio 2003). Thus, Brumby's immediate resort to termination without consideration of an apparent alternative is not only irrational but a dead give-away that the reason he did not explore a potential solution is that he did not want to achieve one.

unpopular Idaho conservationists). This also appears to be an example of relying on dicta in cases that purportedly immunize every government decision under rational basis, while ignoring actual holdings of the Supreme Court and other courts that refuse to rubber-stamp intentional discrimination when an unpopular group is targeted or when the state's action perpetuates an irrational government system.

A. Excusing Intentional Discrimination Based on Meritless Lawsuits Creates an Irrational System That Improperly Interferes With the Medically and Legally Approved Transition Process.

It is inexcusable for a public employer to invoke the specter of meritless lawsuits that its courts cannot control as a justification for intentional discrimination and for interference with the transition process recognized medically and legally as appropriate. While it is permissible to define the state interest as cost savings or efficiency, it is impermissible to accomplish the goal by arbitrarily disadvantaging some people. "This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 441 (1982); *Romer*, 517 U.S. at 635 (not questioning a need to allocate the public fisc to target the most pernicious but holding that "[t]he breadth of the Amendment is so far removed from these particular justifications that we find it

impossible to credit them."); *see also Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (need to conserve the public fisc was not a sufficient reason to limit a tax benefit for Vietnam Veterans arbitrarily to long-term residents of the state); see generally *Lyng v. Int'l Union*, 485 U.S. 360, 373 (1988) (that fiscal concerns can be a legitimate interest "does not mean that Congress can pursue the objective of saving money by discriminating against individuals or groups"). Thus, to allow the termination of otherwise qualified employees to rest on those who would interfere with the transition process recognized by medical professionals and the state by filing meritless lawsuits "is the very essence of arbitrary state action." *Logan*, 455 U.S. at 442. [30]

In recognizing that the Real Life Experience is included in "a triadic therapeutic protocol for the treatment of GID," the District Court echoed a

[30] The deferential cases Brumby cites either do not involve classifications of groups with a tradition of disfavor, do not involve such drastic government action against such a group, or both. See *Schweiker v. Wilson*, 450 U.S. 221, 231 (1981) ("[T]his statute does not classify directly on the basis of mental health" but instead based on the type of facility where they live); *FCC v. Beach Communications*, 508 U.S. 307, 316 (1993) (reviewing regulation that excluded certain facilities from the definition of "cable system"); *Heller v. Doe*, 509 U.S. 312 (1993) (reviewing Kentucky statutes requiring clear and convincing evidence for commitment based on mental retardation but proof beyond a reasonable doubt for commitment based on mental illness); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (approving mandatory retirement age for police officers); *Breck v. State of Michigan*, 47 F. Supp. 2d 880, 886 (E.D. Mich. 1999) (same, but for judges); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (refusing to interfere with Texas' method of funding school districts); *Hadix*, 230 F.3d at 847 (holding the Prison Legal Reform Act's attorney fee provision rationally furthered goal of discouraging frivolous lawsuits).

longstanding judicial recognition of the Real Life Experience as beneficial and often essential for many individuals with Gender Identity Disorder -- either as treatment in and of itself, as a prerequisite for preparing for sex reassignment surgery, or both. [Doc. 70] at 3; *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107, 109 (D. Mass. 2010); *In re R.W. Heilig*, 372 Md. 692, 719, 816 A.2d 68, 78 (2003); *Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978); *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980).[31] In 1982, Georgia enacted O.C.G.A. § 31-10-23(3), allowing for a legal change of sex after surgery; now, all but three states have similar legal avenues by which the law will recognize the reality of one's post-transition sex.[32] At the time of Georgia's 1982 enactment, it was already understood that the prevailing medical wisdom strongly recommended and/or required an extended period of living in the gender one was transitioning to as a prerequisite to surgery. *See McConn*, 489 F. Supp. at 79 ("In fact, cross-dressing is mandatory, as surgery will generally not be performed unless cross-dressing has occurred for a minimum specified period of time."); *Chicago v. Wilson*, 389

[31] *See also McConn*, 489 F. Supp. at 79 (" . . . [A]n integral part of the presurgical process requires that a transsexual wear the clothing of the gender to which reassignment is sought throughout the pre-operative stage. Said procedures are medically and psychologically necessary for the true integration of the body and mind throughout the transition period of the developing gender.").

[32] See Lambda Legal, "Amending Birth Certificates to Reflect Your Correct Sex," available at http://data.lambdalegal.org/pdf/169.pdf and *Heilig*, 816 A.2d at 83-84 and n.8.

N.E.2d at 525 (citing cross-dressing as part of "the necessary therapy in preparation for such surgery").

The orderly process by which medicine and the law will guide and regulate the transition process should not be interfered with arbitrarily, as courts across the country have recognized in striking down laws that would have just that effect. *Chicago v. Wilson* and *McConn* held laws against cross-dressing unconstitutional as applied to the plaintiffs who dressed in accord with their gender identity pursuant to their course of treatment. *Chicago v. Wilson*, 389 N.E.2d at 525; *McConn* 489 F. Supp. at 81 ("the challenged Ordinance fails to pass even a minimal degree of scrutiny" as applied to "transsexual Plaintiffs who cross-dress in preparation for sex-reassignment surgery."). In reaching its decision, the Illinois Supreme Court pointed out that the cross-dressing ban interfered not only with the treatment prescribed for the plaintiffs, but also with the state legislature's "enactment of [a statute that] authorizes the issuance of a new certificate of birth following sex-reassignment surgery." *Chicago v. Wilson*, 389 N.E.2d at 525, citing Ill. Rev. Stat. 1977, ch. 111 1/2, par. 73 -- 17(1)(d). With that enactment, "the legislature has implicitly recognized the necessity and validity of such surgery. It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for such surgery." *Chicago v. Wilson*, 389 N.E.2d at 525, citing Ill. Rev. Stat. 1977, ch. 111 1/2, par. 73 -- 17(1)(d).

Other state appellate courts have cited their birth certificate amendment statutory provisions in rejecting other legislative or judicial actions that interfere with a transsexual's statutory right to pursue a legal change of gender. *Somers v. Superior Court*, 172 Cal. App. 4th 1407, 92 Cal. Rptr. 3d 116 (2009) (striking down statutory requirement that suit to change one's gender designation must be filed in one's county of residence because it irrationally discriminated against non-residents); *Heilig*, 816 A.2d at 82 (holding that statute allowing judicial petitions for birth certificate changes for Maryland-born individuals also permitted jurisdiction to grant a petition for legal sex change for those born elsewhere, because statute "evidences a clear recognition by the General Assembly that a person's gender can be changed and that there are courts with jurisdiction to consider and determine whether that has occurred.").

Highly instructive is *Logan*, where the Court held unconstitutional Illinois's law that terminated fair employment act claims if the state commission responsible for handling the claims did not schedule a hearing within 120 days.[33] 455 U.S. at 441-42. The law plainly penalized the claimant for the failure of the legal system to handle the claim expeditiously, and thus the Court was not swayed by the fact that Illinois quite reasonably could have believed that its draconian termination of

[33] The Court held the law to violate both due process and equal protection, with six justices expressing support for each position.

claims that were not processed timely would have the "aim of encouraging the Commission to convene timely hearings." *Id*. at 442. But to penalize the claimant, irrespective of the merits of the claim, based on a failure of the system was held to be "the very essence of arbitrary state action" which failed the "Equal Protection Clause['s . . .] requirement of some rationality in the nature of the class singled out." *Id*. (citation omitted).

Also, while decided under a different standard, *Johnson Controls* has some relevance here. *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). There, it was held that the employer could not engage in intentional sex discrimination based on a genuine fear of meritorious litigation that would be seeking redress for severe physical injuries, not for discomfort with another personal's course of medical treatment. *Id*. at 208-09. While the Court expressed the hope that its ruling would immunize from tort liability those companies forced to retain women irrespective of pregnancy, it did not base its holding on the existence of such immunity, and in fact, tort liability for fetal damage has persisted to this day.[34] *Id*. In short, the Supreme Court has been extremely critical of allowing the specter of theoretical – or even probable -- litigation risk to justify

[34] For cases holding employers liable based on working conditions endured by the plaintiff's mother, see *Asad v. Cont'l Airlines, Inc.*, 328 F. Supp. 2d 772 (N.D. Ohio, 2004); *Snyder v. Michael's Stores*, 16 Cal. 4th 991; 945 P.2d 781 (1997); *Pizza Hut of Am. v. Keefe*, 900 P.2d 97, 101-02 and n.4 (Colo. 1995) (citing cases); *Thompson v. Pizza Hut of America, Inc.*, 767 F. Supp. 916 (N.D. Ill. 1991).

intentional discrimination. See *also Ricci v. DiStefano*, 129 S. Ct. 2658, 2677 (2009) (fear of disparate impact liability must have a strong basis in evidence before intentional employment action based on race is justified); *Hayes v. Shelby Memorial Hosp*., 726 F.2d 1543, 1552 n.15 (11th Cir. 1984) (because, "[i]n today's litigious society, the potential for litigation rests in almost every human activity. . . . we believe that potential liability is too contingent and too broad a factor to amount to a "business necessity" . . . [and that] extension of the business necessity defense beyond a strict relationship to job performance" should be "based on a higher public policy than simply protecting employers from lawsuits.").

The state cannot blame its own legal system of tort liability as the reason it needs to discriminate. More importantly, Glenn submits that Georgia law already makes clear that no such claim lies, in its statutory recognition of the medical necessity and legal propriety of the transitioning process. This recognition renders it impossible for a fellow bathroom patron whose sensibilities are offended to meet the high standards set in Georgia law to bring an action for trespass or intentional infliction of emotional distress. *Elmore v. Atlantic Zayre, Inc.*, 178 Ga. App. 25, 26, 341 S.E.2d 905 (1986) (holding that store employee's legitimate intent [in that case, to ferret out unlawful behavior] necessarily meant that he did not have "the purpose of invading the privacy of another," citing O.C.G.A.§§ 16-11-61, 16-11-62(3)); *Steed v. Fed. Nat'l Mortg. Corp*., 301 Ga. App. 801, 810-811, 689 S.E.2d

843, 851-52 (Ga. Ct. App. 2009) (liability for intentional infliction of emotional distress is "a question of law" and conduct "must be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" and the standard is not met where there is no evidence that interlopers "had acted with the intent to frighten or intimidate [plaintiff] in any manner.").

The District Court simply stated *ipse dixit* that litigation risk was a factor without examining the law, a result Brumby encourages. See Brumby Open. Brf. at 32. But when the effect is to infringe on the rights of a politically unpopular group, speculation is not sufficient, a point driven home in *Cleburne*. 473 U.S. at 449 (refusing to credit "doubts about the legal responsibility for actions which the mentally retarded might take" where there was no showing that such concern was valid). Rather than distinguish *Cleburne*, the District Court repeated the mistake that it condemned.[35]

[35] Brumby's other defense of his rash firing of Glenn – that it would be impossible to "monitor" or "shadow" Glenn to determine her compliance with any agreement or rule about bathroom usage -- improperly attempts to justify discrimination based on an unjustified assumption that the target will not play by the rules. *See* Brumby Open. Brf. at 29; *Cleburne* at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.").

B. Brumby's Firing of Glenn Based on a Purported Concern About Legislators' Loss of "Confidence" In His Office Has No Rational Relationship to a Legitimate Governmental Objective.

Brumby also claims he fired Glenn to preserve legislators' "confidence" in his office. Discovery revealed that by "confidence," Brumby refers not to OLC's ability to carry out its statutorily-imposed duty to draft bills and provide legal advice, but instead to the very type of manifestation of private biases that state actors are forbidden to consider:

> Q: Why did you think there might be an adverse impact on their confidence in your office?
>
> A: Well, as we discussed earlier, I think some members of the legislature would view that taking place within our office as perhaps immoral, perhaps unnatural, and perhaps, if you will, liberal or ultraliberal. And our office works for 236 members of the legislature of all political parties and all political persuasions. And I think some of those members would not -- would have diminished confidence in the operation where that happened.

PF 95; Order at 18 (citing cases).[36]

[36] Accord *Schroer*, 577 F. Supp. 2d at 302 (rejecting employer's argument that transitioning employee "might lack credibility with Members of Congress" as "explicitly based on her gender non-conformity and her transition from male to female and [] facially discriminatory as a matter of law. Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."); *Open Homes Fellowship, Inc. v. Orange County, Fla.*, 325 F. Supp. 2d 1349, 1354, 1355, 1359-60 (M.D. Fla. 2004) (zoning denial improperly deferred to the "unsubstantiated" "negative attitudes" of the public that residents posed a threat to children and "illegally gave these biases effect," and failed rational basis review).

Brumby's purported concern about how others would judge his action also lacked a factual basis. *See Schroer*, 577 F. Supp. 2d at 302 (court rejected employer's assumption that Schroer's existing network of contacts would react negatively to the transition, because it was not based on employer's actually asking those contacts). Two of the three testifying legislators said resolutely that they would not second-guess Brumby's personnel decisions. The other one testified that his only concern was whether Brumby had the legal right to fire Glenn, to which Brumby replied that Georgia "a right-to-work state. We are on solid legal ground." PAF 13.[37]

CONCLUSION

This Court should affirm the sex discrimination holding and not reach the mental condition discrimination claim. If reached, it should be reversed, as Brumby's precipitous firing of Glenn was irrational.

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[37] It is recognized that at-will employment, as provided for by statute in O.C.G.A. 34-7-1, still forbids an employer from discharging an employee in contravention of a state statute or federal law, including the U.S. Constitution. *E.g.*, *Balmer v. Elan Corp*., 261 Ga. App. 543, 544, 583 S.E.2d 131, 133 (1996); *accord Lopez* at 665 n.19. Brumby's purported concern about "confidence" in the OLC, which exists to provide legal advice, seems especially hollow. Brumby knew that either Section 1983 or Title VII would override Georgia's at-will employment statute. Moreover, when the applicable cases are outside one's circuit and some hold that your action unequivocally violates the law, while others side with you only if the facts are different and the employee invokes Title VII, and not Section 1983, reporting that you are on "solid ground" does not inspire confidence in your prescribed job duties. See PF 73.

Dated: January 31, 2011

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The undersigned counsel for Appellee/Cross-Appellant certifies that the above document is a computer document prepared in Times New Roman (14 point) font in accordance with Eleventh Circuit Rule 32(a)(5)(A)'s requirements for briefs. The undersigned further certifies that the document contains12,492 words and thus complies with FRAP 28.1(e)(2)(B)(i).

So certified this 31st day of January, 2011.

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I HEREBY CERTIFY that I have this day served a copy of the within and foregoing Corporate Disclosure Statement upon counsel for all parties by placing a copy for delivery by the U.S. Postal Service, first class, postage prepaid, addressed to the following attorneys of record:

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