



Women's Law Project

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May 26, 2017

By email: chreese@pa.gov

Ms. Christina Reese
 Pennsylvania Human Relations Commission
 333 Market Street, Floor 8
 Harrisburg, PA 17101

Dear Ms. Reese:

Thank you for the opportunity to submit comments on the PHRC's proposed guidances concerning protections for lesbian, gay, bisexual, transgender and queer/questioning individuals in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act.

The guidances inform the public that "it is the position of the Pennsylvania Human Relations Commission that it will take and investigate sex stereotyping claims filed by LGBTQ individuals." The Women's Law Project strongly supports this position and thanks the Commission for issuing these guidances.

Members of the LGBTQ community often suffer from sex discrimination in employment, housing, and public accommodations including educational institutions based on their nonconformity with traditional sex stereotypes. Women's rights organizations have a longstanding interest in seeing that sex stereotype discrimination is adequately addressed. For example, Legal Momentum and the Women's Law Project filed an amicus brief in *Prowel v. Wise Business Forms, Inc.*, 579 F. 3d 285 (3d Cir. 2009), on behalf of the plaintiff. In *Prowel*, the Third Circuit Court of Appeals determined that the district court erred when it found that a self-described "effeminate" gay man could not proceed with his Title VII claim because he was merely asserting a sexual orientation discrimination claim "repackaged as a gender stereotyping claim." The court of appeals reversed the district court and concluded that the plaintiff "was harassed because he did not conform to [his employer's] vision of how a man should look, speak, and act – rather than harassment based solely on his sexual orientation."

Gender identity discrimination often occurs alongside and is based upon sex stereotype discrimination. As legal scholars have argued, discrimination against transgender individuals is rooted in "stereotypes about how men and women are 'supposed' to behave and about how male and female bodies are 'supposed' to appear." Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000). When a defendant employer discriminates against a

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transgender employee, the defendant's actions often "stem from the fact that the defendant believed the plaintiff to be a man or woman who 'failed to act like one.'" Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 25 (2000). In this sense, discrimination based on gender identity fits within the sex stereotype theory of discrimination articulated by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). As one scholar has explained:

Like Hopkins, a transgender plaintiff can root a discrimination claim in sex discrimination when it is the plaintiff's failure to meet sex stereotypes that gives rise to the discriminatory treatment. Thus, a biological male plaintiff who transitions to become female (a transsexual woman) may state a claim of sex discrimination against her employer when she is treated adversely because the defendant prefers people to look "stereotypically masculine" or "stereotypically feminine."

Levi, *supra*, at 26-27.

We would encourage the Commission to make explicit what its guidances imply: that discrimination based on sexual orientation or gender identity is *always*, at its core, a form of sex discrimination regardless of whether the victim outwardly rejects or embraces traditional gender roles. This is because the belief that men must have sexual or romantic attachments only to women and women must have sexual or romantic attachments only to men is sex stereotyping pure and simple—as is the belief that men must dress and comport themselves only in a masculine way and women must dress and comport themselves only in a feminine way.

In the absence of explicit protection for discrimination against LGBTQ people, we commend the Commission for seeking to ensure that the existing prohibitions are robust enough to reach all forms of sex discrimination, including those perpetrated against LGBTQ people. We add our voice to the chorus of support for passage of the Fairness Act so that these basic protections will rest on a firmer statutory basis. In the meantime, we thank the Commission for issuing these helpful guidances and for including the LGBTQ community within the ambit of protection of our state civil rights laws.

Sincerely,



Susan Frietsche
Senior Staff Attorney