

**TRANSGENDER EMPLOYEES & RESTROOM
DESIGNATION—*GOINS V. WEST GROUP, INC.***

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I. INTRODUCTION

“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”¹ The purpose of anti-discrimination laws is to combat stereotypes that have systematically dictated the role of women, men, and minorities in the workplace.

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1. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

Minnesota's anti-discrimination law includes a category of employees that by their definition challenge stereotypes: "[a person] having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."² Julienne Goins fit into this category, but the Minnesota Supreme Court held that despite the state's anti-discrimination law, Goins's employer could question and ultimately determine her eligibility for her choice of restroom use.³

Goins v. West Group, Inc. is a significant decision in transgender jurisprudence, because it involves the Minnesota Supreme Court's first interpretation of the nation's initial across-the-board statutory prohibition of discrimination against transgender people.⁴ The effect of this ruling is that even though employers are still prohibited from discriminating against people on the basis that the employee's self-image differs from a biological stereotype of feminine or masculine, in Minnesota an employer can prohibit such an employee from using the restroom of their choice.

This article examines the methodology applied by the Minnesota Supreme Court in interpreting the Minnesota Human Rights Act ("MHRA") in *Goins* and the implications of this interpretation on transgender jurisprudence in Minnesota. Part II outlines the facts, procedural history, and the supreme court's decision in *Goins*. Part III considers the supreme court's approach to interpreting the MHRA – that if not expressly considered by the legislature, the supreme court would not interpret the MHRA to have such broad social implications. Part IV considers the implications of the supreme court's determination that Goins must prove she is eligible to use the women's restroom based on her "biological gender." Part V concludes that West Group distinguished Goins on the basis that Goins failed to conform to the stereotypical view of a woman using the women's restroom and that because this mistreatment is permitted, the tenets of the MHRA have not been upheld.

2. MINN. STAT. § 363.01, subd. 41(a) (2000).

3. *Goins v. West Group, Inc.*, 635 N.W.2d 717, 725-26 (Minn. 2001) [hereinafter *Goins II*].

4. Rosalind Bentley, *The Supreme Court: Minnesotans React to Ruling with Joy, Disappointment*, STAR TRIB. (Minneapolis), May 21, 1996, at 8A; see MINN. STAT. § 363.01, subd. 41(a) (2000).

II. *GOINS V. WEST GROUP, INC.*

The case of *Goins* involves the claim by Julienne Goins of discrimination based on her sexual orientation, as defined by the MHRA. An examination of the factual background and an analysis of the procedural posture outlines the history of *Goins*.

A. *Factual Background*

At her birth in 1973, Julienne Goins was designated male and given the name Justin Travis Goins.⁵ Like many transgendered individuals, throughout her childhood and adolescence Goins was confused about her sexual identity.⁶ After counseling, Goins began taking female hormones in 1994, and has presented herself publicly as female since 1995.⁷ Through a Texas court order in October 1995, Goins changed her legal name to Julienne Hannah Goins, and her “legal” gender from “genetic male” to “reassigned female.”⁸

In May 1997, Goins began working in the Rochester, New York office of West Group, where she presented as female and presumably used the women’s restroom without incident. In 1997, Goins visited West’s Eagan facility on four occasions while considering relocating to Minnesota, which she eventually did in October 1997.⁹

While visiting the Eagan facility Goins used the women’s restroom, as she had done in New York.¹⁰ A small number of female employees at the Eagan facility expressed concern to West supervisors about sharing a restroom with Goins.¹¹ After consultation with the director of human resources and legal counsel, West decided to treat the women’s complaints as a hostile

5. *Goins II*, *supra* note 3, at 720. The sex designation on a birth certificate is determined by the birth attendant, and if the external genitalia appear unambiguous, the external genitalia usually determine the sex designated on the birth certificate. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999). Because a birth certificate is commonly used to obtain other legal documents, an individual’s legal sex is generally fixed based upon the appearance of a person’s external genitalia at birth. *Id.* at 272.

6. *Goins II*, *supra* note 3, at 720.

7. *Id.* at 720-21.

8. *Id.* at 721.

9. *Id.*

10. *Id.*

11. *Id.*

work environment issue and determined that Goins would be required to use either a single-occupancy, unisex restroom¹² on a different floor of the building where she worked, or the single-occupancy, unisex restroom in another building.¹³

On her first day of work at West's Minnesota office, Goins was informed of the complaints and the new restroom policy. Goins objected to West's restroom policy, refused to comply, and proposed education and training to allay the concerns of her coworkers.¹⁴ Goins refrained from eating or drinking during the work day to avoid having to use the women's restroom, but at times, she used the women's restroom located closest to her workstation.¹⁵ Goins complained to West's human resources representative in Rochester, New York, but she was referred back to the Minnesota supervisors who drafted the restroom policy.¹⁶ Approximately one month after Goins began work in Minnesota, West threatened to take disciplinary action if Goins did not comply with the restroom policy.¹⁷

In January 1998, Goins resigned, declining an offer of promotion.¹⁸ In her letter of resignation, Goins stated that she resigned because of the unwelcome, stressful environment created by the restroom policy.¹⁹

B. *The District Court*

Goins brought an action in Hennepin County District Court, alleging that West had discriminated against her based on her sexual orientation, as defined by the MHRA, by denying her access to the women's restroom.²⁰ Further, Goins alleged that West's discriminatory treatment, along with the conduct of its employees, created a hostile work environment, also in violation of the

12. "Unisex" is defined as "adj. (1) Designed for or suitable to both sexes . . . (2) Not distinguished or distinguishable on the basis of sex. n. The elimination or absence of sexual distinctions, especially in dress." AMERICAN HERITAGE DICTIONARY 1822 (4th ed. 2000).

13. *Goins II*, *supra* note 3, at 721.

14. *Id.*

15. *Goins v. West Group, Inc.*, 619 N.W.2d 424, 427 (Minn. Ct. App. 2000) [hereinafter *Goins I*].

16. *Id.*

17. *Id.*

18. *See Goins II*, *supra* note 3, at 721.

19. *Id.*

20. *Id.*

MHRA.²¹

The district court granted summary judgment in favor of West and dismissed Goins's claims.²² In an analysis ultimately adopted by the Minnesota Supreme Court, the district court used the *McDonnell Douglas Corp. v. Green* burden-shifting framework for proving claims of indirect discrimination.²³ The district court determined that the ultimate issue for its consideration was "whether a pre-op[erative] male to female transsexual person is legally entitled to be treated as a female for the purpose of bathroom use."²⁴ The district court concluded that Goins failed to prove the second element of her prima facie case, that she was qualified to use the women's restroom, because "[i]n significant ways she is functionally different than females with respect to the most common objective criteria related to bathroom use."²⁵ The district court felt obligated to "classify" Goins according to her biological gender:

[T]he legislature has provided no guidance on how transgender persons are to be classified, where classification is necessary. Whether a person should use the male bathroom or the female bathroom is normally a decision in which employers do not need to become involved. However, in the case of plaintiff, a pre-op[erative] male to female transsexual, it's a legitimate concern both for the employer and the employees.²⁶

Similarly, the district court found that the hostile work environment claim failed because West's policy was reasonable and did not rise to a sufficiently pervasive level of harassment.²⁷

21. *Id.*

22. *Id.*

23. *See id.* at 723-24; *Goins v. West Group, Inc.*, No. 98-18222 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000). The elements of a prima facie case for indirect discrimination, as defined in *McDonnell Douglas* are (1) plaintiff is a member of a protected class; (2) plaintiff is eligible for the position in question; and (3) plaintiff was denied the position in question. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972).

24. *Id.* at 9 (emphasis omitted).

25. *Goins v. West Group, Inc.*, No. 98-18222 (Minn. Dist. Ct. 4th Dist. Jan. 14, 2000) at 10.

26. *Id.* at 5.

27. *Id.* at 12.

C. *The Court of Appeals*

The Minnesota Court of Appeals reversed the district court.²⁸ The court of appeals found the district court's reliance on the *McDonnell Douglas* burden-shifting framework unnecessary because Goins had established a direct claim of discrimination.²⁹ In reliance on the plain language of the statutory definition of sexual orientation, the court of appeals concluded:

The statute prohibits discrimination on the basis of the inconsistency between anatomy and self-image. West denied Goins use of the women's restroom in disregard of her undisputed female self-image. The district court agreed with West and held that, as a matter of law, anatomy alone makes Goins a man and that her self-image is irrelevant to the issue of restroom use. The district court held that Goins can only use the women's restroom by demonstrating anatomy consistent with self-image. The MHRA, however, does not require an employee to eliminate an inconsistency between self-image and anatomy; it protects the employee from discrimination based on such an inconsistency.³⁰

West argued that in attempting to comply with the public accommodation statute, which permits discrimination based on sex for purposes of the designation of public restrooms according to sex, it legitimately discriminated against Goins based on *sex*.³¹ The court of appeals rejected this argument, stating that Goins's claims were based on sexual orientation, not sex: "[g]iven the unambiguous wording of the MHRA, West had failed, at this state of the litigation, to present a non-discriminatory, legitimate defense."³²

The court of appeals similarly reversed the district court on the hostile work environment claim, finding that the evidence raised at least a genuine issue of material fact as to whether the harassment would give rise to a hostile work environment.³³ Finally, the court of appeals ruled that the district court could not compel Goins to answer discovery relating to her genitals because facts regarding

28. *Goins I*, *supra* note 15, at 431.

29. *Id.* at 428.

30. *Id.* at 428-29.

31. *Id.* at 429 (emphasis added); *see* MINN. STAT. § 363.02, subd. 4 (2000).

32. *Goins I*, *supra* note 15, at 429.

33. *Id.* at 430.

the appearance and function of her genitalia were irrelevant to a claim based on her sexual orientation, as defined by the MHRA.³⁴

D. The Supreme Court

The supreme court unanimously reversed the court of appeals in an opinion authored by Justice Russell Anderson.³⁵

The supreme court focused primarily on whether Goins had proven a prima facie case for direct discrimination and whether the employer's decision was actually motivated by Goins having a protected trait, a self-image inconsistent with her biological gender.³⁶ The court determined that West's motives were based solely on sex, because Goins was denied use only of the restrooms designated for women.³⁷

The parties did not dispute that an employer may properly designate restrooms according to biological sex.³⁸ Rather, Goins argued that the MHRA requires employers to allow restroom use based on self-image of gender, whereas West argued that the public accommodation statute allowed employers to designate restroom use based on biological sex.³⁹ The supreme court agreed with West in that restroom use can be designated based on "biological gender" not because of any statutory authority but because of "cultural preference":

As the district court observed, where financially feasible, the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender. To conclude that the MHRA contemplates restrictions on an employer's ability to designate restroom facilities based on biological gender would likely restrain employer discretion in the gender designation of workplace shower and locker room facilities, a result not likely intended by the legislature.⁴⁰

Concerns regarding the effect of designating public-facilities

34. *Id.* at 431.

35. *Goins II*, *supra* note 3, at 720, 725.

36. *Id.* at 722 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993))).

37. *Id.* at 723.

38. *Id.*

39. *Id.*; *see also infra* Part IV. (discussing the difference between sex and gender).

40. *Goins II*, *supra* note 3, at 723.

use by self-image rather than biological sex influenced the court's decision.⁴¹ The court specifically noted that workplace restrooms are, in other respects, covered under the MHRA, and that the MHRA does "protect her right to be provided an adequate and sanitary restroom."⁴²

The supreme court then utilized the *McDonnell Douglas* burden-shifting framework to determine whether Goins had proven a prima facie case for disparate treatment based on circumstantial evidence.⁴³ The court deviated from the traditional second element requiring that the employee prove she is eligible for the specific employment position in question.⁴⁴ Instead, the court concluded that Goins must show that (1) she is a member of a protected class; (2) she is eligible to use the restrooms designated for her biological gender; and (3) she was denied access to the restroom, which she is qualified to use.⁴⁵ The court found that Goins had failed to show that she was eligible to use the restrooms designated for use according to her biological gender.⁴⁶ The court provided no specific criteria with which to analyze whether an employee is eligible to use a certain restroom. In a Special Concurrence, Justice Page clarified that in order to be eligible to use the women's restroom, "Goins must establish that she is *biologically* female" and that she had failed to do so.⁴⁷ Therefore, the court concluded, Goins failed to make her prima facie case.

Finally, the court also held that Goins failed to prove a hostile work environment claim because West's restroom policy was not based on sexual orientation.⁴⁸ The court noted that the conduct of Goins's coworkers, although inappropriate, did not rise to a level so severe or pervasive as to create an actionable hostile work environment.⁴⁹

41. *Id.*

42. *Id.* at 723 n.2. The court did not state, however, that transgender employees are protected under the MHRA in all other terms, conditions, facilities, or privileges of employment. *Id.*

43. *Id.* at 724; *see generally* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

44. *Goins II*, *supra* note 3, at 724.

45. *Id.* The court noted that the elements, as provided in *McDonnell Douglas Corp.*, "vary with the circumstances of the alleged discrimination." *Id.*

46. *Id.* at 725.

47. *Id.* at 726 (Page, J., concurring specially) (emphasis added).

48. *Id.* at 725.

49. *Id.*

III. INTERPRETING THE MINNESOTA HUMAN RIGHTS ACT

Because the MHRA provides the first statewide protection of transgender people, the Minnesota Supreme Court's interpretation of the MHRA is of central importance to transgender jurisprudence.⁵⁰ Three perspectives of the court's interpretation of the statute are examined: (1) whether the legislature intended the statute to have broad social implications; (2) whether the legislature indirectly considered the rationale behind questioning a transgender person's use of the restroom; and (3) whether the purpose of the statute was to allow an employer to discriminate against a transgender person on the basis of sex.

The MHRA was amended in 1993 to include a prohibition of discrimination against an employee in the terms, conditions, facilities, or privileges of employment based on sexual orientation.⁵¹ The statute's definition of "sexual orientation" is so broad as to unmistakably encompass transgender people:⁵²

"Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or *having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness*. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.⁵³

50. This is an important issue because other states and cities have modeled their discrimination statutes after the MHRA. *See infra* note 75. One other state, Rhode Island, has adopted a similarly broad protective statute. *See* R.I. GEN. LAWS § 34-37-3(17) (1995 & Supp. 2001) (prohibiting discrimination on the basis of a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression; "whether or not . . . different from that traditionally associated with the person's sex at birth").

51. MINN. STAT. § 363.03, subd. 1(2)(c) (2000).

52. In Minnesota, transgender people are included within the definition of sexual orientation, but the definition of transgender is not entirely appropriate. Transgender people are not treated differently because of their sexual preference or affection for another. Often times the sexual preference of a transgender person is unknown, although in such a case transgender people may be treated differently because of a perceived sexual preference or affection. More likely, however, transgender people are treated differently because of the inconsistency between their self-image and their biological sex, and the statutory language seems to indicate that.

53. MINN. STAT. § 363.01, subd. 41(a) (2000) (emphasis added).

The parties agreed that Goins has a self-image inconsistent with her biological gender and that she is included in the protected category defined by the statute as sexual orientation.⁵⁴

The supreme court focused on West's intent to discriminate, rather than Goins's inclusion within the protected category. The court found that West discriminated against Goins based on her *sex or gender* rather than her sexual orientation: "[Because] Goins sought and was denied access only to those restrooms designated for women, West's enforcement of that policy was likewise grounded on gender."⁵⁵ Nevertheless, West was not liable because the MHRA provides an exception to the prohibition on sex discrimination for public accommodations.⁵⁶ The MHRA has no similar exception to the prohibition on sexual orientation discrimination.

The supreme court clearly felt that society is not yet prepared for and the Minnesota legislature had not anticipated a means of restroom designation based on self-image.⁵⁷

Bearing in mind that the obligation of the judiciary in construing legislation is to give meaning to words accorded by common experience and understanding, to go beyond the parameters of a legislative enactment would amount to an intrusion upon the policy-making function of the legislature. Accordingly, *absent more express guidance from the legislature*, we conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA.⁵⁸

Unless the legislature had expressly considered and accounted for such implications, the court would not interpret a statute to create a result with such broad implications.

A. *Legislative Intent*

The supreme court believed that the Minnesota legislature had not considered whether to allow transgender people to use the restroom of their choice. The adoption of the amendment to the

54. *Goins II*, *supra* note 3, at 722.

55. *Id.* at 723. It appears that West never suggested to Goins that she use the men's restroom. *Id.* at 725 n.5.

56. MINN. STAT. § 363.02, subd. 4 (2000).

57. *Goins II*, *supra* note 3, at 723.

58. *Id.* (emphasis added).

MHRA in 1993 to include gay, lesbian, bisexual, and transgender people, had broad social implications for Minnesota and the nation.⁵⁹ This section examines the history behind the adoption of the 1993 amendment to the MHRA to determine whether the legislature was aware that the statute would have the broad social implications envisioned by the supreme court.⁶⁰

The MHRA arose from the local politics of the Twin Cities.⁶¹ The language contained in the MHRA was based on the language of municipal ordinances in both Minneapolis and St. Paul.⁶² In 1974, Minneapolis passed an ordinance prohibiting discrimination on the basis of “affectional or sexual preference.”⁶³ St. Paul also passed a similar ordinance in 1974.⁶⁴ A year later in 1975, Minneapolis amended the definition of “affectional or sexual preference” to include “having or projecting a self-image not associated with one’s biological maleness or one’s biological femaleness.”⁶⁵

At the state level in 1975, anti-discrimination bills were introduced in both the Minnesota Senate and House of Representatives.⁶⁶ Both bills were defeated.⁶⁷

In 1978, the St. Paul ordinance protecting transgender people

59. See Donna Halvorsen, *They Know Whereof They Legislate*, STAR TRIB. (Minneapolis), Apr. 2, 1993, at 1B (interviewing Senator Allan Spear and Representative Karen Clark on the significance of the passage of the “gay-rights bill”).

60. See PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICY MAKERS (2000) [hereinafter TRANSGENDER EQUALITY].

61. *Id.* at 19.

62. See Sen. Allan Spear, Minnesota Senate Floor Debate on Senate File 444 (Mar. 18, 1993).

63. See MINNEAPOLIS, MINN., ORDINANCE 99-68 (1974) (amending MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 945 (relating to Civil Rights)).

64. See ST. PAUL, MINN., ORDINANCE 15,653, ¶ J, (1974) (amending ST. PAUL, MINN., LEGISLATIVE CODE § 74.02).

65. See MINNEAPOLIS, MINN., ORDINANCE 100-288 (1975); see also MINNEAPOLIS, MINN., CODE OF ORDINANCES § 139.20 (1975) (defining affectional preference).

66. See S.F. 595, 69th Minn. Leg., Feb. 24, 1975; see H.F. 536, 69th Minn. Leg., Feb. 20, 1975. The public accommodation section of the bill was dropped in the House Judiciary Committee. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 237 (1999).

67. Senate File 595 never left the Senate Judiciary Committee to which it was sent on May 19, 1975; House File 536 was defeated, as amended, after a floor debate on May 8, 1975. Minnesota State House Representative Arne Carlson offered an amendment on the House floor that included protection of gender identity in the bill. CLENDINEN & NAGOURNEY, *supra* note 66, at 237.

against discrimination was repealed.⁶⁸ In 1990, however, the St. Paul City Council re-enacted the law, with an expansive definition of “sexual or affectional orientation” that included “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or one’s biological femaleness.”⁶⁹ A year later, an initiative to repeal the discrimination ordinance reached the ballot again.⁷⁰ During the campaign against the repeal of the St. Paul ordinance, a transgender activist refuted opponents’ arguments about transgender people in public restroom by stating that Minneapolis has not experienced any problems in public restrooms since 1975.⁷¹ In 1991, St. Paul voters defeated the proposed repeal of the anti-discrimination ordinance.⁷²

After their victory in St. Paul, activists pushed for statewide discrimination protection for gay, lesbian, bisexual, and transgender people.⁷³ Although the gay, lesbian, and bisexual community was unsure about whether including transgender language would mean the death-knell of the bill, several key transgender activists threatened to take political action against the community if the language was not included.⁷⁴ The bill’s legislative sponsors and the activists lobbying for the proposed legislation made an affirmative choice to include protections for transgender people in the amendments.⁷⁵

68. See ST. PAUL, MINN., ORDINANCE 16,436 (1978).

69. See ST. PAUL, MINN., ORDINANCE 17,744, § 3 (1990) (amending ST. PAUL, MINN., LEGISLATIVE CODE § 183.02); see also ST. PAUL, MINN., LEGISLATIVE CODE § 183.02 (26).

70. TRANSGENDER EQUALITY, *supra* note 60, at 21.

71. See *id.* (quoting authors’ interview with Susan Kimberly on June 25, 1999).

72. Anthony Lonetree, *Voters Refuse To Repeal Gay Rights*, STAR TRIB. (Minneapolis), Nov. 6, 1991, at 1A.

73. TRANSGENDER EQUALITY, *supra* note 60, at 22.

74. *Id.* at 22 (quoting authors’ interview with Susan Kimberly on June 25, 1999).

75. Although creating a wholly new category of protection for transgender people has obvious benefits, such as visibility and symbolic value. Pragmatically, legislators are more prone to amending an existing protection. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial and Legislative Equality For Transgender People*, 7 W & MARY J. WOMEN & L. 37, 50 (2000). In San Francisco, the local human rights ordinance includes “gender identity” as a protected category, and sixteen other local ordinances have similar separate categories. S.F., CAL., ORDINANCE 433-94 (Dec. 30, 1994); see also ANN ARBOR, MICH., ORDINANCE 10-99 (Mar. 17, 1999); ATLANTA, GA., ORDINANCE No. 00-1983 (Dec. 4, 2000); BENTON COUNTY, OR., ORDINANCE 98-0139 (Aug. 14, 1998); BOULDER, COLO., ORDINANCE 7040 (Jan. 20, 2000); IOWA CITY, IOWA, ORDINANCE

Although the issue was key to activists, the inclusion of transgender protection was never raised in the legislative debates: “We made no effort to hide it but we weren’t going to discuss it unless people brought it up.”⁷⁶ No out-transgender people testified at the hearings.⁷⁷ An amendment to the definition of sexual orientation was suggested: “homosexual, heterosexual, or bisexual,” and such an amendment clearly excluded transgender people.⁷⁸ The amendment was defeated on the Senate floor, where Senator Spear argued that his proposed language refrained from categorizing people, whereas the amendment did, and the case law from Minneapolis and St. Paul, with nearly identical language, provided a clear precedent for future interpretations of the statute.⁷⁹ The bill passed and Governor Arne Carlson signed it into law.⁸⁰

The legislature never indicated that it anticipated the issue of restroom use by transgender people, and the prohibition against transgender discrimination seems to have passed largely under the radar screen of its potential critics.⁸¹ On the other hand, the adoption of the 1993 amendment was a major change in the state’s anti-discrimination laws, requiring a significant political movement of gay, lesbian, bisexual, and transgender activists to lobby for its adoption. The result of that movement is a statute with plain language that speaks for itself, unambiguously including transgender people within the definition of sexual orientation and exempting the segregation of public restrooms on the basis of sex

95-3697 (Nov. 7, 1995); ITHACA, N.Y., LOCAL LAW No. 2-2000, ch. 215, art. V, § 215-30 (2000); JEFFERSON COUNTY, KY., ORDINANCE 36 (Oct. 12, 1999); LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, KY., ORDINANCE 201-99 (July 8, 1999); LOUISVILLE, KY., ORDINANCE 9 (Jan. 26, 1999); MADISON, WIS., EQUAL OPPORTUNITIES ORDINANCE (Aug. 1, 2000); NEW ORLEANS, LA., ORDINANCE 18794 (July 8, 1998); OLYMPIA, WASH., ORDINANCE 5670 (Feb. 25, 1997); PORTLAND, OR., CIVIL RIGHTS ch. 23.01 (2000); SEATTLE, WASH., ORDINANCE § 14.04.030 (1999); TUCSON, ARIZ., ORDINANCE 9199 (Feb. 1, 1999); WEST HOLLYWOOD, CAL., ORDINANCE 98-520 (July 20, 1998); VT. STAT. ANN. TIT. 13 § 1458 (2000).

76. TRANSGENDER EQUALITY, *supra* note 60, at 22 (quoting authors’ interview with Minnesota State Senator Allan Spear on June 23, 1999).

77. *See* Hearing on S.F. 444 Before the S. Judiciary Comm., 78th Minn. Leg. (Mar. 5, 1993); Hearing on H.F. 595 Before the H. Judiciary Comm., 78th Minn. Leg. (Mar. 8, 1993); *see also* TRANSGENDER EQUALITY, *supra* note 60, at 22.

78. TRANSGENDER EQUALITY, *supra* note 60, at 22.

79. *Id.* (quoting authors’ interview with Minnesota State Senator Allan Spear on June 23, 1999).

80. Halvorsen, *supra* note 59, at 1B.

81. *Id.* at 5B. Yet one of the bill’s sponsors, Representative Karen Clark spoke of the campaign, “It’s Time” as including the transgender community. *Id.*

but not on the basis of sexual orientation.⁸² The adoption of the plain language of the statute was a broad social change simply in itself. Therefore, the Minnesota Supreme Court could have just as likely deferred to the plain language of the MHRA and concluded that the legislature was aware that in adopting the broad protections against discrimination for gay, lesbian, bisexual, and transgender people was itself a statement for social change.

B. The Rationale Behind the Fear

Although the Minnesota legislature did not expressly consider the implications of a transgender person using a multi-use restroom, the legislature considered the same *rationale* behind the policy of keeping transgender people from using the restroom of their choice. The legislature considered opponents' fears that the legislation would encourage and allow sexual misconduct; these fears are similar to those of employees who complain about sharing a restroom with a transgender coworker, forcing an employer to balance the interests of the other employees against that of the transgender employee. This section examines whether the legislature indirectly considered the implications of a transgender person using a multi-use restroom, in particular by addressing fears of sexual misconduct in general.

Many employees express their discomfort in sharing a restroom with a transgender person as fear.⁸³ This fear likely stems from stereotypes linking transgender people with sexual predators.⁸⁴ When the Minnesota legislature considered the 1993

82. See MINN. STAT. § 363.02, subd. 41(a) (2000).

83. Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 369 (1999).

84. *Id.* People complaining about sharing a restroom with a transgender person may also express their fear as a loss of privacy, but multi-user restrooms are not a place where employees have a heightened expectation of privacy beyond the protections that the law currently provides. *Id.* at 370. *But see* Lake v. Wal-Mart, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (finding Minnesota recognizes invasion of privacy claims for intrusion upon seclusion, appropriation, and publication of private facts); Fletcher v. Price Chopper Foods of Trumann, Inc., 2000 WL 1121530, at *3 (8th Cir. 2000) (stating tort of intrusion upon seclusion has three elements: (1) intrusion, (2) that is highly offensive to a reasonable person (3) into a matter in which the person has a legitimate expectation of privacy). It seems, however, that if there were no misconduct within the restroom, there would be no intrusion that is highly offensive to a reasonable person. No cases seem to hold that simply by entering a gender-segregated restroom a person has a legitimate expectation of privacy.

amendment to the MHRA, critics voiced fears that a law prohibiting discrimination on the basis of sexual orientation would sanction the actions of sexual predators.⁸⁵ To dissuade those fears, the legislature adopted an amendment to the definition of “sexual orientation” excluding “a physical or sexual attachment to children by an adult.”⁸⁶ By adopting such an amendment, the legislature expressly recognized that sexual misconduct is excluded from the definition of “sexual orientation” and was never intended to be sanctioned by the legislature.⁸⁷

The Eighth Circuit has recently confirmed the legislature’s determination about sexual misconduct, finding that without some specific allegation of misconduct, an employee has no claim that a hostile work environment is created when an employee shares a restroom with a transgender coworker.⁸⁸ In *Cruzan v. Special School District No. 1*, the plaintiff did not allege that the transgender coworker with whom she had shared a restroom had “engaged in any inappropriate conduct other than merely being present in the women’s faculty restroom.”⁸⁹ Without an allegation of misconduct, the Eighth Circuit held that the plaintiff did not have a claim for a hostile work environment against her employer.⁹⁰ Similarly at West, no employee ever alleged that Goins had acted inappropriately in the restroom.⁹¹

85. See Hearing on S.F. 444, *supra* note 77; Hearing on H.F. 595, *supra* note 77; Sen. Allan Spear, *supra* note 62.

86. See Sen. Allan Spear, *supra* note 62; see also MINN. STAT. § 363.01, subd. 41(a) (2000).

87. See Sen. Allan Spear, *supra* note 62.

88. *Cruzan v. Special Sch. Dist. No. 1*, No. 01-3417, 2002 WL 1339108, at *2 (8th Cir. June 20, 2002); see also *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 968 (D. Minn. 2001). The U.S. District Court noted that the complainant could use a unisex restroom, if she chose not to share a restroom with the transgender employee. *Id.* The court distinguished that case from *Goins* in that the complainant in *Cruzan* could choose whether she wanted to use the unisex restroom, whereas Goins did not have a similar choice. *Id.* at 969 n.2. The Minnesota Supreme Court referenced a related case, *Cruzan v. Special School District No. 1*, decided by the Department of Human Rights. See *Goins II*, *supra* note 3, at 717, 723 (citing *Cruzan v. Special Sch. Dist. No. 1*, No. 31706 (Dep’t of Human Rights. Aug. 26, 1999)). See also Rosalind Bentley, *Transgenderism Has Become a Workplace Issue For Employers*, STAR TRIB. (Minneapolis), May 11, 1998, at 1D (discussing how employers confront issues relating to an employee undergoing a gender transition).

89. *Cruzan*, 2002 WL 1339108, at *2; see also *Cruzan*, No. 31706 at ¶13a; *Goins I*, *supra* note 15, at 428 n.3.

90. *Cruzan*, 2002 WL 1339108, at *2.

91. *Goins I*, *supra* note 15, at 428 n.3.

As in the case of West, employers and courts have denied transgender employees use of the restroom by falling back on the seemingly insurmountable practical problems of placating fearful employees.⁹² This argument no longer carries any weight. Without some allegation of misconduct, employers need not balance unfounded fears of coworkers against the interest of the transgender employee in using the restroom of their choice.⁹³

Therefore, by making an affirmative statement that the MHRA will not sanction sexual misconduct by anyone protected under the sexual orientation amendment, the Minnesota legislature indicated that even if it had not considered the issue of transgender restroom use specifically, it had, at least, considered the rationale behind prohibiting transgender employees from sharing a restroom with their coworkers.

C. *Sex Discrimination vs. Sexual Orientation Discrimination*

In interpreting the MHRA, the supreme court held that West had discriminated against Goins on the basis of her “biological” gender rather than her “sexual orientation.”⁹⁴ The logical conclusion of this finding would be that but for the public accommodation exception for sex discrimination, Goins would be protected under the prohibition against sex discrimination. However, that is not the case.

This section analyzes the inappropriate nature of the supreme court’s interpretation that West discriminated against Goins on the basis of her sex. First, Goins would likely not be protected in any other context under the statute prohibiting sex discrimination.⁹⁵

92. See Keller, *supra* note 83, at 368; see also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-49 (8th Cir. 1982) (describing transgender’s use of women’s restroom led to disruption); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 n.1 (9th Cir. 1977) (citing employer affidavit that transgender’s use of men’s restroom caused “personnel problems”); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (noting employer forbade transgender plaintiff from using women’s restroom).

93. *Cruzan*, 2002 WL 1339108, at *2.

94. *Goins II*, *supra* note 3, at 723.

95. See Currah & Minter, *supra* note 75, at 37; see generally Richard Green, *Spelling “Relief” For Transsexuals: Employment Discrimination and the Criteria of Sex*, 9 YALE L. & POL’Y REV. 125 (1985). Transgender litigants have largely been unsuccessful in arguing that they are protected under the prohibitions against sexual orientation discrimination. *Id.*; see Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 311-12 (1997).

Second, the supreme court's interpretation would render unnecessary the statutory language under the definition of "sexual orientation."⁹⁶

Transgender plaintiffs have argued that if sex and gender are synonymous, Title VII's discrimination prohibitions should protect transgender people. However, courts have nearly unanimously determined that Title VII's prohibition against sex discrimination is specific to "sex" and does not include transgender.⁹⁷ The most famous of these cases is *Ulane v. Eastern Airlines, Inc.*⁹⁸ In *Ulane*, the plaintiff, Karen Ulane, previously a male pilot for eleven years, underwent female hormone treatment, and then took a leave of absence to undergo sex reassignment surgery.⁹⁹ Upon her return to work as a woman, Eastern Airlines refused to reemploy Ulane as a pilot.¹⁰⁰ As in *Goins*, the Seventh Circuit focused on the intent of the employer, but in *Ulane*, the Seventh Circuit found that Eastern Airlines had not discriminated against Ulane based on her sex, but rather, based on her sexual identity or her status as a transgender person.¹⁰¹

In *Ulane*, as in *Goins*, the court relied on legislative intent: "[O]ur responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to out-law discrimination based on sex."¹⁰² The category of sex was added as a floor amendment to Title VII; as in the case of Minnesota with transgender, sex was not the focal point of congressional debates.¹⁰³ The Seventh Circuit concluded: "[T]he dearth of legislative history . . . strongly reinforces the view that the section means nothing more than its plain language implies."¹⁰⁴ As in *Goins*, the court construed the lack of legislative history against the complainant and, consequentially, avoided a broad interpretation

96. See *Baker v. Ploetz*, 616 N.W.2d 263, 269 (Minn. 2000) ("A statute should be interpreted, whenever possible, to give effect to all of its provisions, and 'no word, phrase, or sentence should be deemed superfluous, void, or insignificant.'") (citation omitted).

97. See *Storrow*, *supra* note 95, at 317 (discussing "'misprision' of the relation between 'sex' and 'gender'"); see also *infra* Part IV.A. (discussing difference between sex and gender).

98. See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

99. *Id.* at 1082-83.

100. *Id.* at 1082.

101. *Id.* at 1087.

102. *Id.* at 1084.

103. *Id.* at 1085.

104. *Id.*

of the statute: “For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.”¹⁰⁵

Courts also have dismissed Title VII sex discrimination suits by transgender employees for a variety of other reasons.¹⁰⁶ For example, courts have upheld dismissals of employees for violation of dress codes.¹⁰⁷ Courts have denied Title VII claims on the basis that the discrimination was not based on sex but rather the employee’s change of sex.¹⁰⁸ Federal courts applying state anti-discrimination statutes have applied similar reasoning and reached similar conclusions.¹⁰⁹

Recently, however, courts in New Jersey and New York have applied state or local laws to conclude that prohibitions against sex discrimination encompass transgender people.¹¹⁰ In *Enriquez v. West Jersey Health System*, a New Jersey court held that a male-to-female transgender physician, terminated from her position as medical director, had a claim based on the state statute prohibiting discrimination on the basis of sexual identity or gender.¹¹¹ The New Jersey court relied on *Price Waterhouse v. Hopkins*, in which the U.S. Supreme Court held that Title VII barred discrimination of a woman who failed to “act like a woman” or to conform to socially-

105. *Id.* at 1086 (citing *Gunnison v. Commissioner*, 461 F.2d 496, 499 (7th Cir. 1972)); *see also* *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“legislative history does not show any intention to include transsexualism in Title VII”).

106. *See, e.g.*, *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257, at *5 (W.D. Mo. 2000) (finding that supervisor’s conduct of disapproving looks or glances and refusing to look the transgender employee in the eye did not rise to the level of adverse employment action or a hostile work environment).

107. *See* *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1047 (5th Cir. 1981); *Doe v. Boeing Co.*, 846 P.2d 531, 538 (Wash. 1993); *Doyle v. Buffalo Sidewalk Café Inc.*, 333 N.Y.S.2d 534, 537 (1972). A dismissal for “misrepresentation” during a job interview was also upheld. *Sommers*, 667 F.2d at 748.

108. *See* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff’d mem.*, 570 F.2d 354 (9th Cir. 1978).

109. *See, e.g.* *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481 n.4 (D.Kan. 1995); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994).

110. *See* *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 380 (N.J. Super. Ct. App. Div. 2001); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 395-96 (N.Y. Sup. Ct. 1995).

111. *Enriquez*, 777 A.2d at 367, 373; *see also* N.J. STAT. §§ 10:5-1 to 10:5-49 (1993 & Supp. 2002).

constructed gender expectations.¹¹² The New Jersey court interpreted *Price Waterhouse v. Hopkins* to mean that the U.S. Supreme Court had determined that the word “sex” in Title VII encompasses both concepts of sex and gender and is “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹¹³

Similarly, in *Maffei v. Kolaeton Indus., Inc.*, a New York court interpreted a New York City ordinance to prohibit a hostile work environment created by derogatory comments regarding an employee’s sex reassignment operation.¹¹⁴ Applying similar reasoning as the New Jersey court, the New York court determined that the employer was liable for discrimination on the basis of sex.¹¹⁵

Despite these two cases, courts have overwhelmingly concluded that transgender people are not protected by sex discrimination statutes.¹¹⁶ Therefore, Goins faces a “catch 22.” West may properly discriminate against Goins for the purpose of designating restroom use based on her sex, but she is likely not protected against further discrimination on the basis of sex.

Furthermore, if Goins were protected by the prohibition against sex discrimination, then the transgender language, “having or being perceived as having a self-image or identity not

112. *Enriquez*, 777 A.2d at 371-72; see generally Taylor Flynn, *Transforming The Debate: Why We Need To Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001) (discussing the importance of transgender litigation to challenge discrimination based on the failure to conform to conventional gender norms, whether experienced by women or sexual minorities).

113. *Enriquez*, 777 A.2d at 372 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)); see also *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (finding that under the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1994), discrimination against a man because he was wearing a dress constituted sex discrimination).

114. *Maffei*, 626 N.Y.S.2d at 548, 555-56.

115. *Id.* at 556.

116. See generally Green, *supra* note 95, at 132-36; Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of Transgender Jurisprudence*, 70 TEMPLE L. REV. 283 (1997); see also Storrow, *supra* note 95, at 310 (stating “no matter how a transsexual frames her discrimination claim, it will fail”). Storrow argues that even though courts assert that transgender claimants may assert discrimination claims based on sex, their claims fail because courts exclude all claims except those alleging discrimination on the basis of what sex the transgender complainant is perceived by others to be, or was known by others to be in the past and transgender litigants are unlikely to sue for discrimination based on a sex they do not believe they are. *Id.* at 314-15.

traditionally associated with one's biological maleness or femaleness," would be rendered meaningless.¹¹⁷ If the supreme court has found that an employer can treat a transgender employee differently according to her biological sex for purposes of the use of public accommodations only, it is unclear where the MHRA has provided for such a distinction. The line between when an employer is treating a transgender employee according to sex and when an employer is treating a transgender employee according to her self-image or identity has yet to be defined by any court.

By using the lack of legislative history as a rationale for narrowly interpreting the MHRA, the supreme court has created an absurd outcome. West discriminated against Goins because of her sex for purposes of determining her restroom use, but for any other purpose it is unclear whether the supreme court will find that West discriminated against her on the basis of her sex or her sexual orientation. If the court were to determine that an employer discriminates against a transgender employee for any purpose on the basis of her sex, then that determination would go against most jurisprudence and would render the sexual orientation provision unnecessary, as it relates to transgender people. Therefore, the supreme court's interpretation of the MHRA that an employer directs an employee's restroom use based on sex seems to contradict the intent of the statute.

By examining the MHRA from these three perspectives, it is likely that the Minnesota legislature had considered the broad implications of the statute and intended the plain language of the statute to protect a person such as Goins, even in the context of restroom use.

IV. DEFINING SEX

Having determined that Goins had not made a case for direct discrimination, the Minnesota Supreme Court determined that Goins also had not proven a prima facie case of indirect discrimination using the *McDonnell Douglas* burden-shifting framework. The court found that Goins failed to show that she is "eligible to use the restrooms designated for her biological gender."¹¹⁸ The supreme court gave no indication as to what

117. *See supra* note 96.

118. *Goins II*, *supra* note 3, 725.

“biological gender” may mean.¹¹⁹ The supreme court will need to further clarify the qualifications necessary for eligibility to use a certain restroom. In anticipation of this litigation, this section first discusses the meaning of the term “gender,” as applied to transgender, and second, discusses the meaning of the terms biology and sex, as applied to sex reassignment surgery, for purposes of determining eligibility for restroom designation.

A. *[Trans]Gender*

The supreme court used the term “biological gender.” The combination of biology and gender is unusual; biology generally has no impact on the common usage of gender.¹²⁰ Gender refers to “the cultural or attitudinal qualities that are characteristic of a particular sex.”¹²¹ The term, “sex,” on the other hand, reflects biology.¹²² Gender, unlike sex, is often a matter of degree. The notion of transgender challenges the assumption that sex or gender consists of only two categories.

The term “transgender” is an umbrella term for different types of people who are in some way gender-nonconformist.¹²³ The broadest definition is perhaps akin to the MHRA: “people who experience a separation between their gender and their biological [or] anatomical sex.”¹²⁴

Not all transgender people define themselves similarly.¹²⁵ The transgender community includes people who understand themselves to be of the opposite sex from which their genitals would suggest and seek to become physically, socially, and legally

119. *But see id.* at 726 (Page, J., concurring specially).

120. Greenberg, *supra* note 5, at 271. “Biology” is discussed *infra* at Part IV.B.

121. *Id.* at 274 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting)) (“The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”).

122. *Id.* at 271.

123. See Mary Coombs, *Sexual Dis-Oriented: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 239 (1998); see also Flynn, *supra* note 112, at 392 (defining “transgender” as an umbrella term that includes gay men, lesbians, and bisexuals whose appearance, behavior or other characteristics differ from traditional gender norms).

124. Coombs, *supra* note 123, at 237; *c.f.* MINN. STAT. § 363.01, subd. 41(a) (2000) (protecting those “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness”).

125. Coombs, *supra* note 123, at 237-38.

the sex they have always been psychologically.¹²⁶ The medical profession has defined this condition as “gender identity disorder,” having two essential components:

- (1) a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex; and
- (2) persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.¹²⁷

Nevertheless, many transgender people do not see their identity as a “disorder.”

Some transgender people seek to have sex reassignment surgery, but many cannot afford the surgery. Others determine that the surgery is not necessary to live as a person with the sex to which they identify.¹²⁸ Some, but not all, claim transgender as a basis for an identity and a political community, while others seek to live simply as the sex with which they are psychologically identified.¹²⁹

The transgender community also includes cross-dressers or non-transsexuals, who wear clothes associated with the other sex but still identify with their assigned sex.¹³⁰ Furthermore, transgender people vary on the issue of sexual orientation; not all transgender people are homosexual.¹³¹

Statutes tend to classify people into two categories – male or female.¹³² The language of the MHRA, however, is not categorical

126. *Id.* at 238.

127. AM. PSYCHIATRIC ASS’N., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 2000). Gender Identity Disorder can be distinguished from Transvestic Fetishism, which occurs in heterosexual or bisexual males for whom cross-dressing behavior is for the purpose of sexual excitement. *Id.* at 580. Gender Identity Disorder Not Otherwise Specified includes individuals who have a gender identity problem concurrent with a congenital intersex condition (e.g., partial androgen insensitivity syndrome or congenital adrenal hyperplasia). *Id.* at 580-81.

128. Coombs, *supra* note 123, at 238, 240.

129. *Id.* at 238.

130. *Id.* at 239.

131. *Id.* at 241-42. Society commonly confuses transgender people as homosexual, when in fact, many transgender people are not. *See, e.g.*, *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 371 (N.Y. Super. Ct. App. Div. 2001) (noting transgender plaintiff not a homosexual or bisexual or perceived to be either and presented no evidence she was discriminated against because of her “affectional, emotional or physical attraction” to others).

132. *See* Patricia A. Cain, *Stories From the Gender Garden: Transsexuals and Anti-*

but descriptive.¹³³ Such a methodology is well tailored to the notion of transgender, which defies categories. To require a transgender employee to fit into one of two categories – male or female – along the lines of biology is inconsistent with the notion of transgender.

B. *Biological Sex and Surgery*

The supreme court implied that if Goins had undergone sex reassignment surgery, the court would have considered her qualified to use the women’s restroom. This section examines the impact of sex reassignment surgery on the factors used by courts to determine biological sex.

The supreme court may have given some clue as to the eligibility requirements for restroom use in its definition of “transgender.”¹³⁴ The supreme court defined transgender as “people [who] seek to live as a gender other than that attributed to them at birth but without surgery.”¹³⁵ If Goins identifies herself as “transgender” and she is ineligible to use the women’s restroom, then the court implies that if Goins had elected sex reassignment surgery, then she would qualify to use the women’s restroom. Given the information that exists regarding transgender people, however, sex reassignment surgery is an unduly artificial line between the sexes.¹³⁶

Discrimination Law, 75 DEN. U. L. REV. 1321, 1322-23 (1998) (“It seems, then, that in American law and society, sex is either male or female. Gender is either masculine or feminine. Furthermore, masculine gender is expected to correlate to male sex, feminine gender to female sex. Persons who do not fit these categories are unprotected . . .”); *see generally* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed. 1996).

133. *See* Sen. Allan Spear, *supra* note 62.

134. Goins identified herself as transgender or trans-identified. *See Goins II*, *supra* note 3, 721.

135. *Id.* at 721 n.1 (citing Keller, *supra* note 83, at 332).

136. *See* Doe v. City of Minneapolis, No. Ct. File No. EM 99-0000299, 11 (Minn. D. Ct. 2002). The court evaluated the Supreme Court’s discussion of “biological gender”:

[t]his cannot be all the Supreme Court had in mind, however, in ruling that restroom designations based on biological gender. . . . This court must assume the Supreme Court had a broader concept of biological gender in mind, presumably one taking into account not just reproductive organs but overall appearance, which is what affects the comfort level of others using the restroom.

Id.

An individual's "biological sex" can be determined using a number of different criteria: chromosomes, gonads, hormonal levels, genital appearance, and internal reproductive structures.¹³⁷ Sex reassignment surgery cannot alter *every* criteria used to determine biological sex. Surgery will alter genital appearance but it will not alter chromosomes, gonads, or internal reproductive structure.¹³⁸ A person also can undergo partial surgery to remove or enhance outward indicators of biological sex, like a mastectomy or breast enlargement so that the result is that genital appearance is not wholly indicative of just one biological sex. Furthermore, hormonal treatment alters hormone levels and dramatically alters outward characteristics, such as hair, voice, and the distribution of body fat, without surgery.¹³⁹ These medical steps, although not a complete sex reassignment surgery, may alter a person's public anatomical appearance more than sex reassignment surgery, which affects only genitals, which are largely hidden to the public.¹⁴⁰

These complications in defining "biological sex" are not new to courts, which for decades have struggled to define biological sex in several areas of the law: the segregation of the sexes in prisons,¹⁴¹ the prohibition of same-sex marriages,¹⁴² the creation of legal documents,¹⁴³ and the prohibition of discrimination on the basis of sex.¹⁴⁴

137. Green, *supra* note 95, at 126.

138. See Coombs, *supra* note 123, at 246 (discussing importance of procreation in a marriage); Cain, *supra* note 132, at 1356 (stating that if "physical appearance of genitalia were to define femaleness, then a post-op [male-to-female] transsexual would typically qualify as female," even though that person cannot reproduce).

139. See *Goins's Petition for Rehearing*, at 1-2 (stating Goins "has undergone the very serious medical process of hormonal sex-reassignment and related procedures" which have altered her estrogen levels and her "secondary sex characteristics" such as breasts, body fat distribution and an absence of facial hair); see also Joshua F. Boverman & Anna C. Loomis, *Cross-Sex Hormone Treatment In Transsexualism*, 7 PRIMARY PSYCHIATRY 68 (June 2000) (describing effects of female hormones).

140. See *supra* note 139.

141. See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1202-06 (9th Cir. 2000).

142. See, e.g., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (1971); *In re Ladrach*, 513 N.E.2d 828 (Ohio. 1987); MINN. STAT. § 517.03, subd. 1(a)(4), (b) (2000) (prohibiting marriages between persons of the same sex); cf. *M.T. v. J.T.*, 355 A.2d 204, 205-10 (N.J. Super. Ct. App. Div. 1976) (allowing marriage where the transsexual was physically and psychologically a woman by successful sex reassignment surgery).

143. See *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000).

144. Keller, *supra* note 83, at 340 (quoting SUZANNE KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 121 (1978)).

Traditionally, courts have used birth certificates and other legal documents that are created using an individual's birth certificate to determine legal sex.¹⁴⁵ An individual's sex on their birth certificate is generally determined by the appearance of external genitalia at birth.¹⁴⁶ The problem with relying on the appearance of genitals to determine biological sex, or gender, is that after birth, society almost never evaluates a person's sex based on the appearance of genitals because external genitalia are almost never publicly visible.¹⁴⁷

Beyond the birth certificate, chromosomes also can be used to determine biological sex.¹⁴⁸ Maria Patiño, a Spanish hurdler, failed a sex chromatin test and was banned from the 1985 World University Games even though she never knew she was anything other than female.¹⁴⁹ Even more than the appearance of genitalia, a chromosome identification of biological sex is an impossible basis for an employer's evaluation of restroom use.

Courts often define sex by the purpose for which sex is being defined.¹⁵⁰ For example, in determining whether an illegal same-sex marriage exists, courts have traditionally used the ability to procreate as a criteria for sex.¹⁵¹ The problem with relying on the ability to procreate is that in issuing marriage licenses, states do not require proof of a capacity to procreate.¹⁵² Furthermore,

145. See generally, *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio 1987); see also Storrow, *supra* note 95, at 325-332 (discussing ability to change name and gender on birth certificate); Greenberg, *supra* note 5, at 309-17 (discussing official documents of sex).

146. Greenberg, *supra* note 5, at 271; see also Alice Domurat Dreger, "Ambiguous Sex" – or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality, 28 HASTINGS CTR. 7REP. 24, 27-28 (1998).

147. See generally Greenberg, *supra* note 5, at 272-73. Furthermore, in some cases, the appearance of genitals at birth is not consistent with other biological facts of sex. *Id.*

148. See *id.* at 273; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for 'Gender Identification' of Female Athletes*, 256 JAMA 1920, 1920-23 (1986).

149. Greenberg, *supra* note 5, at 273; Alison Carlson, *When is a Woman Not a Woman*, WOMEN'S SPORTS AND FITNESS, Mar. 1991, at 24-29.

150. Greenberg, *supra* note 5, at 273.

151. See, e.g., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500-01 (1971); *Corbett v. Corbett*, 2 All E.R. 33 (P.D.A. 1970); see also *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio 1987). But see *M.T. v. J.T.*, 355 A.2d 204, 208-210 (N.J. Super. Ct. 1976) (finding most important criterion for classifying a person as male or female was core gender identity but assumes that heterosexual intercourse is the defining marital act). Transsexual marriage cases show that a person cannot marry as a member of his or her new sex before completing sex reassignment surgery. Coombs, *supra* note 123, at 256.

152. See MINN. STAT. § 517.02 (2000) (discussing persons capable of

procreation does not require marriage, procreation no longer requires intercourse, and parenting does not require procreation.¹⁵³

Similarly in this case, the purpose for which sex is defined does not match the method by which the supreme court has categorized restrooms. The purpose for which sex or gender is defined in the designation of restrooms is to provide comfort and privacy for people using the restrooms. By making sex reassignment surgery a criteria for the eligibility of restroom use, the supreme court's methodology for determining sex is the appearance of genitals.¹⁵⁴ The problem with this methodology is twofold. First, an employer's inquiry into the appearance or functionality of an employee's genitals is generally not a permissible discourse between employer and employee and could lead to a harassment claim, a privacy claim, or perhaps other legal claims.¹⁵⁵ Second, fellow employees' discomfort does not stem from the outward appearance of genitals because most fellow employees never see others' genitals while using the restroom.¹⁵⁶ For these reasons, a genital-standard is both contradictory and impractical.¹⁵⁷

The struggle of courts to define sex using biological factors illustrates that biology does not provide a bright-line standard for the eligibility for restroom use, and the application of sex reassignment surgery as a factor simply causes further confusion. Practically, admittance into multi-use restrooms is determined on the basis of outward appearance and self-selection, criteria not used to determine biological sex.

In conclusion, classification of restrooms according to biology or sex is an unsupportable standard for restroom designation. These categories are too restrictive and impractical. In contrast, the MHRA is not categorical but descriptive. Self-selection of restroom use, based on outward appearance and comfort level, is

contracting for marriage).

153. Coombs, *supra* note 123, at 246.

154. See *Goins II*, *supra* note 3, at 725.

155. See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) (recognizing invasion of privacy claim).

156. See *supra* Part III.B.

157. See *Doe v. City of Minneapolis*, Ct. File No. EM 99-000029, 11 (Minn. D. Ct. 2002) (recognizing that the Minnesota Supreme Court, in finding that employers may designate restrooms according to "biological gender," has "a broader concept of biological gender in mind, presumably one taking into account not just reproductive organs but overall appearance, which is what affects the comfort level of others using the restroom").

the only workable standard for restroom designation. Of course, had the court applied the self-selection standard, it would have found Goins eligible to use the women's restroom. Therefore, whatever criteria the supreme court used to find Goins ineligible to use the women's restroom, it is contradictory to the descriptive nature of the MHRA.

V. CONCLUSION

“[B]athroom use frequently becomes either a means or a source of employer discipline of [transgender] employees.”¹⁵⁸ Although restroom choice may seem like a trivial exception to the broader protections remaining for transgender people under the MHRA, discrimination in restroom use is of primary concern to transgender employees.¹⁵⁹

When confronted with what West saw as conflicting employee interests, and perhaps liability exposure from both sides, West found a solution that *seemed* reasonable for all parties involved – allowing Goins to use a third restroom labeled “unisex.” For people whose selection of restroom is never doubted, the “unisex” seems like a fair accommodation, but essentially, the “unisex” itself is an instrument of discrimination:

The choice of a third bathroom for a transsexual's use is not uncommon, and offers a stark example of what outsider status is like: if society is composed only of those who enter the women's room and those who enter the men's room, requiring someone to use a third bathroom tells them they are outside society.¹⁶⁰

West's act of discrimination was not requiring Goins to use the unisex restroom but in prohibiting Goins from using the women's restroom. West denied Goins the same opportunity that her fellow employees enjoyed – to belong, without question. For that reason, requiring Goins to use the “unisex” restroom is not a reasonable accommodation.

This case is not about the desegregation of public restrooms. Goins selected the restroom in which she felt most comfortable, the same criteria her coworkers use. West had never before questioned that selection process or required every employee to prove their

158. Keller, *supra* note 83, at 368.

159. *See id.* at 368-69.

160. *Id.*; *see also* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 122-23 (1991) (arguing that incident of unisex bathroom akin to race discrimination).

biological sex before allowing each employee to use the restroom. We must assume that no other employee wishing to use the women's restroom was asked by West's counsel to disclose the appearance or functionality of their genitals. Instead, West assumed that Goins did not qualify to use the women's restroom because Goins refused to answer questions about the appearance of her genitals.¹⁶¹

West did not treat Goins differently because her birth certificate originally designated her "male" or because she had not yet had sex reassignment surgery. West was unaware of these facts when it initially formulated its policy. Goins was singled out because something about her appearance was inconsistent with someone's – presumably her coworkers' or West's – notion of what "women" means.¹⁶²

This distinction is based on Goins's inadvertent challenge to a stereotype. In every sense, that distinction is based squarely on the criteria set forth in the MHRA: "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹⁶³ By definition, Julienne Goins has a self-image that does not conform to the stereotypical view of male or female. The purpose of anti-discrimination laws is to prohibit adverse treatment of employees based on nonconformity. To force Goins to conform to a narrow view of the categories – "men" and "women" – as defined by someone other than herself contradicts the very tenets of the MHRA.

161. Many employees, whether transgender or not, would have refused to participate in such inappropriate discourse between employer and employee.

162. The record does not reveal what qualities about Goins initially created the red flag causing the coworkers of Goins to initially come forward or what initially caused West to doubt Goins's eligibility requirements for using the women's restroom.

163. MINN. STAT. § 363.01, subd. 41(a) (2000).