

BY E-MAIL AND FIRST-CLASS MAIL

September 23, 2009

The Honorable George Miller, Chairman
Committee on Education and Labor
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The Honorable John Kline, Ranking Member
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Dear Chairman Miller and Ranking Member Kline:

We write to express our support for HR 3017, the Employment Non-Discrimination Act (ENDA). The passage of ENDA would provide lesbian, gay, bisexual, and transgender (LGBT) individuals with long overdue protection against discrimination in the workplace. Additionally, ENDA would preclude defendants from using the presence of sexual orientation- or gender identity-based claims to shield otherwise actionable Title VII sex stereotype discrimination claims.

LGBT employees often face discrimination based on their failure to conform to sex stereotypes, discrimination that is rooted in stereotypes about how men and women “should” look, sound, or behave and about how their bodies “should” appear. But there is no question that discrimination based on sex stereotypes is unlawful. It is well settled that Title VII’s prohibition on sex discrimination proscribes discrimination based on gender stereotypes. The U.S. Supreme Court held long ago in *Price Waterhouse v. Hopkins* that the failure to promote a female employee based on her variation from prevalent stereotypes about women was an actionable sex discrimination claim under Title VII. 490 U.S. 228, 250 (1989). A similar prohibition on sex stereotype discrimination by government actors exists under the federal Equal Protection Clause. In *U.S. v. Virginia*, the Supreme Court held that gender-based government action must pass heightened scrutiny and cannot be based on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” 518 U.S. 515, 533 (1996).

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Yet defendant employers continue to argue to courts that sex stereotype discrimination claims under Title VII do not apply where there is also discrimination based on sexual orientation or gender identity. Many courts have correctly rejected those arguments and recognized actionable sex stereotype discrimination regardless of an employee's sexual orientation or gender identity. For example, just last month the U.S. Court of Appeals for the Third Circuit reversed a district court's finding 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." *Prowel v. Wise Business Forms, Inc.*, --- F.3d ---, 2009 WL 2634646, at *6 (3d Cir. Aug. 28, 2009). Instead, the court found 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." *Id.* And a district court in Georgia recently denied a motion to dismiss a Title VII claim brought by a transgender state government employee, finding that "it is now well-established in federal law that discrimination based on the failure of an individual to conform to sexual stereotypes is a form of sex discrimination." *Glenn v. Brumby*, --- F. Supp. 2d ---, 2009 WL 1849951, at *6 (N.D. Ga. June 25, 2009).

Some courts, however, have been misguided by defendants' arguments and dismissed valid claims of discrimination against LGBT employees based on sex stereotypes by construing them as claims of discrimination based solely on sexual orientation or gender identity. In a number of cases, for example, courts have discounted valid evidence of sex stereotyping because the language used in the harassment also referred to the plaintiff's sexual orientation. *See, e.g., Trigg v. New York City Transit Authority*, C.A. No. 99-CV-4730, 2001 WL 868336 (E.D.N.Y., July 26, 2001). Other courts have incorrectly dismissed Title VII sex stereotype claims because of a plaintiff's transgender status. *See, e.g., Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002). Enacting ENDA's explicit protection against discrimination based on sexual orientation and gender identity would curtail defendants' ability to confuse the issues in this way and to persuade courts that valid Title VII sex stereotype claims should be dismissed merely because the plaintiff is (or is perceived to be) an LGBT individual.

Ensuring that American workplaces are free of sex discrimination, including discrimination based on gender stereotypes, is vital to achieving true gender equity in the workplace. We urge Congress to pass ENDA, to give LGBT employees the workplace equality they need and deserve, and to preclude defendants from misguiding courts to dismiss actionable claims of impermissible sex stereotyping because of the concurrent existence of sexual orientation- or gender identity-based discrimination.

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Sincerely,

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