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New York Supreme Court

Appellate Division—First Department

HISPANIC AIDS FORUM,

Plaintiff-Respondent,

—against—

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10,

Defendants-Appellants.

BRIEF FOR LEGAL MOMENTUM, *AMICUS CURIAE*

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PRELIMINARY STATEMENT

This case involves the fundamental question of whether discrimination against transgender people is consistent with this State's legal commitment to equality. That commitment is embodied in the New York Human Rights Law ("State HRL") and the New York City Administrative Code ("City HRL") (collectively, "Human Rights Laws"), which prohibit—among other things—discrimination on the basis of sex. According to the allegations in the Complaint, the trustees of the Estate of Joseph Bruno, et al. ("Defendants") engaged in precisely the type of discrimination that is prohibited by the Human Rights Laws. In particular, Defendants evicted the Plaintiff, Hispanic AIDS Forum ("HAF"), because it serves transgender clients, and in so doing, Defendants illegally discriminated on the basis of sex.[1]

Put simply, discrimination against transgender people *is* sex discrimination, and it is illegal under New York law. At least two rationales support this conclusion. *First*, discrimination against transgender people perpetuates sex-based stereotypes by enforcing rigid rules about how women

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[1] This brief addresses the ways that discrimination against transgender people is discrimination on the basis of sex. Although not addressed here, *Amicus* Legal Momentum also endorses HAF's argument that Defendants, in evicting HAF because of its transgendered clients, discriminated on the basis of disability as well.

and men are "supposed" to look and behave. Such sex-role stereotyping is a particularly pernicious form of sex discrimination because it relies on and reinforces the supposedly "proper" and "natural" roles of men and women. *Second*, discrimination against transgender people is *per se* sex discrimination because it makes a formal distinction based upon sex—that is, such discrimination treats the victim "in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted). In any event, regardless of the analysis, discrimination against transgender people cannot be reconciled with New York's guarantee of equal rights to all of its citizens without regard to sex.

In the circumstances of this case, the Complaint adequately alleges that Defendants engaged in illegal sex discrimination, and the decision of the court below denying Defendants' motion to dismiss should therefore be affirmed.

INTEREST OF AMICUS

Legal Momentum, the new name of NOW Legal Defense & Education Fund, is a leading national non-profit civil rights organization that, for nearly thirty-five years, has used the power of the law to advance women's rights. Legal Momentum is dedicated to the rights of all women and men to live and work free of sex stereotypes, and it is committed to

rooting out all burdens and restrictions grounded in these stereotypes. In keeping with this mission, Legal Momentum has consistently supported the rights of transgender people to be free from discrimination.

Legal Momentum has an interest in this case because it raises the critical issue of whether landlords may discriminate against tenants who serve transgender clients. Because discrimination against transgender people perpetuates gender stereotypes by dictating the way that women and men are expected to behave and appear, such discrimination constitutes a harmful and unlawful affront to gender equality.

BACKGROUND

A. The Complaint

According to the allegations in the Complaint, which must be taken as true in deciding a motion to dismiss, Defendants evicted HAF because it serves transgender clients.[2] This is clear from numerous statements made in the course of the negotiation of HAF's renewal lease. In particular, Defendants informed HAF that they objected to "'the type of clientele' coming in and out of the building and using the bathrooms," (Compl. ¶ 23, R.32), and that they wanted to "get rid of 'all these Queens'"

[2] A detailed recitation of facts is contained in HAF's brief on appeal. We therefore do not repeat all of those facts here, but rather only those facts that are relevant to HAF's sex discrimination claims.

(*id.* ¶ 24, R.32). Further, Defendants told HAF that they had received complaints about "men who think they're women using the women's bathrooms" and "women who think they're men using the men's bathrooms" (*id.* ¶ 21, R.31), and that HAF's lease "would not be renewed unless HAF prevented its transgendered clients from using common areas in the building, including the main entrance and the bathrooms" (*id.* ¶ 2, R.27). When HAF refused, Defendants commenced eviction proceedings.

After being forced out of the building, HAF brought this action, alleging that Defendants violated the Human Rights Laws by discriminating against HAF's transgender clients. The Complaint alleges four separate claims of sex and disability discrimination. This brief addresses only Counts One and Two, which allege, respectively, that Defendants discriminated on the basis of the sex in violation of the State HRL (*id.* ¶¶ 32-33, R.34-R.35), and that they engaged in gender discrimination in violation of the City HRL (*id.* ¶¶ 34-38, R.35-R.36).

B. The Statutory Framework

The New York State Human Rights Act as a whole reflects a broad commitment "to ensure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life." N.Y. Exec. Law § 290. As the Court of Appeals has emphasized, "the elimination of discrimination in the provision of basic opportunities is the predominant

purpose of this legislation." *Koerner* v. *State*, 62 N.Y.2d 442, 448, 478 N.Y.S.2d 584, 586-87 (1984). And numerous courts in this State have recognized that "[i]t is the declared policy of this State to afford every individual an equal opportunity to enjoy a full and productive life free of discrimination and intolerance." *Bd. of Educ. of Tuxedo Union Free Sch. Dist. No. 3* v. *State Div. of Human Rights*, 68 Misc. 2d 1035, 1037, 330 N.Y.S.2d 274, 276 (Sup. Ct. Westchester County 1972) (internal quotation marks omitted); *see also Rochester Hosp. Serv. Corp.* v. *Div. of Human Rights*, 92 Misc. 2d 705, 707, 401 N.Y.S.2d 413, 415 (Sup. Ct. Monroe County 1977) ("The abolition of discrimination based on race, creed, color, national origin, sex, disability or marital status is a fundamental public policy of New York.").

As part of this commitment to equality, the State HRL prohibits discrimination on the basis of sex in the sale, rental, or leasing of commercial real estate. In particular, § 296(5)(b)(1) of the Executive Law provides:

> It shall be an unlawful discriminatory practice . . . to refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons land or commercial space because of . . . sex . . . of such person or persons.

With respect to the law in New York City, the City HRL bans discrimination in similar circumstances. At the time that HAF was evicted, the New York City law paralleled the State law, with the terms "gender" substituted for "sex":

> It shall be an unlawful discriminatory practice . . . [t]o refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons land or commercial space or an interest therein because of the actual or perceived . . . gender . . . of such person or persons . . . .

N.Y. City Admin. Code § 8-107(5)(b)(1). The City also prohibits discrimination in a place of public accommodation based on actual or perceived gender. N.Y. City Admin. Code § 8-107(4)(a).

Notably, these laws prohibit a form of discrimination known as associational discrimination. In other words, they prohibit a landlord (here, Defendants) from discriminating against a tenant (here, HAF) because of a protected characteristic of that tenant's clients or customers. This Court has already found that these statutes prohibit such associational discrimination. *Barton* v. *N.Y. Comm'n on Human Rights*, 151 A.D.2d 258, 259, 542 N.Y.S.2d 176, 178 (App. Div. 1st Dep't 1989) (affirming 140 Misc. 2d 554, 531 N.Y.S.2d 979 (Sup. Ct. N.Y. County 1988)). In *Barton*, this Court affirmed a holding that a sublessor had illegally discriminated against a

commercial sublessee by prohibiting the sublessee from serving patients with AIDS. *Id.*; *see also Bernstein* v. *1995 Assocs.*, 185 A.D.2d 160, 163, 586 N.Y.S.2d 115, 118 (App. Div. 1st Dep't 1992) (holding that landlord could not discriminate against tenant because of an objection to the tenant's clients).

ARGUMENT

I. DISCRIMINATION AGAINST TRANSGENDER PEOPLE IS SEX DISCRIMINATION BECAUSE IT PENALIZES INDIVIDUALS FOR FAILING TO CONFORM TO SEX STEREOTYPES

Defendants evicted HAF because they objected to the presence of HAF's transgender clients in their building. According to the Complaint, Defendants insisted that HAF, as a condition for remaining in the building, bar its transgender clients from all common areas, including bathrooms. In so doing, Defendants made clear that they (and their other tenants) disapproved of persons who failed to conform to their expectations of how men and women "should" look and act.

By evicting HAF for this reason, Defendants engaged in an invidious form of sex discrimination: they sought to enforce rigid and intrusive norms of gender-appropriate appearance and behavior. These stereotypes about appropriate appearance and behavior based on assigned sex are no less pernicious than other sex-based stereotypes that the courts

have found to be illegal. In short, enforced conformity to gender stereotypes is inimical to sex equality.

A. The Evolution of Sex Discrimination Law Reveals a Growing Recognition of the Harm Wrought by Fixed Notions of What Is "Natural" and "Appropriate" for Members of a Particular Sex

History teaches us that assumptions about how men and women "should" look and behave are contrary to sex equality. Indeed, the problems with sex-based stereotypes are perhaps best illustrated by the now-discredited decisions that endorsed reliance on archaic assumptions about the proper roles of men and women.

For example, in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872), the Supreme Court held that the Illinois Bar could, consistent with the Fourteenth Amendment as then understood, exclude married women from the practice of law. *Id.* at 137-39. In a now-infamous concurrence, Justice Bradley emphasized the "natural and proper" differences between men and women, long-embodied in the law, as a basis for denying women the right to practice law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of

> woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases.

Id. at 141-42 (Bradley, J., concurring).

In invoking "the natural and proper timidity which belongs to the female sex," Justice Bradley was essentially asserting—as do those who disapprove of transgender persons—that conceptions of what is "natural" or "proper" justify the enforcement of gender stereotypes. Yet numerous now-discredited decisions demonstrate that "nature" is an unsatisfactory justification for efforts to require adherence to traditional sex-role norms. *See, e.g., In re Lavinia Goodell*, 39 Wis. 232, 245-46 (1875) (justifying exclusion of women from practice because "[t]he law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor."). Rather, as commentators have pointed out, gender-based norms that rely on stereotyped assumptions of men's and women's "proper" and "natural" behaviors and roles tend to reinforce sexist notions of men's "natural" superiority and women's "natural" inferiority.[3]

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[3] *See, e.g.*, Deborah L. Rhode, *Sex-Based Discrimination: Common Legacies and Common Challenges*, 5 S. Cal. Rev. L. & Women's Stud. 11, 21 (1995) ("Taboos against 'effeminate' men and 'unfeminine' women grow out of the same gender role assumptions that have limited opportunities for all individuals . . . .").

Notwithstanding over a century of prior decisions approving the legal enforcement of gender stereotypes, it is now well settled that the Equal Protection Clause, which forms a baseline for sex discrimination jurisprudence, does not allow states to require either men or women to adhere to gender stereotypes.[4] *See, e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973) (plurality opinion) (striking down classification that was based on "gross, stereotyped distinctions between the sexes"); *Stanton* v. *Stanton*, 421 U.S. 7, 14 (1975) (dismissing "old notions" of male and female roles as justification for gender classification); *Craig* v. *Boren*, 429 U.S. 190, 203 n.14 (1976) (striking down statute that reflected "social stereotypes" about gender); *Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (holding unconstitutional a gender classification that "carrie[d] with it the baggage of sexual stereotypes"); *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718,

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[4] Notably, antidiscrimination laws prohibit sex-based generalizations even if most men and most women do, in fact, act in a certain way. *See, e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 550 (1996) ("*VMI*"); *Hogan*, 458 U.S. at 724-25; *Manhart*, 435 U.S. at 707 n.13; *see also* Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. Contemp. Legal Issues 1, 7 (1998). As the Supreme Court said in *VMI*, "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (emphasis in original). That is because such generalizations have traditionally had the effect of limiting individual opportunities and subordinating women to men.

725 (1982) (in determining validity of gender-based classification, "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"); *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (states "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").[5]

Title VII jurisprudence has undergone a similar transformation. In interpreting the scope of the statutory prohibition on sex discrimination, courts initially ignored the harms of sex-based stereotypes. *See, e.g.*, Mary Anne C. Case, *Disaggregating Gender from Sex & Sexual Orientation: The Effeminate Man in the Law & Feminist Jurisprudence*, 105 Yale L.J. 1, 6 (1995) (discussing the "four generations of sex-stereotyping cases"). Thus, for several decades after Title VII was enacted, sex stereotyping was not recognized as a form of sex discrimination, and transgender individuals were, as a result, denied Title VII's protection. *See, e.g.*, *Ulane* v. *Eastern*

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[5] *See also Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 736 (2003) ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees."); *Back* v. *Hastings on Hudson Union Free Sch. Dist.*, ___ F.3d ___, 2004 WL 739846 (2d Cir. Apr. 7, 2004) (holding that school could not terminate employee because of assumption that "she, as a young mother, would not continue to demonstrate the necessary devotion to her job").

Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) ("Title VII does not protect transsexuals."); *Holloway* v. *Arthur Andersen & Co.*, 566 F.2d 659, 663 & n.7 (9th Cir. 1977) (same); *Voyles* v. *Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (same); *cf. Sommers* v. *Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 474 (Iowa 1983) (interpreting Iowa Civil Rights Act). Title VII jurisprudence fundamentally changed, however, after the Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), and as shown below, transgendered individuals are now protected from discrimination under Title VII.[6]

B. Sex Discrimination Law Prohibits Conduct That Enforces Conformity to Gender Stereotypes

In *Price Waterhouse*, the Supreme Court held that requiring adherence to sex stereotypes is impermissible sex discrimination under Title VII. The plaintiff in that case, Ann Hopkins, was passed over for partnership at an accounting firm in part because she was viewed as not

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[6] The decisions interpreting federal statutory bans on sex discrimination provide a guide for interpreting the scope of the Human Rights Laws. *See, e.g.*, *Ferrante* v. *American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 28 (1997) ("The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under title VII of the Civil Rights Act of 1964."); *Mauro* v. *Orville*, 259 A.D.2d 89, 91 n.3, 697 N.Y.S.2d 704, 707 n.3 (App. Div. 3rd Dep't 1999) ("Because the language of the two statutory provisions is almost identical, New York courts may rely upon title VII case law in interpreting Executive Law § 296.").

sufficiently feminine. Among the partners who evaluated and ultimately rejected Hopkins, one described her as "macho," one suggested that she was "overcompensated for being a woman," and another advised her to take "a course in charm school." *Id.* at 235. Similarly, several partners objected to her use of profanity because she was "a lady using foul language." *Id.* Hopkins was advised that, in order to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

Reasoning that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," the Court held that Hopkins had made out a claim for sex discrimination. *Id.* at 251. In reaching this result, the Court noted that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250; *see also id.* at 272-73 (O'Connor, J., concurring) (describing evidence that adverse employment decision was based in part on plaintiff's failure to conform to gender stereotypes as evidence of discriminatory conduct); *cf. Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 707 n.13 (1978) (noting that Title VII was "intended to strike at the entire spectrum of

disparate treatment of men and women resulting from sex stereotypes") (internal quotation marks omitted).

The facts of this case parallel those of *Price Waterhouse.* Just as Price Waterhouse objected to Ms. Hopkins' failure to present herself in a "feminine" manner, so the Defendants here objected to the insufficiently "masculine" or "feminine" presentation of HAF's transgender clients. And just as Price Waterhouse denied Ms. Hopkins a significant benefit (partnership) for her failure to meet its gender role expectations, so the Defendants punished HAF's transgender clients (by denying them access to the building and their health care provider) for their failure to conform to gender norms. The inescapable conclusion is that Defendants, like Price Waterhouse, engaged in illegal sex discrimination.[7]

Following the Supreme Court's example in *Price Waterhouse*, the lower federal courts have consistently characterized sex stereotyping—including the very manifestations of sex stereotyping at issue in this case—as a form of prohibited sex discrimination. For example, in *Rosa* v. *Park*

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[7] It is irrelevant that Defendants may have based the decision to evict HAF because of the objections of other tenants. As this Court has emphasized in the past, "it is well settled that customer preference can never be the basis for discrimination." *Barton* v. *N.Y. City Comm'n on Human Rights*, 140 Misc. 2d 554, 563, 531 N.Y.S.2d 979, 985 (Sup. Ct. N.Y. County 1988), *aff'd*, 151 A.D.2d 258, 542 N.Y.S.2d 176 (App. Div. 1st Dep't 1989). Similarly here, the preferences of other tenants do not justify Defendants' discrimination.

West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000), the plaintiff, Lucas Rosa, applied for a bank loan dressed in women's clothing. The bank officer advised him that he needed to dress "in more traditionally masculine attire before [the bank] would provide him with a loan application and process his loan request." *Id.* at 214. He sued under the Equal Credit Opportunity Act, alleging that he had been discriminated against on the basis of his sex. *Id.* Relying on *Price Waterhouse*, the First Circuit held that the plaintiff had stated a claim for sex discrimination. *Id.* at 215-16.

Similarly, in *Nichols* v. *Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 872 (9th Cir. 2001), the Ninth Circuit held that harassment based on a person's failure to match gender stereotypes is impermissible sex discrimination. The plaintiff in that case, Antonio Sanchez, claimed that he was harassed by his co-workers "because he was effeminate and did not meet their views of a male stereotype." *Id.* at 869. In particular, "Sanchez was attacked for walking and carrying his tray 'like a woman' – *i.e.*, for having female mannerisms. . . . Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.'" *Id.* at 874. In finding sex discrimination, the Ninth Circuit reasoned that, "[a]t its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did

not act as a man should act." *Id.* The court emphasized that "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes [such as] the harassment here." *Id.* at 874-75.

These cases make clear that the law no longer countenances restrictions based on assumptions of how "masculine" or "feminine" men or women should dress or act. Based on this principle, an increasing number of courts—including those in this State—have found that plaintiffs have properly stated claims for sex discrimination by alleging that they were penalized for failing to adhere to gender-based norms of appearance and behavior. *See, e.g., N.Y. Dep't of Corr. Servs.* v. *McCall*, 111 A.D.2d 571, 571, 489 N.Y.S.2d 633, 634 (App. Div. 3d Dep't 1985) (upholding sex discrimination claim based on evidence of that employer based decision on sex stereotype that "women were more easily manipulated than men"); *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.") (citation omitted); *Doe* v. *City of Bellville*, 119 F.3d 563, 581 (7th Cir. 1997) ("[A] man who is harassed because his voice is soft, his

physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."), *vacated on other grounds*, 523 U.S. 101 (1998).

C. Courts Now Recognize That Discrimination Against Transgender People Is Impermissible Sex Steotyping

Although, as discussed above, transgendered individuals were denied Title VII's protection for many years, the federal courts have increasingly applied the law's prohibition on sex discrimination to bar discrimination against transgender individuals. *See, e.g.*, *Tronetti* v. *TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (male-to-female transgender person stated 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 *5 (N.D. Ohio Nov. 9, 2001) (male-to-female transgender person had stated a claim under Title VII because she "may have been fired, at least in part, because her appearance and behavior did not fit into her company's sex stereotypes"); *see also Schwenk* v. *Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding that male-to-female transsexual could state claim under Gender Motivated Violence Act on ground that

"[d]iscrimination because one fails to act in the way expected of a man or woman" is impermissible sex discrimination).

The courts in this State have also consistently recognized that discrimination against transgender people is sex discrimination.[8] This commitment to sex equality has been clear for over twenty five years, dating back to *Richards* v. *United States Tennis Association*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (Sup. Ct. N.Y. County 1977), where the Supreme Court for New York County held that the ban on sex discrimination in the State HRL covered discrimination against a transgendered individual. In *Richards*, the United States Tennis Association insisted that Ms. Richards, a male-to-female transsexual, take a chromosome test to determine her "true" sex before she would be allowed to compete in the women's competition at the U.S. Open. The court held that this demand constituted impermissible sex discrimination, observing that the "unfounded fears and misconceptions of

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[8] Other states' antidiscrimination laws have been interpreted similarly to New York's Human Rights Laws. *See Jette* v. *Honey Farms Mini Market*, No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrimination Oct. 10, 2001); *Millet* v. *Lutco, Inc.*, No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm'n Against Discrimination Oct. 10, 2001); *Enriquez* v. *West Jersey Health Sys.*, 777 A.2d 365, 372 (N.J. Super. Ct. App. Div. 2001); *Barreto-Neto* v. *Town of Hardwick*, No. 03-1014-cr (Vermont Office of the Attorney General Nov. 4, 2003). *But see James* v. *Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 481 n.4 (D. Kan. 1995) (interpreting Kansas Act against Discrimination).

defendants must give way" to the statutory prohibition on sex discrimination. 93 Misc. 2d at 722, 400 N.Y.S.2d at 272.

This principle was reaffirmed in *Maffei* v. *Kolaeton Industries, Inc.*, 164 Misc. 2d 547, 626 N.Y.S.2d 391 (Sup. Ct. N.Y. County 1995). In *Maffei*, a female-to-male transgender employee brought a sexual harassment claim alleging that he was subjected to a hostile work environment because of his gender transition. The court held that the plaintiff had stated a claim under the State HRL, observing that "the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status[] creates discrimination based on 'sex,' just as would comments based on the secondary sexual characteristics of a person." 164 Misc. 2d at 555-56, 626 N.Y.S.2d at 396; *see also Rentos* v. *Oce-Office Sys.*, 72 Fair Empl. Prac. Cas. (BNA) 1717 (S.D.N.Y. 1996) (holding that the State HRL "outlaws discrimination against transsexuals as a form of unlawful 'sex' discrimination").

D. Sex Stereotyping Is Not Only Unlawful, But Is A Harmful Part of the Legacy Of Sex Discrimination

The harms of sex stereotyping are perhaps best illustrated by the numerous limitations that have been placed on women's and men's economic and social opportunities because of assumptions about what sorts

of behaviors were or were not appropriate for their sex. Because sex-based stereotypes rely upon and reinforce ideas about the "natural" and "proper" capabilities of women and men, they have drastically limited the roles that women and men can play in society—the jobs that they hold, the schools they attend, and the position that they occupy in the family. For example, sex stereotypes have kept women from practicing law, from purchasing liquor, and from attending state military academies. They have also prevented men from attending nursing school, from taking an active part in caring for children, and from receiving equal spousal benefits. *See generally Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003) (describing history of sex discrimination); *United States* v. *Virginia*, 518 U.S. 515 (1996) (same).

The stereotypes in the facts presented here—that is, those motivating Defendants' decision to evict HAF—are just as invidious as those presented in the numerous cases discussed above.[9] Defendants evicted HAF because of their view that men and women should dress and act in a certain manner. These stereotypes are part and parcel of the legacy of sex

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[9] Indeed, it is impossible to draw any line between the sex stereotyping that punished Ann Hopkins for refusing to wear makeup, wearing "masculine" clothing, and talking "like a man" and the sex stereotyping at issue in this case. Any such a line would sanction invasive inquiries into a person's "true" anatomical sex.

discrimination against women, and they are the same types of stereotypes that have limited the opportunities of both women and men. Defendants' conduct in this case implicates not only the rights of transgender people, but the freedom of every individual to dress and act in the way that accurately expresses his or her own gender identity.

In sum, sex stereotyping can take many forms. It can be based on an employer's belief that women will prioritize family over work; it can come from a state government's assumption that women should not attend military school; or it can be grounded on a landlord's vision of what it means to "act like a man." But no matter what form it takes, sex-role stereotyping is sex discrimination, and it is illegal under New York law.

II. DISCRIMINATION AGAINST TRANSGENDER PEOPLE IS SEX DISCRIMINATION BECAUSE IT MAKES A FORMAL DISTINCTION BASED ON SEX

The discrimination at issue in this case was illegal not only because it relied on and reinforced sex stereotypes but also because Defendants made a formal distinction based upon sex. In fact, it was solely because of the perceived sex of HAF's clients that Defendants objected to their behavior. For example, were it not for the fact that Defendants considered some of HAF's transgender clients to be men, they would not have objected to their use of the women's restrooms. By basing their

eviction decision on the sex of HAF's clients, however, Defendants ran afoul of New York's ban on sex discrimination.

Most laws prohibiting sex discrimination, including the Human Rights Laws, make it illegal to treat people differently "because of" sex. *See* N.Y. Exec. Law § 296(5)(b)(1); N.Y. City Admin. Code § 8-107(5)(b)(1); *see also* Title VII of the Civil Rights Act of 1964, 78 Stat. 255, codified as amended at 42 U.S.C. § 2000e-2(a)(1). In deciding whether such discrimination has occurred, courts have used a "but for" test: whether the allegedly discriminatory decision affecting the plaintiff would "pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted); *see Mauro* v. *Orville*, 259 A.D.2d 89, 92, 697 N.Y.S.2d 704, 707 (App. Div. 3rd Dep't 1999) ("In proscribing discrimination because of sex, the critical concern is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the opposite sex are not exposed . . . .").[10]

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[10] *See also Price Waterhouse*, 490 U.S. at 240 ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way."); Sunish Gulati, Note, *The Use of Gender-Loaded Identities*

Here, Defendants decided to evict HAF on the basis of the sex of HAF's clients. Indeed, the perceived "real" sex of HAF's clients was fundamental to Defendants' decision to evict. In such a situation, the "but for" test is satisfied: but for the perceived "real" sex of HAF's transgender clients, Defendants would not have evicted HAF. The transgender clients who were described by other tenants as "men who think they're women" were penalized for engaging in behavior (wearing women's clothing, using women's restrooms) that would have been entirely acceptable if those clients had been thought of as women. Were it not for the perceived gender of HAF's transgender clients, Defendants would not have objected to their presence in the building. In this situation, Defendants made a formal distinction based upon sex, which is illegal under the Human Rights Laws.

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in Sex-Stereotyping Jurisprudence, 78 N.Y.U. L. Rev. 2177, 2181 (2003).

CONCLUSION

For the foregoing reasons, and for those stated in HAF's brief on appeal, the judgment below should be affirmed.

Dated: New York, New York
May 7, 2004

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CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word.

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Kerry L. Quinn