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Comment: Transgender Employment Discrimination Equality In Wisconsin: The Demise Of A Former LGBTIQ+ Rights Trailblazer

Alexandra A. Klimko

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COMMENT: TRANSGENDER EMPLOYMENT DISCRIMINATION EQUALITY IN WISCONSIN: THE DEMISE OF A FORMER LGBTIQ+ RIGHTS TRAILBLAZER

Alexandra A. Klimko*

Wisconsin, once known as “The Gay Rights State” and a pioneer of the LGBTIQ+ civil rights movement, has disappointingly failed to create transgender-inclusive employment discrimination legislation, much like the majority of American states. As a result, Wisconsin transgender employees face shocking workplace discrimination with saddening repercussions felt by transgender individuals who call Wisconsin home. This Comment identifies the federal, state, and city approaches that have extended equal employment discrimination legal protections to transgender workers in the United States. Further, this Comment urges the Wisconsin legislature to incorporate “gender identity or expression” to Wisconsin’s Fair Employment Act as a non-discrimination category, continuing with the state legislature’s recognized preferred approach for creating transgender-inclusive laws. The Wisconsin legislature is likely the sole governmental branch capable of and willing to extend such employment discrimination rights to Wisconsin’s transgender community as a result of the existing political atmosphere in the state.

* Candidate for Juris Doctor, Marquette University Law School, May 2017.

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I. INTRODUCTION

Long before Bruce became Caitlyn,¹ American transgender² employees were fighting for equal rights and legal recognition under city, state, and federal laws.³ Despite recent support stemming from popular media figures like Caitlyn Jenner,⁴ the American transgender civil rights movement has yet to garner similar success—particularly in the realm of American state employment discrimination law—to that obtained by the American gay and lesbian civil rights movement.⁵

As of September 2015, only nineteen states and the District of Columbia have enacted employment discrimination legislation protecting transgender citizens.⁶ Correspondingly, transgender individuals working or attempting to work in the

¹ Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (July 2015), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz> [<https://perma.cc/R2R9-G5M6>].

² The term “transgender” is defined as “[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” *GLADD Media Reference Guide - Transgender Issues*, GLADD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/529R-X4ZP>]. In contrast, “cisgender” is understood to mean “[a] person who by nature or by choice conforms to gender/sex based expectations of society[.]” *Definition of Terms*, UC BERKELEY – CENTERS FOR EDUCATIONAL JUSTICE & COMMUNITY ENGAGEMENT, <http://ejce.berkeley.edu/geneq/resources/lgbtq-resources/definition-terms#intergender> [<https://perma.cc/6J5X-3Z7K>]. For the purposes of this Comment, the term “transgender” will be used broadly to reference all LGBTIQ+ gender and non-gender conforming categorizations comprised of individuals who do not identify as being cisgender. It is important to note however that the umbrella term “transgender” encompasses a wide variety of more specific categorizations including, but not limited to, agender, bigender, gender diverse, intersex, and pangender categorizations. *Id.*

³ See generally SUSAN STRYKER, *TRANSGENDER HISTORY* (Seal Press 2008).

⁴ Bissinger, *supra* note 1.

⁵ STRYKER, *supra* note 3.

⁶ Teresa Rainey & Elliot E. Imse, *qualified and transgender: A report on results of resume testing for employment discrimination based on gender identity*, D.C. OFF. OF HUM. RTS., http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FINAL_110215.pdf [<https://perma.cc/2NP5-3UVA>]; (citing *State Nondiscrimination Laws in the U.S.*, NAT’L LGBT TASK FORCE, http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_color_new.pdf [<https://perma.cc/J2ET-2HKH>] (last updated May 21, 2014)). In 2014, Utah passed transgender-inclusive employment discrimination legislation that was not included in the above-cited study, increasing the total amount of states with transgender-inclusive employment discrimination legislation to twenty. See UTAH CODE ANN. § 34A-5-106 (Lexis Nexis 2015).

United States have suffered significant inequalities related to hiring practices, job promotions, and employment termination.⁷ A recent national study revealed that when reviewing resumes for hiring purposes, forty-eight percent of American employers preferred less-qualified cisgender candidates instead of more-qualified transgender candidates.⁸ This study further indicated that thirty-three percent of the surveyed American employers offered interviews to less-qualified cisgender candidates over more-qualified transgender individuals.⁹ Alarming, a 2011 national study reported that forty-seven percent of the transgender population in the United States claimed employment termination or job promotion denial because of gender identification or expression.¹⁰

Wisconsin, once known as “The Gay Rights State” and a pioneer of the LGBTIQ+ civil rights movement,¹¹ has disappointingly joined the majority of states failing to extend equal employment discrimination legal protections to individuals who do not conform to traditional societal gender norms.¹² Tammy Baldwin, a Wisconsin senator and prominent LGBTIQ+ advocate,¹³ recounted before the United States House of Representatives’ Subcommittee on Health, Employment, Labor, and Pensions, the story of a Wisconsin transgender woman forced into taking dire action after she was fired from her management-level position.¹⁴ The Wisconsin woman was terminated by her Wisconsin-based employer after she expressed

⁷ Rainey & Imse, *supra* note 6.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 93 (2007).

¹² A.M. Gill, *2014 State Equality Index*, HUMAN RTS. CAMPAIGN FOUND. & EQUALITY FED’N INST., <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/HRC-SEL-2014-ReportRev5-1-Opt.pdf> [<https://perma.cc/Y2S5-QWFB>].

¹³ Emanuella Grinberg, *Wisconsin’s Tammy Baldwin is first openly gay person elected to Senate*, CNN (Nov. 7, 2012), <http://www.cnn.com/2012/11/07/politics/wisconsin-tammy-baldwin-senate/> [<https://perma.cc/N6T3-JSVY>].

¹⁴ *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 8-9 (2008) (Statement of Hon. Tammy Baldwin, Rep. in Cong. from the State of Wis.), available at <https://www.gpo.gov/fdsys/pkg/CHRG-110hhr43027/html/CHRG-110hhr43027.htm> [<https://perma.cc/FGG2-2PEY>].

a desire to undergo medical gender transition procedures; this was the employer's sole rationale for firing the transgender employee.¹⁵ In her speech, Senator Baldwin highlighted the grim reality many transgender Wisconsinites face under the state's non-inclusive employment discrimination laws, stating that "because Wisconsin's law gave [the transgender woman] no legal recourse, she faced an impossible situation and ended up moving to a different [s]tate."¹⁶

This Comment will compare Wisconsin's current employment discrimination legislation—a statutory scheme failing in its entirety to protect Wisconsin transgender employees—to various American federal, state, and city actions that have positively granted employment discrimination rights to America's transgender population. Part II of this Comment will identify the different approaches that currently exist in the United States that afford American transgender citizens equal employment discrimination legal protections. Part III will examine Wisconsin's own employment discrimination laws and discuss the disparities the state's transgender community faces as a result of non-inclusive Wisconsin legislation. In conclusion, Part IV will suggest that Wisconsin legislators incorporate "gender identity or expression" language into Wisconsin's employment discrimination statutory scheme as an explicitly defined and separately protected category of non-discrimination. Adopting such language through action taken by the Wisconsin legislature will be the most successful and probable approach Wisconsin lawmakers can take to provide equal employment discrimination rights to Wisconsin's transgender community.

II. UNITED STATES FEDERAL, STATE, AND CITY APPROACHES AFFORDING EMPLOYMENT DISCRIMINATION LEGAL RIGHTS TO TRANSGENDER EMPLOYEES IN AMERICA

A key step in determining how Wisconsin can protect its transgender workforce is identifying the variety of approaches the federal government, various states, and even some Wisconsin cities have used to accomplish the same goal. Each of the approaches discussed in this Part vary in form, structure, and language, but essentially, remain important examples at

¹⁵ *Id.*

¹⁶ *Id.*

play in the United States that Wisconsin lawmakers should consider.

A. *Transgender-Inclusive Employment Discrimination Rights Under United States Federal Law*

The United States federal government became the first authority to recognize and protect American workers from unfair employment discrimination practices in 1964 with Congress' passage of Title VII of the Civil Rights Act.¹⁷ Under Title VII, Congress prohibited employment discrimination on the basis of "race, color, religion, sex, or national origin" by enumerating each of these rationales as specific categories of non-discrimination.¹⁸ Today, Title VII remains the predominant federal law governing federal employment discrimination in the United States.¹⁹

Despite Congress' desire to reduce the amount of employment discrimination occurring in the United States,²⁰ Title VII does not incorporate explicit language that includes American transgender employees as a protected non-discrimination class.²¹ Title VII's language provides no mention of prohibiting employment discrimination based upon an employee's gender identity or gender expression.²² Sexual orientation has also not been included among the list of protected non-discrimination categories pursuant to the federal civil rights law.²³

In fact, Title VII's absence of overt LGBTIQ+ legal protections has led to repeated attempts by Congress to pass the

¹⁷ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012). The Civil Service Reform Act of 1978 also protects transgender individuals from employment discrimination, but is limited in scope to federal employees. Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(1)(A) (2012).

¹⁸ 42 U.S.C. § 2000e-2(a)(1).

¹⁹ *Federal Laws Prohibiting Job Discrimination: Questions and Answers*, U.S. EQUAL OPPORTUNITY COMM., <https://www.eeoc.gov/facts/qanda.html> [<https://perma.cc/XKC5-QT2X>]; Univ. of Tex. Southwestern Med. v. Nassar, 133 S.Ct. 2517, 2522 (2013) ("Title VII is central to the federal policy of prohibiting wrongful discrimination in the Nation's workplaces").

²⁰ 42 U.S.C. § 2000e-2(a); H.R. 7152, 88th Cong. (2d Sess. 1964) ("[T]o prevent discrimination in federal assisted programs . . .").

²¹ *Id.*

²² *Id.*

²³ *Id.*

Employment Non-Discrimination Act (ENDA).²⁴ If enacted, ENDA would grant both transgender employees and other LGBTIQ+ groups equal employment rights under federal law, as indicated by the following proposed language:

The purposes of this Act are –

- (1) to address the history and persistent, widespread pattern of discrimination on the bases of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers;
- (2) to provide an explicit, comprehensive Federal prohibition against employment discrimination on the bases of sexual orientation and gender identity, including meaningful and effective remedies for any such discrimination;
- (3) to invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution, and to regulate interstate commerce pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the bases of sexual orientation and gender identity; and
- (4) to reinforce the Nation's commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom.²⁵

However, ENDA has never successfully passed through both houses of Congress,²⁶ and the proposed legislation has received increased criticisms from many LGBTIQ+ groups who fear the effect that recent United States Supreme Court judicial decisions, such as *Burwell v. Hobby Lobby*,²⁷ would have on the fully implemented law.²⁸ A decline in support for ENDA makes

²⁴ Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 278 (2014).

²⁵ Employment Non-Discrimination Act of 2013, S. 815 113th Cong. § 2 (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/815> [<https://perma.cc/LLW6-EGW2>].

²⁶ *ENDA Passes Senate 64 to 31*, HUM. RTS. CAMPAIGN (Nov. 7, 2013), <http://www.hrc.org/blog/enda-passes-senate-64-32> [<https://perma.cc/3MCR-D2PV>]; Reed, *supra* note 24, at 278-80.

²⁷ 134 S.Ct. 2751 (2014).

²⁸ Ed. O'Keefe, *Gay Rights Groups Withdraw Support from ENDA After Hobby Lobby Decision*, THE WASH. POST. (July 8, 2014, 4:37 PM), <https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group->

it unlikely for transgender employees to obtain employment discrimination legal protections under such legislation any time in the near future.²⁹

Still, Title VII's lack of "gender identity and expression" language and ENDA's improbable enactment have not prevented transgender employees from asserting employment discrimination claims in the federal political realm. Instead, the Judicial Branch, Executive Branch, and federal administrative agencies have driven the creation of employment discrimination legal rights for American transgender employees. While the federal courts and the Equal Employment Opportunity Commission (EEOC) have created protections for transgender workers under federal law by more broadly interpreting Title VII's definition of "sex,"³⁰ the Obama Administration has bestowed such rights to the transgender community by adding "gender identity and expression" to categories of non-discrimination related to employment.³¹

First, some federal courts have granted employment discrimination rights to American LGBTIQ+ employees by interpreting Title VII's "sex" non-discrimination category as prohibitive of employment discrimination based on sexual orientation and gender identity.³² *Price Waterhouse v. Hopkins*³³ is the leading United States Supreme Court case acting as the basis for Title VII's inclusion of these LGBTIQ+ employment discrimination rights.³⁴ In *Price Waterhouse*, Ann Hopkins was denied a job promotion because she failed to comport with

withdrawing-support-of-enda-after-hobby-lobby-decision/ [https://perma.cc/82TP-ESFA].

²⁹ *Id.*; Reed, *supra* note 24, at 313.

³⁰ See discussion *infra* pp. 169-74.

³¹ See discussion *infra* pp. 174-75.

³² For an in-depth discussion of Title VII as related to judicial interpretations of "sex" that are inclusive of "sexual orientation," see Anthony E. Varona & Jeffrey Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000). See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1316-21 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d. 566, 572-75 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d. 1187, 1202 (9th Cir. 2000).

³³ 490 U.S. 288 (1989).

³⁴ E.g. *Smith*, 378 F.3d at 573 (continuing to apply *Price's* definition of "sex" under Title VII after a Congressional act subrogated *Price's* application framework); *Schwenk*, 204 F.3d at 1202 (reaching the same definition of "sex" under Title VII as *Price* after being subrogated by a Congressional act).

gender norms typically associated with being female.³⁵ Hopkins alleged she was denied a promotion because she was viewed as “macho” by co-workers and used manners not becoming of a “lady.”³⁶ One of Hopkins’ supervisors advised her “to improve her chances [at] partnership [by] . . . ‘walk[ing] more femininely, talk[ing] more femininely, dress[ing] more femininely, wear[ing] make-up, hav[ing] her hair styled, and wear[ing] jewelry.’”³⁷ In agreeing with Hopkins’ claim of illegal employment discrimination under Title VII, the United States Supreme Court held that Title VII’s “sex” category of non-discrimination prohibited sex stereotyping like that alleged by Hopkins.³⁸ The Supreme Court mandated in its pivotal opinion that “gender must be irrelevant to employment decisions.”³⁹

The United States Supreme Court further expanded upon Title VII’s “sex” definition in *Oncale v. Sundowner Offshore Services*.⁴⁰ In *Oncale*, a male employee filed a Title VII claim against his former employer, alleging workplace sexual harassment against his former male supervisors.⁴¹ A lower federal court dismissed the employee’s Title VII suit and held that Title VII’s language does not apply to same-sex harassment claims.⁴² Adding to its *Price Waterhouse* precedent, the Supreme Court overturned the lower court’s ruling, and held instead that employees may use Title VII to make workplace sexual harassment claims, irrespective of the harasser’s or victim’s sex.⁴³ Therefore, *Oncale* stands for the Supreme Court’s continuous broadening of the definition of “sex” under Title VII.

Even though the Supreme Court’s *Price Waterhouse* and *Oncale* decisions did not deal specifically with transgender employment discrimination claims under Title VII, many federal appellate courts have increasingly interpreted these decisions as an extension of employment discrimination legal rights to

³⁵ *Id.* at 233-35.

³⁶ *Id.* at 235.

³⁷ *Id.*

³⁸ *Id.* at 258.

³⁹ *Id.* at 240.

⁴⁰ 523 U.S. 75, 79-80 (1998).

⁴¹ *Id.* at 77.

⁴² *Id.* at 76-77.

⁴³ *Id.* at 79-80 (“Title VII prohibits ‘discriminat[ion] . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”)

American transgender employees.⁴⁴ In the Eleventh Circuit’s 2011 *Glenn v. Brumby*⁴⁵ decision, the court held that a transgender employee, who was fired from her job after transitioning from male to female, possessed a valid Title VII claim per federal law.⁴⁶ Relying on the Supreme Court’s *Price Waterhouse* decision, the Eleventh Circuit held that there was “congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”⁴⁷ Because *Price Waterhouse* prohibited employment discrimination based on gender, the Eleventh Circuit held—under an expanded interpretation of “sex”—that if the transgender employee had pursued his claim under Title VII, the court would have found that he was wrongfully terminated.⁴⁸

Similarly, the Sixth Circuit relied on *Price Waterhouse* in *Smith v. City of Salem*⁴⁹ when it held that a transgender firefighter, who was suspended from her position after being diagnosed with gender identity disorder and expressing a more feminine appearance at work, was entitled to federal employment discrimination protections.⁵⁰ In *Smith*, the Sixth Circuit rejected pre-*Price Waterhouse* case law that refused to extend Title VII legal rights to transgender employees.⁵¹ The court abandoned these early federal court decisions that claimed “Congress had a narrow view of sex in mind’ and ‘never

⁴⁴ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

⁴⁵ 663 F.3d 1312 (11th Cir. 2011).

⁴⁶ *Id.* at 1320-21.

⁴⁷ *Id.* at 1316.

⁴⁸ *Id.* at 1317-20.

⁴⁹ 378 F.3d 566 (6th Cir. 2004).

⁵⁰ *Id.* at 574-75. “Gender identity disorder” has since been replaced with the term “gender dysphoria,” which is prevalent when an individual identifies with a gender different than the gender assigned to them at birth. See *Gender Dysphoria*, AM. PSYCHIATRIC PUB. (2013), https://psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [<https://perma.cc/8ZQN-7BNN>]. Not all people identifying as “transgender” have gender dysphoria. See *Know your Rights: FAQ on Access to Transition-Related Care*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/transition-related-care-faq> [<https://perma.cc/H9GT-4TPM>].

⁵¹ *Smith*, 378 F.3d at 572 (citing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984); *Holloway v. Arthur Andersen & Co.*, 556 F.2d 659, 662-63 (9th Cir. 1977)).

considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.”⁵² Rather, the Sixth Circuit relied upon *Price Waterhouse*’s prohibition of employment discrimination based on gender, like the Eleventh Circuit in *Glenn*, and held that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination[.]”⁵³ This court also adopted a broader interpretation of “sex” under Title VII, and concluded that “a label, such as ‘transsexual,’ is not fatal to a [federal] sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”⁵⁴

Other federal courts have also broadly construed *Price Waterhouse* and Title VII’s “sex” definition as an extension of federal employment discrimination rights to American transgender employees,⁵⁵ but the United States Supreme Court has not specifically held that Title VII prohibits employment discrimination based on gender identity or expression, nor has the issue been addressed by every federal appellate court.

Moreover, the EEOC—the federal administrative branch charged with enforcing Title VII and employment discrimination decisions made by federal courts⁵⁶—has adopted an approach similar to that used by the Judicial Branch regarding transgender employee rights under Title VII.⁵⁷ In *Macy v. Holder*,⁵⁸ a transgender woman was denied a job transfer after she interviewed and was offered a police detective position while still presenting as a man; she later completed transition processes and notified her new employer of her change in gender identity and expression before officially starting the new job.⁵⁹

⁵² *Id.*

⁵³ *Id.* at 575.

⁵⁴ *Id.*

⁵⁵ *E.g.*, *Barnes*, 401 F.3d at 737 (holding that a transgender woman who was demoted after a probationary period for displaying transsexual characteristics was wrongly discriminated against under Title VII federal law). *See also Schwenk*, 204 F.3d at 1202 (holding that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”).

⁵⁶ Robert Kuhn, *Title VII Transitions: Recognizing an Identity Inclusive Theory of Sex-Based Discrimination*, 54 SANTA CLARA L. REV. 965, 980 (2014).

⁵⁷ *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 at 5 (E.E.O.C. Apr. 20, 212).

⁵⁸ Appeal No. 0120120821, 2012 WL 1435995 at 1 (E.E.O.C. Apr. 20, 212).

⁵⁹ *Id.*

The police agency terminated the transgender woman's employment soon after learning of the woman's transgender status.⁶⁰ After the transgender woman filed a Title VII "sex" claim with the EEOC, the federal agency held in an administrative appeal that "intentional discrimination against a transgender individual because that person is transgender [like the transgender employee in *Macy*] is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."⁶¹ Like the approach used by federal courts, the EEOC's *Macy* decision adopted a transgender-inclusive policy for the EEOC regarding Title VII claims by broadening its interpretation of "sex."⁶² In fact, the EEOC outright stated in *Macy* that it was "not creat[ing] a new 'class' of people covered under Title VII[.]"⁶³ Instead, *Macy* enforces use of a particular method by the EEOC, as has been similarly used by the Judicial Branch, for creating employment discrimination rights for American transgender employees under federal law.⁶⁴

In contrast, the Executive Branch has extended legal protections available to the American transgender workforce under federal law by way of a different method of recognition.⁶⁵ Executive Order 13,672, a resolution issued by the Obama Administration, created employment discrimination rights for American transgender employees who work for the federal government.⁶⁶ On July 21, 2014, President Barack Obama signed the resolution into action to amend Executive Order 11,246, which governs federal employers and federal contractors.⁶⁷ Specifically, Executive Order 13,672 added "gender identity" to the list of categories of non-discrimination under Executive Order 11,246, making it illegal for federal employers and federal contractors to discriminate against an employee because of an employee's gender identity or

⁶⁰ *Id.*

⁶¹ *Id.* at 8.

⁶² *Id.* at 1.

⁶³ *Id.* at 7.

⁶⁴ See also *Lusardi v. Dep't of the Army*, Appeal No. 0120133395, 2015 WL 1607756 at 5 (E.E.O.C. Apr. 1, 2015).

⁶⁵ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

⁶⁶ *Id.*

⁶⁷ *Id.*

expression.⁶⁸ Unlike the approach utilized by the Judicial Branch and the EEOC, the Obama Administration included and defined “gender identity” as its own protected category of non-discrimination, rather than broadening the definition of “sex.”⁶⁹

The approaches discussed in this Part are pertinent to members of the Wisconsin transgender community; transgender employees working in Wisconsin can bring claims of gender identity or expression employment discrimination through these approaches in the federal political realm. Importantly, the federal action identified in this Part provides examples to Wisconsin lawmakers when considering how they, too, can provide equal employment discrimination rights to transgender employees under Wisconsin state law.

B. Transgender-Inclusive Employment Discrimination State Law in America: A Minority Approach

In addition to those protections available to American transgender employees under federal law, a minority of states have granted further legal protections to the nation’s transgender population by way of state law.⁷⁰ The states that have positively extended employment discrimination legal protections to transgender employees have followed one of two approaches: (1) adding “gender identity or expression” to the non-discrimination categories of the state’s employment discrimination legislation like the method used by the Executive Branch,⁷¹ or (2) expanding upon the statutory definition of “sex or sexual orientation” like the Judicial Branch and EEOC.⁷² For both approaches, providing employment discrimination legal rights to transgender employees via state law has been dictated by each state’s legislative branch, which is a divergence from the predominantly judicial and executive action driving creation of transgender-inclusive employment discrimination law by the federal government.⁷³

First, some states have adopted a similar approach to that used by President Obama in Executive Order 13,672 to extend

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Rainey & Imse, *supra* note 6.

⁷¹ *E.g.*, CAL. GOV’T CODE § 12940 (2016).

⁷² *E.g.*, MINN. STAT. § 363A.08(2) (2015).

⁷³ *See* discussion *supra* Part I.

employment discrimination legal protections to transgender employees under state statutory schemes.⁷⁴ Like Executive Order 13,672, these states have expressly defined “gender identity or expression,” and added it as a category of non-discrimination under the corresponding state employment discrimination law.⁷⁵

In California, the state legislature used this method to create employment discrimination protections for the state’s transgender employees.⁷⁶ In 2003, California state legislators passed Assembly Bill No. 196, informally labeled as a “Gender Nondiscrimination Act.”⁷⁷ In the legislation’s initial stages, the bill broadened the definition of “sex” under the Fair Employment and Housing Act (FEHA).⁷⁸ California further amended its employment discrimination state legislation in 2011 to provide transgender employees legal rights under a separately defined non-discrimination category based exclusively on an employee’s transgender status.⁷⁹ After the 2011 amendment, all California state laws related to education, housing, and employment included “gender, gender identity, and gender expression” among the listed categories of prohibited discrimination.⁸⁰ California legislators defined the new category as “a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth,”⁸¹ which ultimately provided California’s transgender population with equal protections from gender identity and expression employment discrimination.

⁷⁴ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

⁷⁵ See CAL. GOV’T CODE § 12940(a); IOWA CODE § 216.6(1) (2016).

⁷⁶ CAL. GOV’T CODE § 12940(a).

⁷⁷ Assemb. B. 196, Sec. 1(p), 2003-2004 Leg. (Cal. 2004).

⁷⁸ *Id.*; AB 196, Assemb. Comm. on Labor Emp’t (Ca. 2003); See also AB 196: *What it Means to You*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/resources/housing/ab-196-what-it-means-for-you> [https://perma.cc/H8NS-ANCM] (last updated September 2003); *Advancements in State and Federal Law Regarding Transgender Employees: A Compliance Guide for Employers and Employment Law Attorneys*, NAT’L CENTER FOR LESBIAN RTS. & TRANSGENDER LAW CENTER, <http://www.nclrights.org/wp-content/uploads/2013/07/complianceguideemployers1.pdf> [https://perma.cc/J8MA-2NF4] (last updated April 2006).

⁷⁹ Assemb. B. 887, 2011-2012 Leg. (Cal. 2011). See *FAQ: The Gender Nondiscrimination Act*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/issues/know-your-rights/faq-the-gender-nondiscrimination-act> [https://perma.cc/CHD6-WRPN].

⁸⁰ Assemb. B. 887, 2011-2012 Leg. (Cal. 2011); CAL. GOV’T CODE § 12940(a).

⁸¹ CAL. GOV’T CODE § 12926(r)(2).

State legislators used the same statutory method in 2007 when amending Section 216.6 of Iowa's Code.⁸² Iowa's amended state law protects transgender employees from gender identity and expression employment discrimination under the following amended statutory language:

It shall be an unfair or discriminatory practice for any . . . [p]erson to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, *gender identity*, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.⁸³

Like California's existing employment discrimination legislation⁸⁴ and the Obama Administration's recent executive action,⁸⁵ Iowan legislators specifically included "gender identity" as a separate category within Iowa's employment discrimination statutory scheme.⁸⁶ "Gender identity" was defined by Iowa's legislature as "a gender-related identity of a person, regardless of the person's assigned sex at birth."⁸⁷ Twelve other states have also used this or a related approach to provide employment discrimination rights to transgender individuals under state law, including Utah, Vermont, Rhode Island, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, Nevada, New Mexico, Hawaii, and the District of Columbia.⁸⁸

⁸² IOWA CODE § 216.6(1)(a); *see also* Joe Fraioli, *Transgender in Iowa: Know Your Rights*, AM. CIV. LIBERTIES UNION OF IOWA, <http://www.aclu-ia.org/lgbt-rights/> [<https://perma.cc/E6BZ-JF9L>].

⁸³ IOWA CODE § 216.6(1)(a).

⁸⁴ CAL. GOV'T CODE § 12940(a).

⁸⁵ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

⁸⁶ IOWA CODE § 216.6(1)(a).

⁸⁷ *Id.* at § 216.2(10).

⁸⁸ UTAH CODE ANN. § 34A-5-106(1) (LexisNexis 2015) (Utah); VT. STAT. ANN. tit. 21, § 495 (2009) (Vermont); 28 R.I. GEN. LAWS § 28-5-5 (2003) (Rhode Island); CONN. GEN. STAT. §§ 46a-814c (2016) (Connecticut); DEL. CODE ANN. tit. 19, § 711(a)(1)-(2) (2016) (Delaware); MD. CODE ANN. STATE GOV'T § 20-602 (LexisNexis 2015) (Maryland); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2013) (Massachusetts); N.J. STAT. ANN. § 10:5-5(rr) (West 2016) (New Jersey); NEV. REV. STAT. § 613.330 (2016) (Nevada); N.M. STAT. ANN. § 28-1-7 (West 2011) (New Mexico); HAW. REV. STAT. § 378-2(a) (2016) (Hawaii); D.C. CODE § 2-1401.01(a)-(b) (LexisNexis 2001) (District of Columbia); *See generally* Jerome Hunt, *A State-by-State Examination of*

In comparison, six states—Minnesota, Washington, Colorado, Oregon, Illinois, and Maine—have extended employment discrimination legal protections to transgender employees by expanding the definition of “sex” or “sexual orientation” under state law.⁸⁹ Instead of defining “gender identity or expression” as a category of non-discrimination, these states have followed suit with the Judicial Branch and the EEOC, broadening the definition of “sex” or “sexual orientation” under existing employment discrimination laws to be transgender-inclusive.⁹⁰ For example, Minnesota became the first state to protect transgender employees from employment discrimination based on gender identity or expression in 1993 by amending the state’s Human Rights Act.⁹¹ With the amendment, Minnesota’s state legislature redefined the category of employment discrimination based on “sexual orientation” to include an individual’s gender identity or expression.⁹² “Gender identity or expression” was not and never has been listed by Minnesota’s state legislature as its own category of non-discrimination, but the state’s employment discrimination statutory scheme is nonetheless transgender-inclusive via the following definition:

Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed, CTR. FOR AM. PROGRESS ACTION FUND (June 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf [<https://perma.cc/G4CW-RA2D>].

⁸⁹ MINN. STAT. § 363A.03(44) (Minnesota); COLO. REV. STAT. §24-34-301(7) (2016) (Colorado); WASH. REV. CODE ANN. § 49.60.040(26) (LexisNexis 2011) (Washington); OR. REV. STAT. §174.100(7) (2015) (Oregon); 775 ILL. COMP. STAT. 5/1-103(O-1), (Q) (2016) (Illinois); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2015) (Maine); See also Hunt, *supra* note 88.

⁹⁰ MINN. STAT. § 363A.08(1)-(4) (Minnesota); COLO. REV. STAT. §24-34-402(1) (Colorado); WASH. REV. CODE ANN. § 49.60.180 (Washington); OR. REV. STAT. §659A.030(1) (Oregon); 775 ILL. COMP. STAT. 5/1-102(A)-(B) (Illinois); ME. REV. STAT. ANN. tit. 5, § 4572(1) (Maine).

⁹¹ *Human Rights Protections in Minnesota*, OUTFRONT MINNESOTA, <https://www.outfront.org/library/humanrights> [<https://perma.cc/S53R-X9YR>]. While Minnesota’s employment discrimination statutory scheme follows the second approach, this Comment examines the protection of Minnesotan transgender employees. Minneapolis has enacted a city ordinance pursuant to the first approach discussed in this Comment. “Gender identity” is included as a separate non-discrimination category under the employment provisions of this ordinance. See MINNEAPOLIS, MINN., CODE § 139.10(b), 139.20, 139.40(a)-(e) (2016).

⁹² MINN. STAT. § 363A.03(44), 363A.08(1)-(4).

“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.⁹³

It is important to note that employment discrimination legislation outside of Wisconsin has been crafted to mirror the legislative goals of each individual state. The state legislation discussed in this Part does not depict Wisconsin’s political situation or indicate the Wisconsin’s public position on transgender-inclusive employment discrimination law. Regardless, lawmakers in Wisconsin can gain significant insight from the legislative approaches its fellow states—including many of Wisconsin’s Midwestern neighbors—have used to adopt employment discrimination laws protecting transgender workers from unjust discrimination.

C. Wisconsin Municipalities Protecting Transgender Employees in Wisconsin

Finally, several Wisconsin cities have joined in creating equal employment discrimination legal rights for transgender employees through the use of transgender-inclusive city ordinances.⁹⁴ Wisconsin’s two largest cities—Madison and Milwaukee—have each passed city ordinances adding “gender identity or expression” to the cities’ employment discrimination municipal codes.⁹⁵ Both cities defined “gender identity or expression” as its own category of non-discrimination, similar to executive action taken by President Obama and states like California and Iowa.⁹⁶

⁹³ MINN. STAT. § 363A.03(44).

⁹⁴ *Nondiscrimination Ordinances*, FAIR WISCONSIN, <http://fairwisconsin.com/ending-discrimination/t-fair/> [<https://perma.cc/B2BU-GLKW>].

⁹⁵ For Madison’s city ordinance, see MADISON, WIS., CODE § 39.03(1)-(3) (2015). For Milwaukee’s city ordinance, see MILWAUKEE, WIS., CODE § 109-1, 109-3(11), 109-45 (2008).

⁹⁶ See discussion *supra* pp. 174-177.

In 2007, Milwaukee's Common Council voted to incorporate transgender-inclusive language into the city's employment discrimination ordinance.⁹⁷ As a result of this addition, Chapter 109 of Milwaukee's Code of Ordinances now states that "[t]he practice of providing equal opportunities in housing and employment to persons without regards to . . . gender identity or expression . . . is a desirable goal of the city and a matter of legitimate concern to its government[.]"⁹⁸ and "[n]o person may engage in any act of discrimination with respect to employment against any individual on the basis of . . . gender identity or expression . . . or based upon affiliation with, or perceived affiliation with any of the[] protected categories."⁹⁹ Milwaukee's Code of Ordinances defines "gender identity or expression" as "a gender-related identity, appearance, expression or behavior of an individual, regardless of the individual's assigned sex at birth."¹⁰⁰

Likewise, Madison's Common Council added "gender identity" as an enumerated non-discrimination category protected under the city's Equal Opportunities Ordinance in 2000, granting "equal opportunities in housing, employment public accommodations and City facilities" to Madison's transgender citizens.¹⁰¹ Like Milwaukee's transgender-inclusive city ordinance, Madison's city ordinance includes and defines "gender identity" as a prohibited category of employment

⁹⁷ WILLIAMS INSTITUTE, WISCONSIN – SEXUAL ORIENTATIONS AND GENDER IDENTITY AND DOCUMENTATION OF DISCRIMINATION 8 n. 58 (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Wisconsin.pdf> [<https://perma.cc/DFV3-63WA>] [hereinafter WILLIAMS INSTITUTE]. Cudahy, Appleton, and Janesville are three additional Wisconsin cities that have also passed city ordinances inclusive of transgender rights with respect to employment discrimination. See *Wisconsin city adopts ordinance banning bias based on gender identity*, THE WIS. GAZETTE (Sept. 3, 2014), <http://wisconsingazette.com/2014/09/03/cudahy-becomes-4th-wisconsin-city-to-ban-bias-based-on-gender-identity/> [<https://perma.cc/9WMJ-K742>]; Amanda Terkel, *Paul Ryan's Hometown Bans LGBT Discrimination*, THE HUFFINGTON POST (Mar. 29, 2016), http://www.huffingtonpost.com/entry/paul-ryan-janesville-bars-lgbt-discrimination_us_56fa8fc3e4b0a372181af4cd [<https://perma.cc/WXZ8-9D7Y>].

⁹⁸ MILWAUKEE, WIS., CODE § 109-1(2).

⁹⁹ *Id.* at § 109-45.

¹⁰⁰ *Id.* at § 109-3(11).

¹⁰¹ WILLIAMS INSTITUTE, *supra* note 97, at 7 n. 50; MADISON, WIS., CODE § 39.03(1).

discrimination, albeit utilizing a more detailed definition of the term.¹⁰² Madison defines “gender identity” as

the actual or perceived condition, status or acts of
1) identifying emotionally or psychologically with
the sex other than one’s biological or legal sex at
birth, whether or not there has been a physical
change of the organs of sex; 2) presenting and/or
holding oneself out to the public as a member of
the biological sex that was not one’s biological or
legal sex at birth; 3) lawfully displaying physical
characteristics and/or behavioral characteristics
and/or expressions which are widely perceived as
being more appropriate to the biological or legal
sex that was not one’s biological or legal sex at
birth, as when a male is perceived as feminine or
a female is perceived as masculine; and/or 4)
being physically and/or behaviorally
androgynous.¹⁰³

Wisconsin lawmakers should also consider the approaches—that are predominantly legislative in nature and form—Wisconsin cities have used to protect transgender employees from employment discrimination practices. These approaches have been used by Wisconsin cities and exist as examples of transgender-inclusive employment discrimination legislation that has already been successfully enacted within the Wisconsin’s own boundaries. The prevalence of such ordinances, suggests the possibility that transgender-inclusive employment discrimination law could also be enacted by Wisconsin’s legislature on a state-wide basis.¹⁰⁴

¹⁰² MADISON, WIS., CODE § 39.03(2).

¹⁰³ *Id.*

¹⁰⁴ *Supra* note 97. See also Jack Craver, *Laws protecting transgender rights meet little resistance in Wisconsin*, THE CAP. TIMES (Sept. 9, 2013), http://host.madison.com/ct/news/local/writers/jack_craver/laws-protecting-transgender-rights-meet-little-resistance-in-wisconsin/article_36919972-1956-11e3-9b3a-0019bb2963f4.html [<https://perma.cc/5BSX-C2Z4>].

III. SILENCE IN WISCONSIN: WISCONSIN'S ABSENCE OF STATE LEGISLATION PREVENTING GENDER IDENTITY AND EXPRESSION DISCRIMINATION

In 1982,¹⁰⁵ the Wisconsin state legislature enacted the Fair Employment Act to prohibit employment discrimination in Wisconsin for the following reasons:

age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, military service, use or nonuse of lawful products off the employer's premises during nonworking hours, or declining to attend a meeting or to participate in any communication about religious matters or political matters.¹⁰⁶

Under the Fair Employment Act, Wisconsin became the first state to recognize sexual orientation as a category of non-discrimination pursuant to state employment discrimination law.¹⁰⁷ Passage of this Act afforded substantial employment discrimination rights to Wisconsin's LGBTIQ+ community, leading to Wisconsin being dubbed "The Gay Rights State" and a subsequent leader in the gay and lesbian civil rights movement for much of the late 20th century.¹⁰⁸

This same progressivism has not followed for other LGBTIQ+ groups, particularly Wisconsin's transgender population.¹⁰⁹ Wisconsin's existing employment discrimination statutory scheme is completely devoid of any legal protections shielding Wisconsin transgender individuals from unfair employment discrimination practices based on an employee's gender identity or expression.¹¹⁰ The Fair Employment Act has remained largely unchanged since its enactment in 1982¹¹¹ with regards to the law's LGBTIQ+ provisions, and "gender identity or expression" has not been added to the list of non-

¹⁰⁵ Turner, *supra* note 11, at 91, 93.

¹⁰⁶ WIS. STAT. § 111.321 (2015-16).

¹⁰⁷ Turner, *supra* note 11.

¹⁰⁸ *Id.*

¹⁰⁹ Gill, *supra* note 12.

¹¹⁰ WIS. STAT. § 111.321.

¹¹¹ See WIS. STAT. § 111.321 (Wisconsin Legislature has failed to enact subsequent provisions to section to further protect against gender identity discrimination in Wisconsin.).

discrimination categories.¹¹² Wisconsin has also failed to amend its Fair Employment Act to expand the definition of “sex” or “sexual orientation,” which could also grant employment discrimination rights to Wisconsin’s transgender population.¹¹³ Finally, neither the Wisconsin judicial branch, nor Wisconsin’s executive branch, has opined upon the scope of the Wisconsin Fair Employment Act related to transgender employment discrimination rights.¹¹⁴

Wisconsin’s inability to address the issue of gender identity or expression employment discrimination under state law has resulted in widespread employment inequalities and struggles faced by Wisconsin’s transgender community.¹¹⁵ The National Center for Transgender Equality and the National Gay and Lesbian Task Force conducted a study that showed a shocking eighty-two percent of Wisconsin transgender individuals who reported experiencing harassment or mistreatment while at work due to their gender identity or expression.¹¹⁶ The study stated that thirty-four percent of transgender individuals living in Wisconsin lost a job on the basis of gender identity or expression, and twenty-two percent of respondents were denied a job promotion for the same reasons.¹¹⁷ Fifty-four percent of Wisconsin transgender respondents reported they were denied a job based on gender identity or gender expression.¹¹⁸

The Wisconsin-based study also depicted the disturbing effect of the state’s lack of transgender-inclusive employment discrimination legislation on the economic opportunities

¹¹² WIS. STAT. § 111.321.

¹¹³ *Id.* at § 111.32(13m).

¹¹⁴ WILLIAMS INSTITUTE, *supra* note 97, at 7, 9-12.

¹¹⁵ *Findings of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY & THE NAT’L GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_state/ntds_state_wi.pdf [<https://perma.cc/8FT5-WXAQ>] [hereinafter *Transgender Discrimination Survey*]. For an examination of the employment-related challenges the transgender community faces across the United States, see generally Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY & NAT’L GAY AND LESBIAN TASK FORCE (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_summary.pdf [<https://perma.cc/2LXV-QZLS>].

¹¹⁶ *Transgender Discrimination Survey*, *supra* note 115.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

available to Wisconsin's transgender citizens.¹¹⁹ Nineteen percent of the Wisconsin transgender respondents claimed to have a household income of \$10,000 or less because of workforce discrimination.¹²⁰ Twelve percent of the respondents were unemployed at the time of the survey, a percentage that is nearly double the national unemployment rate.¹²¹ Most tragically, the study indicated that forty percent of Wisconsin transgender citizens reported attempting suicide at some point in their life because of the obstacles they faced as a transgender person.¹²² In response to the prevalent employment discrimination that is negatively affecting the lives of transgender citizens calling Wisconsin home, Wisconsin's state government must urgently create employment discrimination legal protections that extend to *all* of the state's citizens—transgender individuals included.

IV. INCLUDING “GENDER IDENTITY OR EXPRESSION” AS A PROTECTED NON-DISCRIMINATION CATEGORY UNDER WISCONSIN’S FAIR EMPLOYMENT ACT

Among the various approaches used to grant employment discrimination rights to American transgender employees, Wisconsin lawmakers should opt to add “gender identity or expression” as a protected non-discrimination category under state employment discrimination law, like the approach used by some Wisconsin cities, states like California and Iowa, and the Executive Branch. Recent Wisconsin legislative action¹²³ and the observed trends of other Wisconsin governmental branches suggest that the Wisconsin legislature is the only governmental body likely to generate transgender-inclusive employment discrimination law in Wisconsin at this point in time.¹²⁴

First, Wisconsin legislators have already utilized the transgender-inclusive approach successfully implemented by

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Transgender Discrimination Survey*, *supra* note 115.

¹²³ See WIS. STAT. § 440.45; Assemb. R. 7, 2015-2016 Leg. (Wis. 2015).

¹²⁴ WILLIAMS INSTITUTE, *supra* note 97, at 5-7, 9-12; Assemb. R. 469, 2015-2016 Leg. (Wis. 2015); Jason Stein, *Gov. Scott Walker wants clearer rules on bathrooms for transgender students*, MILWAUKEE J. SENTINEL (Oct. 8, 2015), <http://www.jsonline.com/blogs/news/331274581.html> [<https://perma.cc/5FBR-ANKT>].

Wisconsin cities, some states, and the Executive Branch, to create discrimination rights for transgender citizens under other areas of Wisconsin state law.¹²⁵ During its 2015-2016 Legislative Session, the Wisconsin legislature added new provisions to Wisconsin's state legislation governing transportation network companies.¹²⁶ Under Wisconsin Statute Section 440.45, Wisconsin licensed transportation network companies are required to have company policies prohibiting passenger discrimination on the basis of "trip origin or destination, race, color, national origin, religious belief or affiliation, sex, disability, age, sexual orientation, or *gender identity*["]."¹²⁷ This new Wisconsin legislation also includes a provision preventing drivers employed by Wisconsin transportation network companies from discriminating against potential passengers for the same reasons, including gender identity.¹²⁸

While Section 440.45 neither offers a specific definition of "gender identity" nor is closely linked to Wisconsin's employment discrimination statutory scheme,¹²⁹ enactment of this 2015 legislation exemplifies the Wisconsin legislature's recent use of a statutory approach inclusive of transgender rights under existing state law. Passage of Wisconsin's transportation network company legislation expresses the Wisconsin legislature's preferred approach for extending rights to transgender individuals under state law—enumerating "gender identity or expression" as its own non-discrimination category.

Some Wisconsin legislators have expressed their specific desire to provide equal rights to Wisconsin's transgender population through introduction of a 2015 transgender-inclusive civil rights Assembly resolution.¹³⁰ The proposed resolution states that "Wisconsin leaders shall neither endorse nor approve any legislation or constitutional amendment that explicitly or implicitly allows for discrimination on the basis of age, race, religion, color, handicap, sex, physical condition, developmental

¹²⁵ WIS. STAT. § 440.45.

¹²⁶ *Id.*

¹²⁷ WIS. STAT. § 440.45(1).

¹²⁸ *Id.* at § 440.45(2). This provision of the statute includes each of the categories of protected individuals stated in Wisconsin Statute Section 440.45(1) with the exception of "trip origin." *Id.*

¹²⁹ *Id.* at § 440.45.

¹³⁰ Assemb. R. 7, 2015-2016 Leg. (Wis. 2015).

disability, national origin, sexual orientation, or *gender identity*[.]”¹³¹ This legislative proposal encompasses Wisconsin’s employment discrimination statutory scheme, and emphasizes the legislators’ goal to preclude any discrimination against transgender individuals in Wisconsin.¹³² The existence of this resolution, as well as Section 440.45, suggests there is a willingness and a very real likelihood that Wisconsin legislators could add “gender identity or expression” as a non-discrimination category under Wisconsin employment discrimination law.

Moreover, the state’s current political reality strengthens the Wisconsin legislative branch’s likelihood of being the only governmental branch in Wisconsin willing to create transgender-inclusive employment discrimination law. As discussed in Part III of this Comment, no Wisconsin state court has determined the scope or applicability of Wisconsin’s employment discrimination laws to transgender employment discrimination claims.¹³³ Because judicial law-making depends on the cases appearing before the courts, it is not probable that Wisconsin’s judicial branch can take immediate action to extend employment discrimination rights to Wisconsin employees.

Additionally, Wisconsin’s current Republican executive branch has implied an unwillingness to create transgender-inclusive policies based on the Walker Administration’s support for segregating transgender and cisgender restrooms in Wisconsin’s public schools.¹³⁴ The Republican-sponsored restroom bill was introduced in 2015 and sought to require Wisconsin’s public school officials to “designate each pupil restroom and changing room located in a public school building in the school district and accessible by multiple pupils simultaneously as for the exclusive use of pupils of only one sex.”¹³⁵ “Sex” was controversially defined under the proposed

¹³¹ *Id.* (emphasis added). The Assembly resolution was drafted in response to Indiana’s passing of the Religious Freedom Restoration Act. *Id.* Under new Indianan law, employers could potentially discriminate against transgender individuals by claiming religious exemption. See Ed Payne, *Indiana religious freedom restoration act: What you need to know*, CNN POL. (Mar. 31, 2015, 12:53 PM), <http://www.cnn.com/2015/03/31/politics/indiana-backlash-how-we-got-here/> [https://perma.cc/QXT4-X8FT].

¹³² Assemb. R. 7, 2015-2016 Leg. (Wis. 2015).

¹³³ See discussion *supra* Part III.

¹³⁴ Stein, *supra* note 124.

¹³⁵ Assemb. R. 7, 2015-2016 Leg. (Wis. 2015).

legislation as “the physical condition of being male or female, as determined by an individual’s chromosomes and identified at birth by that individual’s anatomy.”¹³⁶ Governor Scott Walker “indicated his support for the legislation, stating:

“[I]t’s important to have some clarity about [public school restroom use] and I know school districts around the state have just begun to deal with that . . . I understand at least one school district has looked at a separate bathroom [for transgender students] and I think that makes some sense but I think with respect to all the other students there’s got to be some clarity.”¹³⁷

Although the bill did not pass through Wisconsin’s legislature during the 2015-2016 legislative term, Republican sponsors have vowed to reintroduce the bill in coming years.¹³⁸ Governor Walker’s support for the non-inclusive, and arguably more discriminatory, public restroom bill shows the executive office’s position on protecting transgender individuals in Wisconsin from discriminatory practices.¹³⁹ Therefore, it is unlikely that Wisconsin’s current executive branch will create transgender-inclusive employment discrimination legislation.

For the reasons stated above, Wisconsin’s legislative branch is the state governmental branch in the best position to enact employment discrimination laws inclusive of transgender Wisconsinites. Following the approach already used by multiple Wisconsin cities, various states, the Executive Branch, and the Wisconsin state legislature itself, the Wisconsin legislature is urged to amend Wisconsin’s Fair Employment Act to add “gender identity or expression” as a non-discrimination category. By joining the growing national trend of granting equal employment discrimination rights to transgender citizens, Wisconsin legislators can help Wisconsin’s transgender community begin to recover from the unjust inequalities these citizens have suffered because of the state’s longstanding non-inclusion.

¹³⁶ *Id.*

¹³⁷ Stein, *supra* note 124.

¹³⁸ Theo Keith, *Controversial ‘transgender restroom bill’ to return in Wisconsin, lawmaker says*, FOX NEWS (May 2, 2016), <http://fox6now.com/2016/05/01/wisconsin-rep-to-reintroduce-bill-that-requires-people-to-use-restroom-that-matches-gender-at-birth/> [<https://perma.cc/W6RY-8U3B>].

¹³⁹ *Id.*

V. CONCLUSION

This Comment discussed employment discrimination law in Wisconsin and identified the immediate need for Wisconsin lawmakers to create employment discrimination legal protections for Wisconsin's transgender population. Transgender citizens who call Wisconsin home face crippling employment inequalities, which have alarming quality of life effects.¹⁴⁰ The struggles Wisconsin's transgender employees endure are, in part, the direct result of a non-inclusive state employment discrimination statutory scheme that must be changed.¹⁴¹

This Comment identified a variety of approaches that Wisconsin lawmakers can adopt to enact equal employment discrimination laws rightfully inclusive of Wisconsin's transgender community. Ultimately, Wisconsin legislators are strongly urged to continue their recent political actions and add "gender identity or expression" to Wisconsin's employment discrimination statutory scheme, thereby taking a step towards equality and allowing Wisconsin to once again become an advocate for the LGBTIQ+ civil rights movement.

¹⁴⁰ See discussion *supra* Part III.

¹⁴¹ WIS. STAT. § 111.321.