

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LEYTH O. JAMAL,
PLAINTIFF,

v.

SAKS & COMPANY,
DEFENDANT.

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CASE NO.: 4:14-CV-02782

JURY DEMAND

**BRIEF OF AMICI CURIAE HUMAN RIGHTS CAMPAIGN
AND NATIONAL CENTER FOR LESBIAN RIGHTS**

Amici curiae Human Rights Campaign and National Center for Lesbian Rights respectfully submit this brief supporting denial of Defendant SAKS & Company’s pending motion to dismiss. *Amici* are two national organizations working to advance equality for lesbian, gay, bisexual, and transgender (LGBT) people through legislation, policy, public education, and litigation, including working to make workplaces more open to and inclusive of LGBT Americans. *Amici* strongly support the enforcement of laws, including Title VII, which protect workers from discrimination based on sex, including discrimination based on gender identity and nonconformity with gender stereotypes.

Amici agree with Plaintiff that SAKS’ motion to dismiss ignores a host of case law and the conclusions of the EEOC and Department of Justice, all of which firmly establish that harassment or discrimination against a transgender person, whether for having transitioned their sex or for not conforming to gender-based stereotypes, constitutes sex discrimination under Title VII. Therefore, taking all the factual allegations of the complaint as true, as the Court must at this stage, the motion to dismiss should be denied. SAKS is free to present its version of the facts or to deny that harassment or discrimination occurred in this case. However, its position

that Title VII does not protect transgender workers from the types of discrimination and harassment alleged in the complaint is wrong as a matter of law.

Amici submit this brief to offer additional perspective from their long experience working with employers to create workplaces that are welcoming and promote equal opportunity for LGBT employees. Based on those experiences, *Amicus* Human Rights Campaign has developed model policies and best practices to implement employers' legal obligation to treat transgender employees equally. Such policies help employers to avoid instances of harassment or discrimination such as those alleged in the complaint and lead to better workplaces and reduced potential for legal liability. As explained below, leading law firms that represent employers widely recognize that Title VII protects transgender employees and have advised their clients and others to adopt such policies—as tens of thousands of employers across the country have done. Moreover, many employers find that, in addition to being necessary to comply with Title VII and other laws, establishing and enforcing protections for transgender workers is also good for business.

ARGUMENT

I. The Nation's Leading Law Firms That Represent Employers Widely Recognize That Title VII Prohibits Discrimination Against Transgender Employees.

Although many early decisions, including those on which SAKS relies in its motion, held that Title VII's prohibition on sex discrimination does not protect transgender workers from discrimination based on having changed their sex, the law has undergone a sea change since the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, the Court held that Title VII not only prohibits harassment or discrimination based on a person's status as a woman or a man, but also prohibits discrimination based on an individual's nonconformity with stereotypical ideas of appropriate "masculine" or "feminine" behavior or

appearance. Since *Price Waterhouse*, federal courts have held repeatedly that government action that discriminates against transgender people constitutes sex discrimination under Title VII. For example, the Sixth Circuit has held that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.” *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); see also *Barnes v. City of Cincinnati*, 401 F.3d 729, 737-38 (Title VII bars discrimination against a male employee who was transitioning to female).¹ In *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), the district court held that just as it plainly would constitute discrimination based on religion if “an employee is fired because she converts from Christianity to Judaism,” the same analysis applies “where the plaintiff has changed her sex.” *Id.* at 307. That court concluded that discrimination because a person is transgender is “literally ‘discrimination because of . . . sex.’” *Id.* at 308 (quoting *Price Waterhouse*, 378 F.3d at 573) (emphasis in original). Similarly, a decision from this Court concluded that “Title VII and *Price Waterhouse* . . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes.” *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008).

¹ Many other federal and state courts have issued similar decisions holding that discrimination against transgender people constitutes sex discrimination. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, *6-7 (Mass. Super. Ct. Oct. 11, 2000); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

The Executive Branch likewise has concluded that Title VII prohibits discrimination against transgender people. In an important precedent, the Equal Employment Opportunity Commission found that “intentional discrimination against a transgender individual because that person is transgender is, by definition, ‘discrimination based . . . on sex’” in violation of Title VII. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, *11 (EEOC Apr. 20, 2012). Recently, the Attorney General reached a similar conclusion, announcing the Department of Justice’s position that “Title VII’s prohibition against discrimination ‘because of . . . sex’ encompasses discrimination founded on sex-based considerations, including discrimination based on an employee’s transitioning to, or identifying as, a different sex altogether.” Office of the Attorney General, *Memorandum re Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf

Even before the EEOC and DOJ decisions, leading law firms representing employers noted the many post-*Price Waterhouse* court decisions holding that Title VII protects transgender workers and began advising their clients and others that failure to prevent discrimination and harassment against transgender employees could lead to liability under Title VII. For example, following an important Eleventh Circuit decision, the law firm representing Defendant SAKS in this case advised employers:

[B]oth private and public employers must be diligent to avoid any activity in the workplace that arguably disadvantages transgendered employees, including joking, teasing, etc, as well as discipline, discharge and other adverse employment actions.

Ogletree Deakins, *Transgender Employee Fired by Government Employer Is Protected Under Federal Law* (Dec. 8, 2011), <http://www.ogletreedeakins.com/publications/2011-12-08/transgender-employee-fired-government-employer-protected-under-federal-law>.

Last year, the firm again confirmed that transgender workers are protected under Title VII, explaining: “Under current Title VII case law, discrimination based on gender identity and transgender status is discrimination ‘based on sex.’” Ogletree Deakins, *OFCCP’s Newest Directive: Gender Identity and Sex Discrimination* (Aug. 25, 2014) <http://blog.ogletreedeakins.com/ofccps-newest-directive-gender-identity-and-sex-discrimination>.

Many other firms have offered similar advice. *See, e.g.*, Jenner & Block, *Client Advisory: Transsexual May Bring Claim of Gender Discrimination* (Apr. 2006), http://jenner.com/system/assets/publications/7641/original/32._Transsexual_May_Bring_Claim_of_Gender_Discrimination.pdf?1323117085; Jackson Lewis, *Discrimination Against Transgender Worker Is Illegal, Federal Appeals Court Rules* (Dec. 16, 2011), <http://www.jacksonlewis.com/resources.php?NewsID=3977>; Crowell & Moring, *Transgender Employees Protected By Federal Law Against Discrimination* (Mar. 23, 2012), <http://www.crowell.com/NewsEvents/AlertsNewsletters/all/Transgender-Employees-Protected-By-Federal-Law-Against-Discrimination>; Frost Domel PLLC, *Absent BFOQ, Transgendered Employees Protected Under Title VII* (June 24, 2012), <http://www.texasbusinessmatters.com/2012/06/24/absent-bfoq-transgendered-employees-protected-under-title-vii/>; Strasburger & Price, LLP, *Accommodating Transgender Employees Is Not a Theoretical Option* (Oct. 28, 2014), <http://www.strasburger.com/accommodating-transgender-employees-theoretical-option/>. In short, Title VII’s protection of transgender workers is both well established and widely recognized by employment law practitioners.

II. Implementing Protections For Transgender Workers Is Neither Burdensome Nor Difficult.

Amici have long recommended that employers adopt workplace policies both to comply with the requirements of Title VII and to make their offices more inclusive of transgender employees. Implementing protections for transgender employees is neither burdensome nor difficult. Many businesses—both large and small—have added gender identity to their non-discrimination statements and have reported that there are no associated costs, or that the associated costs are negligible. Crosby Burns & Jeff Krehely, Center for American Progress, *Workplace Fairness for Gay and Transgender Workers: Big Benefits, Few-to-No Costs* (Jan. 27, 2012), <https://www.americanprogress.org/issues/lgbt/news/2012/01/27/11006/workplace-fairness-for-gay-and-transgender-workers/>; *see also* Office of the Press Secretary, The White House, *FACT SHEET: Taking Action to Support LGBT Workplace Equality Is Good For Business* (Jul. 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0>.

In particular, employee training and education on how to treat transgender employees equally can be integrated into existing company-wide diversity training programs and “should be comparable to other policy announcements and training initiatives. For instance, if an employer provides online harassment training that incorporates race and sex, it should also incorporate gender identity.” Human Rights Campaign, *Transgender Inclusion in the Workplace* 27 (2d ed. 2008), *available at* <http://www.hrc.org/resources/entry/diversity-training-on-gender-identity-and-gender-expression>.

Moreover, the small costs that some businesses may incur when implementing transgender-inclusive policies are “essentially erased” when the high cost of discrimination is taken into account—for instance, through higher litigation costs and damage to the

discriminating company's reputation. See Burns & Krehely, *supra*; see also Crosby Burns, Center for American Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 6-17 (March 2012), available at http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf. Research has shown that of the large companies that have incorporated protections for transgender employees, "no company stated that the policies would be costly." Brad Sears & Christy Mallory, The Williams Institute, *Economic Motives for Adopting LGBT-Related Workplace Policies* 3 (Oct. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>. Instead, the companies surveyed tied their diversity policies to improvements in their "bottom line." *Id.* at 1.

III. Industry Leaders And Small Businesses Recognize That Protecting Transgender Employees Is Good For Business.

Industry leaders and small businesses recognize that adopting policies to ensure that they are complying with their legal obligation to refrain from discrimination against transgender employees is good for business. Of the top 50 Fortune 500 companies and the top 50 federal contractors, ninety-two percent (92%) state that diversity programs and generous benefit packages are good for their business, and a majority explicitly link policies protecting LGBT employees to improving their bottom line. Sears & Mallory, *supra*, at 1. As the Vice President of Global Workforce Diversity of IBM, Ted Childs, said,

Our goal is to assemble the most talented workforce in our industry, and to use the skills of that diverse team to respond to the needs of our clients. The contributions that are made by [gay and transgender] IBMers accrue directly to our bottom line and ensure the success of our business.

Burns, *supra*, at 11.

Large and small businesses alike recognize that transgender-inclusive policies help companies attract and retain the best and brightest employees, enhance job performance, and avoid litigation costs. Burns & Krehely, *supra*. Two-thirds of the companies ranked in the Fortune 500 have adopted explicit gender identity non-discrimination protections. Human Rights Campaign, *Corporate Equality Index 2015: Rating American Workplaces on Lesbian, Gay, Bisexual and Transgender Equality* 3 (2014), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/documents/CEI-2015-rev.pdf#__utma=149406063.94782811.1421557308.1421557308.1421557308.1&__utmb=149406063.6.9.1421559120220&__utmc=149406063&__utmz=149406063.1421557308.1.1.utmcsr=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&__utmv=-&__utmk=231125407](http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/documents/CEI-2015-rev.pdf#__utma=149406063.94782811.1421557308.1421557308.1421557308.1&__utmb=149406063.6.9.1421559120220&__utmc=149406063&__utmz=149406063.1421557308.1.1.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utmk=231125407). Similarly, six out of ten small business owners believe that anti-discrimination laws can improve their bottom line by helping them attract the best and brightest employees. Small Business Majority, *Opinion Poll: Small Businesses Support Workplace Nondiscrimination Policies* 4 (2013), <http://www.smallbusinessmajority.org/small-business-research/downloads/060413-workplace-nondiscrimination-poll-report.pdf>.

In sum, both the nation's leading law firms that advise employers and the nation's business community widely recognize that Title VII protects transgender employees and have acted accordingly to update their equal employment policies to comply with that requirement—at little or no cost, and to the benefit of both employers and employees.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court deny Defendant's motion to dismiss.

Dated: January 20, 2015

Respectfully submitted,

/s/ Christopher L. Nichols

Christopher L. Nichols, *Attorney-in-Charge*
State Bar of Texas No. 24034600
Southern District of Texas Bar No. 31662
820 Gessner, Suite 1570
Houston, Texas 77024
(281) 822-7950 – Telephone
(832) 476-9554 – Facsimile
Email: chris@jgradyrandlepc.com
Local Counsel for *Amici Curiae*

and

Shannon P. Minter, *of counsel*
State Bar of California No. 168907
Christopher F. Stoll, *of counsel*
State Bar of California No. 179046
Amy Whelan, *of counsel*
State Bar of California No. 215675
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, California 94102
(415) 392-6257 – Telephone
(415) 392-8442 – Facsimile
Email: SMinter@nclrights.org
Email: CStoll@nclrights.org
Email: AWhelan@nclrights.org
National Counsel for *Amici Curiae*

APPENDIX

Human Rights Campaign’s Recommendations for Employer Policies That Comply with Title VII and Make Workplaces More Transgender-Inclusive

Human Rights Campaign recommends that employers institute the following workplace policy changes to comply with the law under Title VII and to make their offices more transgender-inclusive:

- **Amend non-discrimination or equal employment opportunity policies to include “gender identity” as a protected class in the employee handbook and on the company website.** Human Rights Campaign, Employment Policies: Adding Gender Identity as a Protected Category, <http://www.hrc.org/resources/entry/employment-policies-adding-gender-identity-as-a-protected-category> (last visited Jan. 15, 2015).
- **Establish written guidelines for when employees transition, so that responsibilities are clearly communicated to the transitioning employee, their managers, and coworkers.** Human Rights Campaign, Workplace Gender Transition Guidelines (last visited Jan. 15, 2015), <http://www.hrc.org/resources/entry/workplace-gender-transition-guidelines>.
- **Incorporate information about transgender issues in the workplace into diversity training programs.** Human Rights Campaign, Diversity Training on Gender Identity and Gender Expression, <http://www.hrc.org/resources/entry/diversity-training-on-gender-identity-and-gender-expression> (last visited Jan. 15, 2015).
- **Permit an employee to use sex-segregated facilities (such as restrooms) that correspond to his or her full-time gender presentation, regardless of what stage that person is in his or her transition process.** Human Rights Campaign, Restroom Access

for Transgender Employees, <http://www.hrc.org/resources/entry/restroom-access-for-transgender-employees> (last visited Jan. 15, 2015).

- **Change a transitioning employee's name and gender in all personnel and administrative records, including internal and external personnel directories, their e-mail address, and business cards.** Human Rights Campaign, Personnel Documentation for Transgender Employees, <http://www.hrc.org/resources/entry/personnel-documentation-for-transgender-employees> (last visited Jan. 15, 2015).
- **Modify dress codes to avoid gender stereotypes and apply them consistently to all employees. Transgender employees should be permitted to dress consistently in accordance with their full-time gender presentation.** Human Rights Campaign, Workplace Dress Codes and Transgender Employees, <http://www.hrc.org/resources/entry/workplace-dress-codes-and-transgender-employees> (last visited Jan. 15, 2015).
- **Include medically necessary treatments and procedures, such as those defined by the World Professional Association for Transgender Health's Standards of Care for Gender Identity Disorders, in employer-provided healthcare and short-term disability coverage.** Human Rights Campaign, Transgender-Inclusive Benefits for Employees and Dependents, <http://www.hrc.org/resources/entry/transgender-inclusive-benefits-for-employees-and-dependents> (last visited Jan. 15, 2015).