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

LEYTH O. JAMAL,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 4:14-cv-02782**
	§	
SAKS & COMPANY,	§	
	§	
Defendant.	§	

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") is the primary agency charged by Congress with administering, interpreting, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This case raises the issue of whether harassment and discharge of an individual because she is transgender is cognizable as discrimination "because of … sex." Defendant Saks & Company ("Saks") has moved to dismiss Plaintiff Leyth Jamal's complaint on the ground that Title VII does not protect "transsexuals." The Commission has taken the opposite position -- namely, that intentional discrimination because an individual is transgender can be proved to be grounded in sex-based norms, expectations, or stereotypes. In the Commission's view, Saks' argument to the contrary ignores Supreme Court precedent holding that discrimination against an individual because he or she does not conform to gender stereotypes is sex discrimination under Title VII, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and numerous appellate court decisions recognizing that transgender-based discrimination is sex discrimination.

This case also raises the issue of what an individual must allege in an EEOC charge before she may pursue a claim. The EEOC, which investigates charges, has issued a regulation outlining how specific a charge must be. Saks' motion to dismiss argues for a level of specificity that is at odds with the EEOC regulation, Fifth Circuit precedent, and the purpose of the charge-filing requirement.

Finally, Saks invokes the wrong standard when it urges dismissal of Jamal's claim that Saks fired her for filing an EEOC charge. The correct standard derives from the "participation clause" of Title VII's retaliation provision. The "opposition clause" standard that Saks cites to this court is not the correct standard.

Because the court's ruling could implicate the interpretation and effective enforcement of Title VII, the Commission offers its views for the court's consideration.

STATEMENT OF THE ISSUES[1]

1. Whether discrimination against an individual because he or she is transgender is cognizable as discrimination because of sex under Title VII?

2. Whether Jamal's EEOC charge satisfied the administrative prerequisite to a suit alleging transgender discrimination?

3. Whether Jamal engaged in protected activity for purposes of a retaliation claim when she filed an EEOC charge and opposed conduct a reasonable person would believe is unlawful?

[1] The Commission takes no position on any other issue in this case.

STATEMENT OF FACTS[2]

Jamal began working at a Saks outlet in Katy, Texas, as a Selling and Service Associate in April 2011. R.1 ¶8. [3] At the time of her hire, Saks was aware that Jamal is a transgender individual and identifies as a woman. *Id.* at ¶ 22. In March 2012, Jamal transferred to the full-line Houston location, into the position of Selling Associate. *Id.* at ¶ 9. Over the next few months, Jamal experienced inappropriate comments and hostility from managers and co-workers regarding her gender identity and expression. *Id.* at ¶ 33. Taylor asked Jamal to change her appearance to a more masculine one and told her that she should separate her home life from her work life. *Id.* at ¶ 31. Management also told Jamal that she should not wear makeup or feminine clothing. *Id.* at ¶ 32. Saks employees referred to Jamal using male pronouns, threatened her, and insinuated that she was a prostitute. *Id.* at ¶ 34-37. She complained, in writing, to management about the harassment, but Saks took no action. *Id.* at ¶ 43

Jamal filed an EEOC charge on July 2, 2012, alleging sex discrimination and harassment "based on my gender, male (transgender)." *Id.* at ¶ 13. Saks terminated Jamal on July 12, 2014, ten days after she filed her charge. *Id.* at ¶ 15. On July 21, 2012, Jamal amended her charge to include retaliation. *Id.* The EEOC sent a letter of determination to Jamal on February 12, 2014, stating that she was subjected to intimidation and harassment based on sex and due to her "failure to conform to stereotypical male behavior in the workplace." *Id.* at ¶ 16. Conciliation failed and the EEOC issued a right to sue notice. *Id.* at ¶ 17.

Jamal filed suit alleging harassment and discharge because of her sex and retaliatory discharge in violation of Title VII. Saks has moved to dismiss.

---

[2] This recitation of the facts is based on the allegations set out in the complaint, which the district court takes as true in considering a motion to dismiss. *See, e.g., Toy v. Holder*, 714 F.3d 881, 882 (5th Cir. 2013).

[3] "R.#" refers to this court's docket entry number

ARGUMENT

1. Transgender discrimination is cognizable as discrimination because of sex under Title VII.[4]

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). The Supreme Court has clarified that the phrase "because of ... sex" means "that gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). The plaintiff in *Price Waterhouse* was a female senior manager who was being considered for partnership in an accounting firm. *Id.* at 232. There was evidence that she was denied partnership because she was considered "not feminine enough" in dress and behavior. *Id.* at 235. Her evaluators suggested that she could improve her chances for partnership if she were less "macho" and learned to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Court held that the evaluation amounted to prohibited sex stereotyping, explaining that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (citations omitted). The Court held that Title VII barred not just discrimination because the plaintiff was a woman, but also discrimination based on the employer's belief that she was not *acting* like a woman. *Id.* at 250–51.

[4] While Jamal does not use the term "transgender" in her complaint, the EEOC understands the term to refer broadly to a person whose gender identity or expression is different from the sex assigned to him or her at birth, as Jamal describes.

After *Price Waterhouse*, the courts of appeals have recognized that Title VII's prohibition on sex discrimination encompasses "discrimination based on the … fail[ure] … to conform to … gender expectations." *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse*, 490 U.S. at 240); *see also id.* ("under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender") (emphasis in original). More to the point, after *Price Waterhouse*, every court of appeals that has addressed the question has recognized that a transgender plaintiff may state a claim for discrimination because of sex if the defendant's action was motivated by the plaintiff's nonconformance with a sex stereotype or norm. *See Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004) (holding that an adverse action taken because of a transgender plaintiff's failure to conform to sex stereotypes concerning how a man or woman should look and behave constitutes unlawful gender discrimination); *Schwenk*, 204 F.3d at 1201-02 (concluding that a transsexual prisoner had stated a viable sex discrimination claim under the Gender Motivated Violence Act because "[t]he evidence offered … show[s] that [the assault was] motivated, at least in part, by Schwenk's gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor" and noting that its analysis was equally applicable to claims brought under Title VII); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (stating that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender")[5]; *cf. Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007)

[5] *See also Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492, 494 (9th Cir. 2009) (concluding that after *Price Waterhouse*, "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women"); *Myers v. Cuyahoga County*, 182 F. App'x 510, 519 (6th Cir. 2006) (concluding that "Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender"); *Barnes v. City of Cincinnati*, 401

(assuming without deciding that Title VII protects "transsexuals who act and appear as a member of the opposite sex").

In addition, numerous district courts, including one from within the Southern District of Texas, have concluded that transgender discrimination is cognizable under Title VII. *See, e.g.*, *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) ("Title VII and *Price Waterhouse* ... do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an 'effeminate' male or 'macho' female who while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes. There is nothing in existing case law setting a point at which a man becomes *too* effeminate, or a woman becomes *too* masculine, to warrant protection under Title VII and *Price Waterhouse*.") (emphasis in original); *Finkle v. Howard Cnty., Md.*, CIV. JKB-13-3236, 2014 WL 1396386, at *8 (D. Md. Apr. 10, 2014) (holding that an officer's claim that she was discriminated against because of her transgender status was a "cognizable claim of sex discrimination"); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06 (D.D.C. 2008) ("While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself."); *Chavez v. Credit Nation Auto Sales*, No. 13-cv-00312-WSD, 2014 WL 4585452, at *6 (N.D. Ga. Sept. 12, 2014) (acknowledging that the Supreme Court, several circuits, and several district courts have held that "discrimination against a transgender

F.3d 729, 736-39 (6th Cir. 2005) (holding that the demotion of a "preoperative male-to-female transsexual" police officer because he did not "conform to sex stereotypes concerning how a man should look and behave" stated a claim of sex discrimination under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 213-15 (1st Cir. 2000) (applying *Price Waterhouse* to conclude, under the Equal Credit Opportunity Act, that plaintiff states a claim for sex discrimination if bank's refusal to provide a loan application was because plaintiff's "traditionally feminine attire ... did not accord with his male gender").

individual because of her gender non-conformity is sex discrimination, whether it's described as being on the basis of sex or gender") (internal citation omitted).[6]

The Fifth Circuit, outside the transgender discrimination context, likewise has recognized that "a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes." *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 454 (5th Cir. 2013) (en banc) (same-sex harassment case). In reaching its holding, the en banc court relied in part on two transgender discrimination cases, *Smith*, 378 F.3d at 573, and *Glenn*, 663 F.3d at 131. *See Boh Bros*, 731 F.3d at 454 n.4..

In this case, Jamal has alleged enough "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Jamal has alleged that managers and co-workers referred to her using male pronouns, despite her requests to use female pronouns. Further, management told her to change her appearance to a more masculine one, not to wear makeup or feminine clothing, and to separate her home life from her work life. These allegations are sufficient to state a Title VII claim.

Further, Jamal need not have specific evidence of gender stereotyping by Saks officials because "consideration of gender stereotypes will inherently be part of what drives discrimination against a transgendered individual." *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012). As the Eleventh Circuit has emphasized, "[a]

[6] *See also Mitchell v. Axcan Scandipharm, Inc.*, No. Civ. A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. 2006) (transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-cv-375E, 2003 WL 22757935, at *4 (W.D.N.Y. 2003) (transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man'"); *Doe v. United Consumer Fin. Servs.*, No. 1:01-cv-1112, 2001 WL 34350174, at *2-5 (N.D. Ohio 2001) (termination based on non-conformity with gender expectations is actionable under Title VII); *cf. Hart v. Lew*, 973 F. Supp. 2d 561 (D. Md. Sept. 23, 2013) (assuming without deciding that Title VII protects transsexual individuals).

person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." *Glenn*, 663 F.3d at 1316 (citations omitted). Thus, discriminating against an individual because of his or her transgender status inherently entails sex-based considerations. *See Smith*, 378 F.3d at 574-75 ("discrimination against a plaintiff who is transsexual-and therefore fails to act and/or identify with his or her gender-is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."). Jamal's allegation that Saks discriminated against her because she is transgender therefore states a claim for Title VII sex discrimination.

In contending that "transsexuals" are not protected by Title VII, Saks relies heavily on pre-*Price Waterhouse* case law. Prior to the Supreme Court's decision in *Price Waterhouse*, several appellate courts rejected sex discrimination claims brought by transgender individuals. *See, e.g., Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977), *overruling recognized by Schwenk*, 204 F.3d at 1201-02. However, the two rationales these courts used to decline to extend protections to transgender individuals -- a narrow definition of "sex" and a refusal to expand protections beyond the protected groups originally considered by Congress -- both have since been rejected by the Supreme Court. First, as noted, *Price Waterhouse*, 490 U.S. at 251, makes clear that Title VII does not simply prohibit discrimination based on biological sex, but also "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *See also Smith*, 378 F.3d at 573 ("the approach in *Holloway*, *Sommers*, and *Ulane*... has been eviscerated" by *Price Waterhouse*'s holding that

"Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.") And second, in *Oncale v. Sundowner Offshore Oil Services, Inc.*, 523 U.S. 75 (1998), in ruling that same-sex harassment is actionable, the Supreme Court explicitly rejected the notion that Title VII only proscribes types of discrimination specifically contemplated by Congress. *Id.* at 79-80 (explaining that "statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"); *see also Boh Bros.*, 731 F.3d at 454 (same).

Saks does cite one post-*Price Waterhouse* appellate case for the proposition that transgender discrimination is not encompassed by Title VII. However, that case, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), does not stand for such a broad proposition. While the *Etsitty* court did decline to adopt a per se rule that transgender discrimination always amounts to sex discrimination, it held that it would assume the plaintiff could establish a claim under the *Price Waterhouse* theory of gender stereotyping. *Id.* at 1224 (assuming that Title VII protects "transsexuals who act and appear as a member of the opposite sex.").[7] Accordingly, no court of appeals decision supports dismissal of this case. Further, the two post-*Price Waterhouse*

[7] Underpinning the *Etsitty* court's rejection of a broader per se rule was its interpretation of Title VII as prohibiting discrimination against men or women, but not against individuals who change their sex. The court's reasoning is flawed, as the *Schroer* decision highlights that discriminating against someone for changing genders is itself evidence of sex discrimination. 577 F. Supp. 2d at 305-06. The *Schroer* court analogized to a religious conversion: an employer that fires an individual for converting from Christianity to Judaism, and that harbors no bias against Christians or Jews but only converts, has discriminated "because of religion." The court concluded that "[n]o court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Id.* (emphasis in original). It follows that discrimination against transgender individuals- those who have changed their gender expression-"is literally discrimination "because of ... sex." *Id.* at 302.

district court cases that Saks cites are rooted in *Ulane* and the above-discussed pre-*Price Waterhouse* rationales that no longer have merit. *See Lopez*, 542 F. Supp. 2d at 660 (refusing to follow *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. 2002), and *Etsitty*).

2. Jamal's EEOC charge satisfied the administrative prerequisite to a suit alleging transgender discrimination.

Saks argues that Jamal failed to comply with the administrative prerequisites to suit because her EEOC charge did not allege discrimination "because of any alleged status as a female." Def.'s Mot. Dismiss 5. In particular, Saks argues that because the charge alleged discrimination and harassment "based on my gender, male (transgender)," the claims that she suffered discrimination and harassment because of "'her [sic][8] gender' (i.e., female) are outside the scope of Plaintiff's EEOC charge." *Id.* at 2, 5. Saks' argument ignores EEOC's regulation regarding charges and Fifth Circuit precedent on the requisite specificity of EEOC charges, and so lacks merit.

A Title VII plaintiff must first file a timely charge with the EEOC. *See* 42 U.S.C. § 2000e-5(e)(1). Title VII does not specify the form or content of such a charge, but provides only that "charges shall be made in writing under oath or affirmation." 42 U.S.C. § 2000e-5(b); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984) (Title VII "prescribes only minimal requirements pertaining to the form and content of charges of discrimination"). In all other respects, Congress expressly left the details concerning the content of charges to the EEOC, stating that charges "shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b).

[8] Defendant inserted the "[sic]" in its motion.

The EEOC has set out in a regulation the information a charge should contain. The EEOC regulation states that "[e]ach charge should contain . . . [a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3). The regulation further provides that "[n]otwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to *describe generally* the action or practices complained of." 29 C.F.R. § 1601.12(b) (emphasis added); *see also Shell Oil*, 466 U.S. at 62 n.11 (expressly rejecting the interpretation of some earlier courts that required aggrieved individuals to "se[t] forth the facts upon which [the charge is] based"); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 461-62 (5th Cir. 1970) (noting validity of regulation).

Here, although the EEOC charge is not in the record, Saks' motion indicates that Jamal alleged transgender discrimination in her charge.[9] She then alleged discrimination because of "gender, gender identity, and gender expression" in her complaint. Jamal's charge thus described the very type of discrimination later alleged in her complaint. Saks has seized upon the fact that Jamal used the word "male" in her charge, while using the feminine pronoun "her" in her complaint. On these facts, however, there can be no failure to exhaust, for the term "transgender" encompasses a person "who identifies with or expresses a sexual identity that differs from the one which corresponds to the person's sex at birth." *See* Merriam Webster Online Dictionary, Transgender (January 16, 2015) http://www.merriam-webster.com/dictionary/transgender*; Lewis v. High Point Regional Health System*, 5:13-CV-838-

[9] Saks' motion indicates the charge was attached to Jamal's complaint as Exhibit A, but it does not appear that it was in fact attached.

BO (E.D.N.C. Jan. 15, 2014) at 3 (same). Thus, Jamal's complaint does not allege a type of discrimination different from that alleged in the EEOC charge.

In support of its argument, Saks cites to *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 578 (5th Cir. 1993), where the Fifth Circuit rejected plaintiff's attempt to pursue additional acts of discrimination beyond those in her EEOC charge. This case is not about additional acts of discrimination, however. The discrimination alleged in the charge, as Saks describes it, is the same discrimination alleged in the complaint, and so *Fine* lends no support to Saks' argument. More to the point, the Fifth Circuit long ago rejected the argument that a "plaintiff's charging words and her pleading words [must be] sufficiently harmonized and synchronized." *Sanchez*, 431 F.2d at 464. As the *Sanchez* court stressed, the EEOC charge form is "designed to be utilized by even the most unsophisticated and unlettered layman," and a charging party's "lack of literary acumen should not stymie his request for equal employment opportunity." *Id.* at 458, 465. The court held that "the specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." *Id.* at 465. In sum, where Jamal's charge met the minimal general description requirement of EEOC regulations, the charge satisfied Title VII's administrative requirements.

3. Jamal engaged in protected activity for purposes of a retaliation claim when she filed an EEOC charge and opposed conduct a reasonable person would believe is unlawful.

Saks argues that Jamal cannot state a claim for retaliation because she had no reasonable belief that the conduct she complained of violated Title VII. Saks is incorrect for two reasons.

First, Jamal's claim that she was fired, in part, because she filed an EEOC charge should be evaluated under the standard applicable to claims based on the participation clause of Title VII's anti-retaliation provision. By making a "reasonable belief" argument, Saks has invoked the

standard applicable to a different clause, namely the opposition clause. The standards for evaluating claims under the two clauses are distinct, however.

Title VII states that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of its employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter [the opposition clause], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [the participation clause]." 42 U.S.C. § 2000e-3(a). The participation clause, by its terms, does not limit the statute's protection for participation, but requires only that an individual engage in any of the identified protected activities. *Id.*

The Fifth Circuit has recognized that the participation clause does not condition protection for filing a charge on any other criteria. *See Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1138-39 (5th Cir. 1981) ("where the communication with the EEOC satisfied the requirements of a 'charge,' the charging party could not be discharged for the writing") (citing *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969)); *see also* EEOC Compliance Manual, Section 8 – Retaliation ("Compliance Manual"), No. 915-003, at § 8-II(C)(2) (1998) (available at http://www.eeoc.gov/policy/docs/retal.html) (last visited January 22, 2015) (Title VII accords protection under the participation clause for filing charge of discrimination "regardless of the validity or reasonableness of the charge"). Moreover, the Fifth Circuit has held this standard is different from that applicable to the opposition clause. *See Payne,* 654 F.2d. at 1139 (distinguishing the participation clause's broad protection from the opposition clause, which protects "an employee who reasonably believes that discrimination exists"); *see also* Compliance Manual ("While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation

clause applies to all individuals who participate in the statutory complaint process."). Because Jamal filed a charge with the EEOC, her claim that she was fired in retaliation for this filing requires no additional criteria for protection under the participation clause.

Jamal also claims that she was fired, in part, because of her complaints in the Saks workplace. These complaints should be evaluated under the opposition clause. That clause protects an employee from retaliation if she had a good faith, reasonable belief that the challenged practice violated Title VII, even if the practice is not ultimately found to violate the statute. *See Payne*, 654 F.2d at 1137.

In this case, Jamal can satisfy the reasonable belief standard. Federal courts have held that transgender discrimination does in fact violate Title VII. *See Barnes*, 401 F.3d at 736-39; *Smith*, 378 F.3d at 572-73; *Kastl*, 325 F. App'x at 494; *Myers*, 182 F. App'x at 519. The EEOC, the primary agency administering and enforcing Title VII, has recognized that transgender based discrimination is sex discrimination. *See Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012).

This authority makes this case very different from *Clark County School District v. Breeden*, where "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard." 532 U.S. 268, 271 (2001). Here, Jamal could reasonably have believed she was opposing conduct unlawful under Title VII, and so she engaged in activity protected from retaliation. *See Brandon v. Sage Corp.*, No. 5:12-CV-1118-DAE, 2014 WL 6611987 at *10 (W.D. Tex. Nov. 19, 2014) ([Plaintiff] could have reasonably believed that [Defendant]'s alleged opposition to hiring transgendered persons . . . was in violation of Title VII.); *Eure v. Sage Corp.*, No. 5:12-CV-1119-DAE, 2014 WL 6611997 at *8 (W.D. Tex. Nov. 19, 2014) "[T]he contours of the sex stereotyping doctrine that transgender persons can use as a

basis for Title VII discrimination claims are complex. . . [b]ecause there is a potential basis of recovery under Title VII, [Plaintiff]'s belief was reasonable.").

CONCLUSION

For the reasons stated above, the EEOC urges this Court to deny Saks' motion to dismiss.

Respectfully submitted the 22nd of January, 2015.

P. DAVID LOPEZ
General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

JENNIFER S. GOLDSTEIN
Acting Assistant General Counsel

SHERYL M. GOLKOW
Attorney

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507

/s/ Edward Juarez

EDWARD JUAREZ
Supervisory Trial Attorney
Texas State Bar No. 24014498
Federal ID No. 29845
Email: eduardo.juarez@eeoc.gov
Attorney-in-Charge

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
San Antonio Field Office
5410 Fredericksburg Rd., Suite 200
San Antonio, Texas 78229-3555
Telephone: (210) 281-7613
Facsimile: (210) 281-7669
ATTORNEYS FOR PLAINTIFF EEOC

CERTIFICATE OF SERVICE

I, Edward Juarez, hereby certify that I electronically filed the foregoing motion and attached brief with the Clerk of the Court via the CM/ECF system this 22nd day of January, 2015. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the CM/ECF system:

Michael D. Mitchell
Ogletree Deakins et al
500 Dallas St, Ste 3000
Houston, TX 77002-4709
(713) 655-5756
Michael.mitchell@odnss.com

Jillian T Weiss
Office of Jillian T. Weiss
P.O. Box 642
Tuxedo Park, NY 10987
(845) 709-3237
Jweiss@jtweisslaw.com

Mitchell Katine
Katine & Nechman, LLP
1834 Southmore Blvd.
Houston, TX 77004
(713) 808-1000
Mkatine@lawkn.com

Christopher Len Nichols
Randle Law Office Ltd LLP
820 Gessner, Ste. 1570
Houston, TX 77024
(28) 657-2000
Chris@jgradyrandlepc.com

/s/ Edward Juarez
_____
EDWARD JUAREZ