

Memorandum

To: Stakeholders and Interested Parties

From: The ACLU of Pennsylvania and the ACLU National LGBT Project

Re: Securing nondiscrimination protections for LGBT people in Pennsylvania

Date: June 10, 2016

The ACLU strongly supports the passage of comprehensive nondiscrimination protections for the LGBT community in the contexts of employment, housing, and public accommodations. However, it has come to our attention that a group of Pennsylvania legislators intend to introduce and pass legislation to protect LGBT people from discrimination in employment and housing only. This legislation would not include public accommodations, which has been a part of previously filed nondiscrimination legislation that we have supported. The ACLU believes that LGBT Pennsylvanians have little to gain and much to lose through this approach, and here is why:

1. The LGBT community is already protected against discrimination in employment and housing under existing federal sex discrimination laws; however federal protections do not include public accommodations.

If a gay or transgender person is fired for being who they are in Pennsylvania today, they can file a complaint with the U.S. Equal Employment Opportunity Commission (EEOC). According to the [EEOC's website](#), "EEOC resolved a total of 1,135 LGBT charges in FY 2015, including through voluntary agreements providing approximately \$3.3 million in monetary relief for workers and achieving changes in employer policies so that discrimination would not recur." This is the result of significant advances in federal interpretations of sex discrimination to include discrimination on the basis of sexual orientation and gender identity. These efforts gained a tailwind with the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII prohibits not only discrimination because of sex, but also discrimination resulting from sex stereotypes. *Id.* at 251. Discrimination based on a person's sexual orientation or gender identity often is directly related to the sex-based stereotypes and preferences of employers.

Following *Price Waterhouse*, and the EEOC's landmark decisions in *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) (gender identity), and *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015) (sexual orientation), there is now an emerging consensus that discrimination against gay and transgender people is a prohibited form of sex discrimination when it is based on sex stereotypes. It is easy to see why efforts to secure anti-discrimination protections for transgender people under existing prohibitions against sex discrimination, including sex-based stereotypes, have succeeded. "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). Similarly, district courts and the EEOC have recognized that the very quality that defines lesbians and gay men is nonconformity with the sex stereotype that women should date only men and men should date only women.

Similarly, if a gay or transgender person is denied housing for being who they are in Pennsylvania today, they can file a complaint with their local U.S. Department of Housing and Urban Development (HUD) office or file a lawsuit in federal court under the federal Fair Housing Act, which prohibits discrimination in housing on the basis of race or color, national origin, religion, sex, familial status, or disability. Every legal remedy that is available to those discriminated against based on these characteristics can also be pursued by LGBT people for discrimination on the basis of sex.

Notably, and important to this context, federal protections on the basis of sex do not ban discrimination in public accommodations, and so there are currently no federal remedies available for gay and transgender people who experience discrimination in public accommodations, including in public restrooms, gym locker rooms, and wedding-related services.

2. While passing explicit state-level protections is important, state-level nondiscrimination protections may be winnable through administrative and legal channels by expanding agency and court understandings of sex discrimination in the PHRA. Passing a nondiscrimination bill with only housing and employment could jeopardize this strategy by wrongly suggesting that the legislature intended to exclude public accommodations protections from state law.

States like [New York](#) and [Virginia](#) have recently advanced nondiscrimination protections for the LGBT community through administrative interpretations of existing state laws on sex discrimination. Similar to the federal court strategy, this strategy relies upon an understanding of sex discrimination to include sexual orientation and gender identity. We believe Pennsylvania could follow suit, both through executive action and by securing favorable state court decisions. We are currently researching and developing an administrative and legal strategy in Pennsylvania similar to the one in New York and Virginia. Notably, the Pennsylvania Human Relations Commission has been accepting claims of discrimination based on sexual orientation and gender identity under a sex discrimination theory since at least May 2015.

If legislation is passed that explicitly prohibits discrimination on the basis of sexual orientation and gender identity in employment and housing, but does not include public accommodations, that could suggest to the courts that this omission was intentional. One of the factors that courts would consider in assessing whether “sex” discrimination protections in the PHRA extend to LGBT people is what the legislature intended. As a result, explicitly adding LGBT protections only to housing and employment might wrongly lead courts to conclude that the existing sex discrimination protections do not apply to LGBT people. This would jeopardize our ability to gain protections against discrimination in public accommodations for gay or transgender Pennsylvanians under existing sex discrimination law.

3. Passing an employment and housing-only bill would send the wrong message to lawmakers, the LGBT community, and the public, especially regarding the importance of ending discrimination against transgender people in public spaces, including restrooms and locker rooms.

For thirteen years, Pennsylvania lawmakers have introduced comprehensive nondiscrimination bills that would protect the LGBT community against discrimination in employment, housing, and public accommodations. It will not be lost on many in the advocacy and activist communities, as well as the LGBT-media, that dropping public accommodations now, in the midst of the current in-state and national conversation surrounding transgender people and restrooms/locker rooms, is compromising on critical protections because they are controversial. We cannot ignore the message it sends to make this compromise just months after our opposition launched their [‘Defend My Privacy’](#) campaign, complete with ‘No Men in Women’s Restrooms’ billboards along the interstate near Harrisburg. At the ACLU, we feel strongly that now is the time to vociferously defend the right of transgender people to use sex-segregated facilities in accordance with their gender identity.

Similarly, passing a bill with a limited scope sends a message that public accommodations for LGBT people is politically toxic, and perhaps most troubling, that LGBT advocates are willing to compromise away public accommodations protections that are perhaps most acutely needed by the transgender community. This could cause a domino-effect of similar bills advancing in other states modeled after the ‘Pennsylvania Compromise’. Similarly, this could negatively impact federal strategies to pass explicit protections for LGBT people in employment, housing, and public accommodations.

4. Alternate, viable paths exist to secure nondiscrimination protections for LGBT Pennsylvanians without having to make a difficult legislative compromise.

While we recognize the importance of achieving explicit protections from discrimination, we see alternative paths through state and federal litigation and administrative advocacy. These paths to securing and clarifying nondiscrimination protections include ongoing federal court advocacy to secure favorable interpretations of sex discrimination to encompass gender identity and sexual orientation in the Third Circuit Court of Appeals. Recently, the EEOC has filed a lawsuit against Scott Medical Health Center on behalf of a gay Pennsylvanian who experienced workplace discrimination. This case could be considered by the Third Circuit by the end of this year, potentially resulting in additional case law that clarifies that discrimination on the basis of sexual orientation and gender identity is unlawful sex discrimination.

Additionally, we see a parallel state government track to securing favorable interpretations of sex discrimination. By building on the existing interpretations of the PHRC to secure favorable interpretations from key government actors, such as the Governor and the Attorney General, as well as favorable interpretations from state courts, we would be able to secure for the LGBT community every protection available to other protected characteristics under Pennsylvania’s Civil Rights laws.

Meanwhile, we believe that advocacy organizations, including the ACLU, should continue to build from our past work to educate the public and lawmakers on who LGBT people are and why discrimination against LGBT people is inconsistent with the values of the state of Pennsylvania. We should also focus specifically on education about who transgender people are, as well as why they must be able to use facilities that match who they are. This is the important education work that will create a climate for favorable administrative and legal developments, and will continue building a political climate more favorable for advancing LGBT equality and guarding against anti-LGBT backlash and the types of regressive legislation we have seen this past year in dozens of states.