

GENDER IDENTITY IN THE CONTEXT OF SCHOOLS AND EMPLOYMENT

objective: To gain an understanding of the laws governing discrimination in schools and in the workplace and how these laws affect people who have been treated differently because of their gender identity or expression.

Activities/Discussion

■ ADVANCED:

1. Questions on the Schools Reading

L.W. v. Toms River Regional Schools Board of Education

- a. You be the judge. In Toms River, the court laid out two new standards for school discrimination cases in New Jersey. First, New Jersey's Law Against Discrimination (LAD), which prohibits discrimination on the basis of sexual orientation, also applies to perceived sexual orientation. Second, a school is liable for the harassment of one student by another if the school knew or should have known of the harassment and did not take effective measures to stop it. Apply these new standards to the facts in L.W. v. Toms River. Who should win? Did the school violate the LAD by knowing about the harassment and failing to take effective measures to stop it? What arguments should L.W. make? What arguments should the school district make?
- b. At the time the Toms River case was brought, the LAD did not expressly prohibit discrimination on the basis of gender identity (although gender identity and expression have since been added as protected categories). In what ways are gender identity and perceived sexual orientation different? Do they sometimes overlap?

Doe v. Yunits

- c. To determine whether Pat's attire is considered an expression protected by the Massachusetts Constitution's language regarding freedom of speech, the Yunits court laid out two elements: First, Pat must intend to convey a specific message by wearing the clothes, and, second, that message must be likely to be understood by others. Why would the court think Pat would probably be able to meet these two elements?

2. Questions on the Employment Reading

Price Waterhouse v. Hopkins

- a. How does the Court reason that discrimination on the basis of sex stereotyping is discrimination on the basis of sex? Do you agree with the Court?
- b. There is no federal law that explicitly prohibits employment discrimination on the basis of gender identity. Although some states have passed their own laws prohibiting such discrimination, it is still likely to be legal¹ in 38 states to fire, refuse to hire, or create a hostile work environment for people based on the way they identify or express their gender.
 - i. Make an argument that firing someone for the way they identify or express their gender is discrimination on the basis of sex. Make a counter-argument. Consider whether or not such an act (same as previous comment) is discrimination because of sex stereotyping.
 - ii. Do you think the failure to expressly prohibit discrimination on the basis of gender identity and expression could also affect gay, lesbian, and bisexual individuals? How?

Schroer v. Billington

- c. Unlike *Price Waterhouse*, *Schroer* was not a U.S. Supreme Court decision, so its impact is limited. However, the court's holding, that employment discrimination against transgender individuals is discrimination on the basis of sex, may be the direction in which other courts around the country are moving. Even though the U.S. District Court for the District of Columbia does not have binding authority over other U.S. district courts, it can be cited by these courts as persuasive authority. This is because courts often look to other courts of a similar type (here, other federal district courts) for guidance on how to interpret a certain matter of law.
 - i. Can you think of other ways the *Schroer* decision might be persuasive? Consider Diane Schroer's high award for back pay and damages. What might that mean for employers who hear about the case? Is Diane's story compelling enough to change some people's minds about how transgender individuals should be treated in the workplace?
- d. Do you think *Schroer* is a disparate treatment case or a disparate impact case? Consider whether you think the Library intentionally discriminated against Schroer because of her sex, or whether the Library's actions and policies seemed neutral, but affected her differently from others because of her sex. What facts from the case can you use to support your choice?
- e. What are the differences between Title VII and Title IX? Should federal nondiscrimination laws for schools and workplaces be different? In what ways? Why?

¹ There are no express prohibitions against discrimination based on gender identity under state law in 38 states.

■ INTRODUCTORY:

1. Questions on the Schools Reading

L.W. v. Toms River Regional Schools Board of Education

- a. You be the judge. In *Toms River*, the court ruled that New Jersey's law against discrimination because of a person's sexual orientation also includes a person's perceived sexual orientation. This means that students and staff cannot treat another student differently because of what they think that student's sexual orientation is. Do you think the students in Toms River treated L.W. differently because of what they thought his sexual orientation was? Did the school know what was going on and fail to stop it? What arguments should L.W. make? What arguments should the school make?
- b. At the time the *Toms River* case was brought, New Jersey's Law Against Discrimination did not clearly prohibit discrimination because of a student's gender identity (although protections for gender identity and expression were added in 2007). How is sexual orientation different from gender identity? Are they sometimes similar? Do people sometimes make mistakes about someone else's sexual orientation? Why do they make mistakes?

Doe v. Yunits

- c. How did the court decide that the way Pat dressed was an expression of her identity? Do you express your identity by choosing certain clothes and wearing them? Would it upset you if someone forced you to dress in boys' clothes (if you feel like a girl), or in girls' clothes (if you feel like a boy)? Is this different from someone forcing you to dress up for a special occasion?

2. Questions on the Employment Reading

Price Waterhouse v. Hopkins

- a. An example of a sex stereotype is that women like to stay home and cook and clean, while men like to go out and work. Can you think of other examples? Do you know people who fit into these stereotypes? Do you know people who don't?
 - i. Why do you think it is a problem for employers to treat employees differently because of these stereotypes?
- b. There is no federal law that clearly prohibits employers from discriminating against someone because of his or her gender identity. Only 12 states plus Washington, D.C., have laws that expressly prohibit employment discrimination based on gender identity. This means that in most states, employers can fire a man who feels, acts, and dresses like a woman. Do you think this is discrimination because of sex? Is it discrimination because of sex stereotyping, as in the *Price Waterhouse* case? Or is it something else? Consider the case of *Schroer v. Billington*.
- c. What are the differences between Title VII and Title IX? Should federal laws that prohibit discrimination in schools and workplaces be different? In what ways? Why?

Schroer v. Billington

- d. Unlike *Price Waterhouse*, *Schroer* was not a U.S. Supreme Court decision. Courts outside the District of Columbia, where *Schroer* was decided, do not have to follow it. This means that they are free to decide similar cases differently from the way *Schroer* was decided. However, other courts

might be persuaded by the *Schroer* court's decision that employers cannot refuse to hire someone because he or she is transgender. This is because courts often look to each other for guidance on how to decide a certain legal issue.

- i. Can you think of other ways the *Schroer* decision might be persuasive? Consider how much money the court made the Library of Congress give Diane Schroer. What might other employers think when they hear about this case? Will Diane's story change people's minds about how transgender individuals should be treated at work?



GENDER IDENTITY IN THE CONTEXT OF SCHOOLS AND EMPLOYMENT

advanced/intermediate <

ALTHOUGH LAWS GOVERNING DISCRIMINATION IN SCHOOLS, LIKE TITLE IX, AND IN THE WORKPLACE, LIKE TITLE VII, ARE NOT IDENTICAL, THEY ARE VERY SIMILAR.

Courts have interpreted their prohibitions of discrimination on the basis of sex in similar ways. As you read through the following examples, think about how gender identity fits into these anti-discrimination laws.

Gender Identity in Schools

■ TITLE IX

Title IX prohibits discrimination on the basis of sex in educational programs that receive federal funding. This includes both public schools and private schools that receive federal funds, as many private colleges and universities do. Some state laws protect students and staff members against more kinds of discrimination than Title IX does. For example, the New Jersey Law Against Discrimination (LAD) prohibits discrimination in public accommodations,

Title IX prohibits discrimination on the basis of sex in educational programs that receive federal funding.

including public schools, on the basis of, among other things, “affectional or sexual orientation.” This is a protection Title IX does not explicitly offer. Of course, other state and federal protections apply to students and staff members as well, like equal protection and freedom of speech.

L.W. v. Toms River Regional Schools Board of Education, 915 A.2d 535 (N.J. 2007).

L.W. was a student in Toms River School District. From fourth to ninth grade, his classmates harassed him about his perceived sexual orientation. They called him “gay,” “homo,” “fag,” and “fruit cake.” In seventh grade, L.W. found a piece of construction paper in his locker that read, “You’re a dancer, you’re gay, you’re a faggot, you don’t belong in our school, get out.”

“‘Almost every single day’ classmates directed slurs at L.W. loudly in the halls ‘so everyone could hear.’ When asked about his day, L.W. would occasionally reply, ‘Nobody called me anything today. I had a good day.’”

His classmates began to attack him physically. When L.W. started high school in ninth grade, three students cornered him on his way home from school and accused him of having a crush on one of them. One called L.W. a “faggot” and punched him in the face, knocking him down. The administration in the high school seemed to have no knowledge of L.W.’s history of being harassed in middle school, but

background reading

suspended his attacker for ten days. Soon after that, outside a convenience store, a student threatened L.W., pushed him down, and completely covered him with dirt.

L.W. sued the school district, alleging that he had been harassed because of his perceived sexual orientation in violation of the New Jersey Law Against Discrimination (LAD). The Supreme Court of New Jersey agreed that the LAD's prohibition of discrimination on the basis of affectional or sexual orientation also included perceived affectional and sexual orientation.

State courts often look to federal standards when deciding how to apply similar laws. In deciding how to apply the LAD, however, the New Jersey court decided not to look to the U.S. Supreme Court's application of Title IX. The U.S. Supreme Court only finds

Because the court announced a new legal standard, it remanded the case, or sent it back to the lower court, for the parties to further develop the record so they could better argue the case under the new standard.

■ FREEDOM OF EXPRESSION

Doe v. Yunits, 2000 Mass. Super.
LEXIS 491 (Oct. 11, 2000).

Pat Doe (not her real name) was a biologically male fifteen-year-old who identified as female. In seventh grade, she began to wear traditionally feminine clothes and accessories to school. Sometimes she wore makeup, skirts, wigs, high-heeled shoes, and padded bras. The school's principal required Pat to come to his office every morning so he could approve her attire. Sometimes he sent her home to change, and sometimes, after she was sent home, she did not return to school. In eighth grade, she stopped attending school altogether. When she tried to enroll the next year, school officials told her she could not return if she continued to wear girls' clothes and accessories.

Pat sued the school for impermissibly suppressing her freedom of expression under the Massachusetts Constitution. Before the trial, the court ruled that the school could not refuse to allow Pat to wear girls' clothes and accessories until the court completed the trial and came to a decision. The court ruled this way, it explained, because Pat was likely to win on her claim that she was exercising her freedom of expression, which courts consider part of the freedom of speech, by wearing certain clothes and accessories. The court wrote:

"Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being, as attested to by her treating therapist. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."

The court ruled... she was exercising her freedom of expression, which courts consider part of the freedom of speech...

schools liable for student-on-student sexual harassment under Title IX if the school acted with *deliberate indifference* to the harassment. Instead, the New Jersey court applied the LAD standard governing harassment in the workplace. Under that standard, an employer is liable for workplace harassment if it *knew or should have known* of the harassment and *did not take effective measures* to stop it. Because this standard is easier to prove than the federal "deliberate indifference" standard, the New Jersey court concluded it would be less burdensome to students and would fit well with the state's strong policy in protecting students under the LAD.

"Our conclusion furthers the legislative intent of eradicating the scourge of discrimination not only from society, but also from our schools, thus encouraging school districts to take proactive steps to protect the children in their charge."

The court held that the school's refusal to allow her to express her identity in this way was an unlawful suppression of her freedom of speech. Restrictions on speech are permissible when they are content-neutral—that is, if the school's motivation is not directly related to the content of the speech. Because the school would have permitted a biological female to wear the clothes it prohibited Pat from wearing, the court held that the school's conduct was likely not content-neutral.

Gender Identity in the Workplace

■ TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits most employers from discriminating on the basis of race, color, religion, sex, and national origin. Title VII claims fall into two categories: disparate treatment claims and disparate impact claims. A person who believes he or she was intentionally treated differently from other employees because of his or her sex would make a *disparate treatment* claim. On the other hand, a person might be treated differently from other employees, not necessarily intentionally, but because a certain job requirement or policy that appears to treat everyone equally actually affects members of different sexes differently. A person in this situation would bring a *disparate impact* claim. It is not necessary to prove discrimination was intentional in order to prevail on a disparate impact claim.

Consider how the following cases interpret Title VII's prohibition of discrimination on the basis of sex.

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

Ann Hopkins was a senior manager at an accounting firm called Price Waterhouse. The office nominated her for a promotion to partner, highlighting her work helping the firm obtain a \$25 million govern-

ment contract. She performed this work, according to the partners who supported her candidacy, "virtually at the partner level." Although she received praise for being "strong and forthright, very productive, energetic and creative," a number of coworkers found her abrasive. Some considered her "overly aggressive" and "macho." One coworker advised her to take "a course at charm school," and another disliked her swearing "because it's a lady using foul language."

"[I]n order to improve her chances for partnership, [a coworker] advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'"

Hopkins was not promoted. She sued the firm claiming that it had discriminated against her on the basis of her sex. Price Waterhouse argued that it decided not to promote her because of her poor interpersonal skills.

"[Her expression of her gender was] not merely a personal preference but a necessary symbol of her very identity."

Justice Giles, *Doe v. Yunits*

The United States Supreme Court held that Price Waterhouse discriminated against Hopkins on the basis of sex in violation of Title VII by relying on sex stereotyping, or "an impermissibly cabined view of the proper behavior of women." Although it was acceptable, the court explained, for the firm to take employees' interpersonal skills into account in its promotional decisions, the remarks Hopkins' coworkers made "were clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman."

"[I]f an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's

sex and not her interpersonal skills that has drawn the criticism.”

The Court added that Price Waterhouse relied on these sex stereotypes in making its hiring decision and failed to prove that it would have made the same promotional decision without the discriminatory motive.

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

Diane Schroer, a male-to-female transgender woman, applied for a job at the Library of Congress. Because she had not yet begun to present herself as a woman, she applied under her legal name, David, and interviewed for the position in traditionally masculine clothing: a sport coat and slacks with a shirt and tie. She received the highest interview score of all the candidates, was offered the position, and accepted. Before the Library finalized her hiring paperwork, she explained to Charlotte Preece, the Library official in charge of hiring her, that she was transgender. She told Preece that she was about to begin the phase of her transition in which she would wear traditionally feminine clothing and present herself as a woman on a full-time basis.

“Preece’s first reaction was to ask, ‘Why in the world would you want to do that?’ Schroer explained that she did not see being transgender as a choice and that it was something she had lived with her entire life.”



Diane Schroer

Schroer showed Preece photographs of herself dressed as a woman, and Preece thought the pictures looked like “a man dressed in women’s clothing.” After discussing the situation with her coworkers, Preece revoked Schroer’s employment offer. Preece said that she worried, among other things, about Schroer’s ability to keep the government security clearance

she had obtained as a man. Although Schroer told Preece that she had several friends who had transitioned while retaining their security clearances, Preece did not ask for more information or try to contact them.

The United States District Court for the District of Columbia held that the Library discriminated against Schroer in violation of Title VII, both on the basis of sex and on the basis of sex stereotyping.

Preece’s reaction to Schroer’s photographs and the fact that she repeatedly mentioned them to colleagues when she discussed the matter, the court said, was direct evidence that the Library took sex stereotypes into account when it decided to revoke Schroer’s offer.

“Preece’s perception of Schroer as especially masculine made it all the more difficult for her to visualize Diane Schroer as anyone other than a man in a dress.”

The court also ruled that the Library discriminated against Schroer because of her sex:

“[T]he Library was enthusiastic about hiring David Schroer -- until she disclosed her transsexuality. The Library 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.’... 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.’”

In a later ruling, the court awarded Schroer \$491,190 in back pay and damages.

GENDER IDENTITY IN THE CONTEXT OF SCHOOLS AND EMPLOYMENT

introductory <

FEDERAL LAWS AGAINST DISCRIMINATION IN SCHOOLS, LIKE TITLE IX, ARE NOT EXACTLY THE SAME AS LAWS AGAINST DISCRIMINATION AT WORK, LIKE TITLE VII. However, these laws have a lot in common. For example, Title IX and Title VII both make it illegal to discriminate against a person because of his or her sex. As you read through the following cases, think about how gender identity fits into these anti-discrimination laws.

Gender Identity in Schools

■ TITLE IX

Title IX makes it illegal for most schools to discriminate against students or staff members because of their sex. Some state laws protect students and staff against more kinds of discrimination than Title IX does. For example, the New Jersey Law Against Discrimination (LAD) makes it illegal for most New Jersey schools to discriminate because of some-

Title IX makes it illegal for most schools to discriminate against students or staff members because of their sex.

one's sexual orientation, which Title IX does not plainly cover. The following case shows how the New Jersey law protects students.

L.W. v. Toms River Regional Schools Board of Education, 915 A.2d 535 (N.J. 2007).

L.W. was a student in Toms River School District. From fourth to ninth grade, his classmates harassed him about his perceived sexual orientation, or what they thought his sexual orientation was. The harassment began as taunts such as "gay," "homo," "fag," and "fruit cake." In seventh grade, L.W. found a piece of construction paper in his locker that read, "You're a dancer, you're gay, you're a faggot, you don't belong in our school, get out."

"'Almost every single day' classmates directed slurs at L.W. loudly in the halls 'so everyone could hear.' When asked about his day, L.W. would occasionally reply, 'Nobody called me anything today. I had a good day.'"

His classmates began to attack him physically. When L.W. started high school in ninth grade, three students cornered him on his way home from school and accused him of having a crush on one of them. One called L.W. a "faggot" and punched him in the face, knocking him down. The school administration seemed to have no knowledge of L.W.'s history of being harassed, but suspended his attacker for ten days. Soon after that, outside a convenience store, a student threatened L.W., pushed him down, and completely covered him with dirt.

background reading

L.W. sued the school district. He argued that he had been harassed because of his perceived sexual orientation, and that this harassment was unlawful because of New Jersey's Law Against Discrimination (LAD). The Supreme Court of New Jersey agreed that the LAD, by not allowing students to be discriminated against because of their sexual orientation, also did not allow them to be discriminated against because of their perceived sexual orientation, or what others *think* students' sexual orientations are.

came to a decision. The court ruled this way, it explained, because Pat was likely to win her suit. The court thought Pat was probably exercising her freedom of expression, which courts consider part of the freedom of speech, by wearing certain clothes and accessories. The court explained that dressing in girls' clothes was a way for Pat to show that she felt like a girl. Her ability to do this was important for her health and well-being. Her expression of her gender, the court wrote, was "not merely a personal preference but a necessary symbol of her very identity."

The school's refusal to allow Pat to express her identity in this way, the court said, was probably an unlawful violation of her freedom of speech.

Gender Identity at Work

■ TITLE VII

Title VII of the Civil Rights Act of 1964 says that most employers cannot discriminate against employees because of their race, color, religion, sex, or national origin. Consider how the following cases understand what this law means by discrimination "because of sex."

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

Ann Hopkins was a manager at an accounting firm called Price Waterhouse. She was being considered for a promotion. As it usually did, the firm asked Hopkins' coworkers to write their thoughts about her work at the firm. Some coworkers supported her promotion and called her an "outstanding professional." They praised her for being "strong and forthright, very productive, energetic and creative." Others thought she was "overly aggressive" and "macho." One coworker said she should take "a course at charm school," and another disliked her swearing "because it's a lady using foul language."

"[I]n order to improve her chances for partnership, [a coworker] advised, Hopkins should 'walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'"

The court ruled... she was exercising her freedom of expression, which courts consider part of the freedom of speech...

Because the court announced a new legal rule, it remanded the case, or sent it back to the lower court, for L.W. and the school district to argue the case under the new rule.

■ OTHER SCHOOL CLAIMS

Doe v. Yunits, 2000 Mass. Super. LEXIS 491 (Oct. 11, 2000).

Pat Doe (not her real name) was a biologically male fifteen-year-old who thought of herself as female. In seventh grade, she began to wear makeup, skirts, wigs, high-heeled shoes, and padded bras to school. The school's principal made Pat come to his office every morning so he could approve her clothes. Sometimes he sent her home to change, and sometimes, after she was sent home, she did not return to school. In eighth grade, she stopped attending school altogether. When she tried to enroll the next year, school officials told her she could not return if she continued to wear girls' clothes.

Pat sued the school, claiming that it had violated her freedom of expression. Before the trial, the court told the school not to stop Pat from wearing girls' clothes, at least until the court finished the trial and

Hopkins was not promoted. She sued the firm claiming that her employers had discriminated against her because of her sex. Her employers argued that they decided not to promote her because of her poor social skills.

The United States Supreme Court ruled that Price Waterhouse discriminated against Hopkins because of her sex. The Court explained that it was unlawful for her employers to rely on sex stereotyping, or their views about “the proper behavior of women,” when they decided not to promote her. Because these sex stereotypes “were clear signs... that some of the employers reacted negatively to Hopkins’ personality because she was a woman,” the Court held that when these employers discriminated against Hopkins because of their views about how women should behave, they were discriminating against her because of her sex.

Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

Diane Schroer, a male-to-female transgender woman, applied for a job at the Library of Congress. She had not yet begun to present herself as a woman, so she applied using her legal name at the time, David, and went to the interview in traditionally male clothes. She received the highest interview score of all the candidates. The library offered her the position, and she accepted.

Before the Library finished all her hiring paperwork, Schroer explained to Charlotte Preece, the Library official in charge of hiring her, that she was transgender. She told Preece that she was about to begin wearing traditionally feminine clothes and present herself as a woman on a full-time basis.



Diane Schroer

“[Her expression of her gender was] not merely a personal preference but a necessary symbol of her very identity.”



Justice Giles, *Doe v. Yunits*

“Preece’s first reaction was to ask, ‘Why in the world would you want to do that?’ Schroer explained that she did not see being transgender as a choice and that it was something she had lived with her entire life.”

Schroer showed Preece photographs of herself dressed as a woman, and Preece thought the pictures looked like “a man dressed in women’s clothing.” After talking about the situation with her coworkers, Preece told Schroer that she was taking back the employment offer.

The United States District Court for the District of Columbia ruled that the Library discriminated against Schroer in violation of Title VII, both because of her sex and because of sex stereotyping.

Preece’s reaction to Schroer’s photographs, the court said, showed that Preece saw Schroer as especially masculine, and made it difficult for her to see Schroer as anything other than a man in a dress. This opinion that Schroer did not look the way Preece thought a woman should look, the court said, should not have entered into the hiring decision.

The court also ruled that the Library refused to hire Schroer because of her sex:

“[T]he Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library 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.’”

In a later ruling, the court awarded Schroer \$491,190 in back pay and damages.