Lambda Legal
making the case for equality

September 22, 2009

The Honorable George Miller, Chairman
Committee on Education and Labor
U.S. House of Representatives

The Honorable John Kline, Ranking Member
Committee on Education and Labor
U.S. House of Representatives

Re: The Employment Non-Discrimination Act, H.R. 3017

Dear Chairman Miller and Ranking Member Kline:

I write on behalf of Lambda Legal Defense and Education Fund ("Lambda Legal") and our more than 32,000 active members to urge you to support H.R. 3017, the "Employment Non-Discrimination Act" ("ENDA"), in order to provide protections against workplace discrimination based on sexual orientation and gender identity that are critically important and long overdue. Lambda Legal is the nation's oldest and largest legal organization dedicated to achieving recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") individuals. We were counsel in *Lawrence v. Texas*, 539 U.S. 558 (2003), and co-counsel in *Romer v. Evans*, 517 U.S. 620 (1996), the two most important cases ever decided by the U.S. Supreme Court addressing sexual orientation and the law.

It is difficult to overstate the importance of obtaining recourse for the widespread discrimination faced by LGBT workers or the extent to which the only realistic solution to ending such discrimination in the foreseeable future is for Congress to enact ENDA. By passing ENDA, Congress not only would provide a legal remedy for discrimination, but also would make a powerful statement of principle regarding fair treatment of all employees who work hard and perform well.

The Urgent Need

Lambda Legal operates a legal help desk, through which we respond directly to members of the communities we serve who are seeking legal information about and assistance regarding discrimination related to sexual orientation and gender identity. While Lambda Legal has always received such requests throughout its 36-year history, we now have the equivalent of six full-time staff handling the thousands of calls we receive each year. For each year from 2004 to 2007, we received more calls regarding LGBT workplace discrimination than any other single issue. In each of those years, we received between 900 and 1100 employment discrimination calls. Based on our experience with our legal help desk, we can say with confidence that these remarkable figures certainly understate the prevalence of the problem. Over the years, we have learned many reasons why employees choose not to pursue legal action, including that many people know how few legal remedies exist in most jurisdictions, and many others are afraid to come out publicly and therefore refrain from even considering pursuit of legal action.

But this issue's resonance goes far beyond numbers. People define themselves in large part by the work they do, spend significant portions of their time in the workplace, and depend on their jobs to support themselves and their families and to gain access to health care and other benefits. The emotional investment people have in their jobs means that it not only is devastating when one loses a job, is denied a promotion or otherwise subjected to adverse job actions due to discrimination, but it also takes a significant toll simply to know that one can face harassment or discrimination at any moment and have no redress. ENDA also would strengthen the workforce of tomorrow by establishing that everyone has the ability to pursue the career of their choosing and be judged on the basis of their performance and that alone.

Why Congress Must Act

It also is clear that, for the foreseeable future, Congress alone can provide a national solution to the problem. Even courts that have agreed strongly with employees about the unfairness of discrimination against LGBT

employees have held that *only* Congress can add sexual orientation to Title VII.[1] Given that most, if not nearly all, of the states that do not protect LGBT employees under state law are also strong employment at-will states,[2] there generally are few, if any, legal avenues to remedy such harassment and discrimination, and even fewer lawyers willing to assume representation in such cases.

Although great progress has been made with the passage of many state nondiscrimination laws, it could take years, or even decades, to protect all LGBT Americans without Congressional action. While 21 states now provide express statutory protection against sexual orientation discrimination and 12 expressly cover discrimination based on gender identity as well, in some of those states the remedies provided are limited.[3] In others, progress has been

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[1] See *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (describing the alleged sexual orientation discrimination suffered by the plaintiff to be "morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (". . . harassment because of sexual orientation . . . is a noxious practice, deserving of censure and opprobrium."); (the alleged harassment "reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility."); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 764-65 (6th Cir. 2006); *Valencia v. Department of Interior*, No. 3:08-CV-69-WKW, 2008 WL 4495694, *14 n.8; (M.D. Ala. Oct. 7, 2008); *Lankford v. BorgWarner Diversified Transmission Products, Inc.*, No. 1:02CV1876-SEB-VSS, 2004 WL 540983, *3 (S.D. Ind. Mar. 12, 2004) ("Thus, harassment and discrimination based on sexual orientation, though morally reprehensible, are not actionable under Title VII." [collecting citations]).

[2] This appears to be the case in every state except Montana. Mont. Code Ann. § 39-2-904; see Robinson, Donald C., "The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)", 57 Mont. L. Rev. 375, 376 (1996); Just Cause in Montana: Did the Big Sky Fall? Source: Barry D. Roseman, Advance: The Journal of the ACS Issue Groups, Vol. 3 no. 1 (Spring 2009).

[3] See, e.g., *Herman v. United Broth. of Carpenters and Joiners of America, Local*, 60 F.3d 1375, 1386 (9th Cir. 1995) (". . . we have construed Nevada law as precluding emotional distress claims in the employment context."); Wisconsin Department of Workforce Development, "Remedies at a Glance" (neither compensatory damages for emotional harm nor punitive damages are available under the Wisconsin Fair Employment Law); available at http://dwd.wisconsin.gov/er/discrimination_civil_rights/publication_erd_11055_p.htm#3.

very slow. For example, Delaware, which in July 2009 became the most recent state expressly to ban sexual orientation employment discrimination, did so after similar bills had been introduced every year since the late 1990's.[4] In many of the 29 states without nondiscrimination statutes expressly covering either sexual orientation or gender identity, such legislation has never even been introduced.

A national solution is imperative not only because the right to pursue one's livelihood free from discrimination is and should be a shared American value, but also because the current gaps in discrimination protection most severely affect the most vulnerable. While approximately half of the overall population lives in jurisdictions covered by state sexual orientation nondiscrimination statutes, fewer than 35% of African-Americans do.[5] This is problematic not only because of the historically high degree of discrimination against African-Americans, but especially because, in many of the Title VII cases rejecting a man's claims of discrimination based on gender stereotypes or claims attempted to be brought based on actual or perceived sexual orientation, the employee was an African-American man.[6] The residents of states without nondiscrimination statutes also have significantly lower levels of education attainment, reducing their employment options when discrimination occurs.

The need for Congress to act goes beyond creating a remedy for sexual orientation and gender identity discrimination. Unfortunately, some courts have ruled against claims brought by LGBT workers for discrimination they

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[4] See Delaware Employment Law Blog, published by Young, Conaway, Stargatt & Taylor LLP, at http://www.delawareemploymentlawblog.com/2009/06/delaware_set_to_ban_discrimina.html.

[5] See http://www.census.gov/compendia/statab/ranks/rank12.html

[6] See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 50-51 and n.166 (1995); *Dillon v. Frank*, . 90-2290, 952 F.2d 403 (Table), 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

experience based on sex or religion (both of which Title VII already covers) by attributing the discrimination to sexual orientation or gender identity rather than these other grounds. Moreover, in denying an LGBT person the right to pursue the same theory of relief for sex or religious discrimination enjoyed by everyone else, courts have acknowledged that existing Title VII principles support the claim, but ruled against LGBT employees because they viewed Congressional inaction on sexual orientation nondiscrimination bills as proof that Congress wanted to deny an LGBT employees any recourse for sex or religious discrimination that might be related to the employee's sexual orientation or gender identity.

The most common example of this problem are cases holding sex discrimination claims by LGBT employees to a different standard. For at least the last twenty years, it has been the law that the "because of sex" language in Title VII's precludes an employer from discriminating against an employee because he or she failed to conform to the employer's sex-based stereotypes. *See Price-Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (Title VII was violated where woman was denied partnership "on the basis of a belief that a woman cannot be aggressive, or that she must not be."). Thus, an employer cannot fire or refuse to hire a woman because it believes her to be insufficiently feminine – or a man because he is deemed insufficiently masculine.[7] When this claim, known as sex stereotyping,[8] is brought by an LGBT employee, most courts have followed the correct approach that the employee's sexual orientation is irrelevant, *i.e.*, that Title VII protects both an effeminate heterosexual man and

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[7] *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1998) ("[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."), judgment vacated and remanded, 523 U.S. 1001 (1999) (held still to constitute valid precedent on this point in *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3rd Cir. 2001)); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("Just 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."); *Bibby*, 260 F.3d at 262-63; *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001).

[8] *Price-Waterhouse*, 490 U.S. at 250-51.

an effeminate gay man from sex discrimination.[9] However, some courts have taken a dramatically different approach to sex stereotyping claims brought by LGBT employees. These courts incorrectly have refused to allow LGBT employees to proceed with their claims based on an argument that Congress supposedly wanted to exclude employment discrimination protections for LGBT people from Title VII. In the process, they ignore the fact that an LGBT person has the same right to be free from sex discrimination that all other employees enjoy.

For example, one court obsessed over "sexual orientation (or other unprotected) allegations masquerading as gender stereotyping claims," and about employees' "crafting the [sexual orientation] claim as arising from discrimination based upon gender stereotypes."[10] Another court simply imagined a "clear warning" from a higher court that the gender stereotyping theory "not bootstrap protection for sexual orientation into Title VII."[11]

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[9] *Bibby*, 260 F.3d at 265 ("once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus. For example, had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes."); *Doe*, 119 F.3d at 594; *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) ("Centola does not need to allege that he suffered discrimination on the basis of his sex alone. . . . [T]he fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under Title VII.").

[10] *Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005) (citations omitted). Indeed, the approach of *Dawson* to criticize lawyers who "counsel[] 'gay plaintiffs bringing claims under Title VII[to] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality" is a self-fulfilling prophecy, as shown by Lambda Legal's legal help desk experience. Callers who have reported dealing with agencies and human relations departments about harassment based both on sex stereotypes and sexual orientation have reported that their grievances are treated primarily or exclusive as based on sexual orientation. Given this history, and the approach of *Dawson*, *Trigg* (*infra*), and *Kay* (*infra*), it is hardly surprising that employees would be counseled about how to avoid having their grievances summarily – and incorrectly – ignored.

[11] *Trigg v. New York City Transit Auth.*, No. 99-CV-4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001), quoting *Simonton v. Runyon,* 232 F.3d 33, 38 (2d Cir. 2000). In fact, the *Simonton* court expressed support for the notion that a gay or lesbian employee can bring a Title VII sex discrimination claim if the employee presents the theory and facts to the

Instead of simply evaluating whether the gender stereotyping allegations, in and of themselves, make out a case, these courts have followed the incorrect approach of weighing the gender stereotyping harassment suffered by the employee against facts also showing that sexual orientation harassment also was occurring, and have concluded that, if the latter was more prevalent, there is no claim.[12] This approach sends the message that one can escape liability for his (or her) sex discrimination simply by engaging in more flagrant or frequent sexual orientation discrimination.

Another example of improper exclusion of LGBT employees from Title VII's protections is in the context of a religious discrimination claim. It is widely recognized that Title VII covers an employee who is fired "simply because he did not hold the same religious beliefs as his supervisors." *Shapolia v. Los Alamos Nat. Laboratory*, 992 F.2d 1033, 1037 (10th Cir. 1993); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that

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EEOC and district court. The passage misunderstood by the *Trigg* court makes the point that allowing a claim sex stereotyping claim by a gay man of lesbian is **not** equivalent to engrafting sexual orientation onto Title VII; rather, the *Simonton* court pointed out that a sex stereotyping theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." 232 F,3d at 38,.

[12] In *Kay v. Independence Blue Cross*, No. CIV.A. 02-3157, 2003 WL 21197289 (E.D. Pa. May 16, 2003), the District Court held that two instances of the employee's being told he was "not a real man" were not pervasive enough to sustain a Title VII claim. On appeal, although all three judges agreed with the District Court, two of the three felt compelled to articulate a "differ[ent]. . . approach" by incorrectly focusing on the antigay harassment. The court held that the two instances, "viewed in the broader context of the harassment alleged by Kay . . . demonstrates that the harassment was based on perceived sexual orientation, rather than gender." *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 50 (3d Cir. 2005). In *Trigg, supra*, the court dismissed allegations that Trigg was called a 'sissy,' told "he would have to learn how to carry bags of nickels 'more manly." ' told he "wasn't going to make it in the job if [he were] not more manly, and was told that he was working like a woman," because "In contrast to Trigg's assertion that he is a victim of gender stereotype discrimination, his Amended Complaint is rife with references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality." 2001 WL 868336 at *6. The Second Circuit also ruled against Trigg, but corrected the District Court's approach of weighing the sexual orientation discrimination against the sex discrimination. *Trigg v. New York City Transit Auth.*, 50 Fed. Appx. 458, 459-60 (2d Cir. 2002).

her perceived religious shortcomings [her unwillingness to strive for salvation as Ives understood it, for example] played a motivating role in her discharge.").[13] Under this standard, an employee who gets a divorce, has an extramarital affair, or simply fails to accept or adhere generally to the employer's religious precepts, could invoke Title VII if the employer fired him or her on that basis.[14] Thus, lesbian or gay man fired solely for failing to comply with the employer's religious beliefs should be able to invoke Title VII, but last month, the Third Circuit rejected exactly that claim,[15] not for any logical reason, but based solely on Congress' supposed intent to prevent employment discrimination claims based on sexual orientation or gender identity.[16]

Just as it was unfair to these LGBT litigants to be treated differently than other employees claiming sex or religious discrimination, it was wrong for these

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[13] *Accord Noyes v. Kelly Services*, 488 F.3d 1163, 1166, 1168-69 (9th Cir. 2007); *Panchoosingh v. General Labor Staffing Services, Inc.*, No. 07-80818-CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery v. Asti, Inc.*, 247 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus v. Mena Newspapers, Inc.*. 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar v. Sears, Roebuck and Co.*, 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey v. National Center on Institutions and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa v. Express Images Inc.*, . Civ.04-1538(JRT/JSM), 2005 WL 3299455, *3 (D. Minn. Dec. 1, 2005); *Kaminsky v. Saint Louis University School of Medicine*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

[14] See *Kaminsky*, 2006 WL 2376232 at *5 (getting a divorce); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while going through divorce proceedings against her husband); *Noyes*, 488 F.3d at 1166, 1168-69 (failure to live up generally to employer's religious beliefs); *Venters*, 123 F.3d at 972 (same).

[15] *Prowel v. Wise Business Forms, Inc.*, No. 07-3997, --- F.3d ----, 2009 WL 2634646, *7, 107 Fair Empl. Prac. Cas. (BNA) 1 (3d Cir. Aug. 28, 2009) ("Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, *see Bibby*, 260 F.3d at 261, we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality.").

[16] Whether or not one agrees that the conduct in *Prowel* should be considered religious discrimination, ENDA provides the optimal result of making clear that discrimination against LGBT employees, whether based on religious or secular grounds, is prohibited.

courts to attribute to Congress an intent to exclude LGBT employees from the current scope of Title VII. Indeed, Lambda Legal consistently has insisted to courts that Congress intended, in passing Title VII, to "'strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)."[17] But fair or unfair, it is now apparent that, if Congress fails to pass ENDA, not only will all courts deny protection against sexual orientation and gender identity discrimination under Title VII, but some courts incorrectly will refuse to entertain a Title VII sex or religious discrimination case brought by an LGBT employee, simply because of inaction on ENDA.

LGBT Discrimination in Public Employment

As you are no doubt aware, in enacting a remedy that abrogates the sovereign immunity of the states, Congress should have evidence of discriminatory practice in the public sector. However, evidence of discrimination in the private sector is relevant to this inquiry where the congressional record reflects that the problem is similar in the private and public sector.[18] Unfortunately, it is the case that the public employment discrimination problem is similar, or even worse, given that it occurs against a backdrop of clear unlawfulness nationwide.

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[17] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. and the National Employment Lawyers Association In Support of Appellant and of Reversal of the Judgment Below, 2002 WL 32625900, *7, *Trigg v. New York City Trans. Auth.*, 2d Cir.; Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Utah, Lambda Legal Defense & Education Fund, Inc., and National Center for Lesbian Rights In Support of Appellant Krystal Etsitty and Reversal of the District Court, 2005 WL 3516739, *3, *Etsitty v. Utah Transit Auth.*, 10th Cir.; *see also* 1997 WL 471805, *8, *Oncale v. Sundower Offshore Servs.*, U.S. S. Ct., Brief of Lambda Legal Defense Fund, Inc., et al., as Amici Curiae in Support of Petitioner ("'Congress' intent' in enacting Title VII was 'to forbid employers to take gender into account in making employment decisions[.]'") (quoting Price-Waterhouse, 490 U.S. at 239).

[18] *Tennessee v. Lane*, 541 U.S. 509, 528 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-733 (2003).

A review of nondiscrimination policies and directives illustrates the ongoing problem in public employment. According to Equality Forum, 473 of the Fortune 500 companies have policies against sexual orientation discrimination.[19] Of the 473 companies, 252 are headquartered in states with nondiscrimination statutes, but these companies' policies cover all employees, including those in states with no protection. More impressively, 221 of the companies are headquartered in states that do not ban sexual orientation discrimination.

By contrast, of the 29 states that do not have sexual orientation discrimination statutes, only 11 have issued executive orders providing a clear state-law directive not to discriminate in public employment based on sexual orientation, and thus not to potentially incur liability for such conduct, and only 5 of these include gender identity in such executive orders.[20] This is despite the fact that it is well-established, according to numerous courts, that the government violates equal protection guarantees when it discriminates against employees based on sexual orientation[21] or on gender identity and expression.[22]

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[19] http://www.equalityforum.com/fortune500/listing.cfm?Status=1&Order=3. Equality Forum is a national and international nonprofit 501(c)(3) GLBT civil rights organization with an educational focus. Through its Fortune 500 Project, Equality Forum lobbies the nation's largest corporations for sexual orientation discrimination protection by making the business case to CEOs, Human Resources Directors, Boards of Directors and large institutional investors at noncompliant companies. While Equality Forum's report of Fortune 500 companies with sexual orientation nondiscrimination policies differs somewhat from that of the Human Rights Campaign, the HRC report that 85% of Fortune 500 companies had such policies in 2008 also places the largest private sector companies well ahead of the states in instructing managers not to discriminate. See http://www.hrc.org/issues/workplace/equal_opportunity/about_equal_opportunity.asp

[20] Alaska (Admin. Order No. 195 (2002)); Arizona (Executive Order 2003-22); Indiana (2004 Policy Statement – see http://www.in.gov/spd/files/eehandbook.pdf at p. 13) (includes gender identity): Kansas (Executive Order 07-24) (includes gender identity); Kentucky (Executive Order 2008-473) (includes gender identity); Louisiana (Executive Order No. KBB 2004-54); Michigan (Executive Directive 2003-24); Montana (EEO Rules, 2.21.4001 *et seq.*); Ohio (Executive Order 2007-10S) (includes gender identity); Pennsylvania (Executive Order 2003-10) (includes gender identity); Virginia (Executive Order No. 1).

[21] *See, e.g.*, *Miguel v. Gue*ss, 112 Wash. App. 536, 554, 51 P.3d 89, 97 (2002) ("we hold that a state actor violates a homosexual employee's right of equal protection when it treats that person differently than it treats heterosexual employees, based solely upon the employee's

A government employer's discrimination may violate other constitutional rights of the affected employee. For example, courts have recognized that a public employer violates an employee's First Amendment rights by taking action against the employee for being openly gay or supportive of others who are.[23] Additionally, in ruling that sodomy laws violated the Due Process Clause, the Supreme Court in *Lawrence v. Tex*as specifically noted that sodomy laws "legally sanction[] discrimination . . . including in the area[] of employment."[24] *Lawrence* solved this legal problem for public employees.

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sexual orientation."); *Quinn v. Nassau County Police Dept.*, 53 F. Supp. 2d 347, 357 (E.D.N.Y. 1999) ("a hostile work environment directed against homosexuals [employed by the government] based on their sexual orientation constitute[s] an Equal Protection violation."); *Emblen v. Port Authority of New York/New Jersey*, 2002 No. 00 Civ. 8877(AGS), 2002 WL 498634, 7 (S.D.N.Y. Mar. 29, 2002); *Lovell v. Comsewogue School Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002); *Snetsinger v. Montana University System*, 325 Mont. 148, 157, 104 P.3d 445, 452 (2004); *Glover v. Williamsburg Local School Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998); *Beall v. London City Sch. Dist. Bd of. Educ.*, No. 2:04-cv-290, 2006 WL 1582447, at *15 (S.D. Ohio June 8, 2006); *Marcisz v. City of New Haven*, No. Civ. 3:04-CV-01239WW, 2005 WL 1475329, at *2 (D. Conn. June 22, 2005); *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123, 2000 WL 33376299, at *9- 10 (N.D. Cal. Apr. 17, 2000); *Tester v. City of New York*, No. 95 Civ. 7972, 1997 WL 81662, at *5-*6 (S.D.N.Y. Feb. 25, 1997).

[22] *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (allegation of discrimination against transitioning employee stated a claim for sex discrimination under the Equal Protection Clause); *Glenn v. Brumby*, . 1:08-CV-2360-RWS, 2009 WL 1849951, 106 Fair Empl.Prac.Cas. (BNA) 1355, 1355+ (N.D.Ga. Jun 25, 2009) (same); *Doe v. U.S. Postal Service*, No. 84-3296, 1985 WL 9446 (D.D.C. June 12, 1985) (same).

[23] E.g., *Weaver, supra,* 29 F. Supp. 2d at 1289; *Ancafora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc). An example of public sector discrimination violating both equal protection and First Amendment rights is Lambda Legal's case, *Plymouth-Canton Education Association v. Plymouth-Canton Board of Education*, discussed below.

[24] *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (citation omitted). An example of how sodomy laws violated public employees' Due Process rights is *Shahar v. Bowers*, 114 F.3d 1097, 1104-05 (11th Cir. 1997) (en banc), discussed below.

Given that a primary purpose of executive orders is to ensure the faithful execution of the law,[25] it is notable that so many states have not mandated compliance with constitutionally-mandated principles of equal protection.[26] This is especially so, given that, in these states, the absence of any statutory provision, coupled with typically rigorous adherence to the at-will doctrine, suggests a greater risk that an official might neglect the government's constitutional obligation not to discriminate.[27]

Moreover, even some of the few orders that have been issued have become political footballs. In Kentucky, Governor Paul Patton issued an order prohibiting sexual orientation and gender identity discrimination in state employment in 2003. In 2006, Governor Ernie Fletcher rescinded that order. After Steven Beshear soundly defeated Fletcher in 2007 to become governor, Beshear reinstated the executive order in 2008. In 2004, Louisiana Governor Kathleen Blanco issued an executive order preventing sexual orientation discrimination in state employment; the current governor, Bobby Jindal, let that

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[25] *E.g.*, *Morris v. Governor*, 214 Mich.App. 604, 610, 543 N.W.2d 363, 365 (1995); *Communications Workers of America, AFL-CIO v. Florio*, 130 N.J. 439, 455, 617 A.2d 223, 231 (1992); Va. Op. Atty Gen. 05-094 (Feb. 24, 2006).

[26] While a state government would not be ordered to pay damages in a Section 1983 discrimination suit, *see Will v Michigan Dep't of State Police*, 491 U.S. 58 (1989), it has many financial incentives to prevent such lawsuits. It well may have to defend such a suit for nonmonetary relief (such as reinstatement), and may have assumed responsibility for paying an award that could be ordered against an individual state official. *See Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) ("These examples show that the Eleventh Amendment does not protect the states against every expense or inconvenience . . . especially but not only expenses and inconveniences that a state could largely avoid by being hardhearted about claims against its employees [*i.e.*, not pay them!]."); *see also id.* (citing cases holding that a state cannot extend its own immunity to its employees by agreeing to indemnify them for damage awards).

[27] The recent examples of anti-LGBT discrimination in public employment set forth below and in the appendix are especially relevant, coming after federal courts have made it clear that such action is unlawful. *See Tennessee v. Lane*, 541 U.S. 509, 528 (2004) ("This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it."); *cf. Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 370 n.6 (2001) ("But there is no indication that any State had persisted in [such discrimination against the mentally disabled] as of 1990 when the ADA was adopted.").

provision lapse in 2008. In 2005, Virginia Governor Mark Warner issued a nondiscrimination executive order that was re-issued by his successor, Tim Kaine, in 2006. The Virginia Attorney General, despite acknowledging the governor's duty to execute the law faithfully, held that the order was unconstitutional because the Virginia legislature had not enacted such a protection. Va. Op. Atty Gen. 05-094 (Feb. 24, 2006). The opinion did acknowledge that previous executive orders regarding nondiscrimination included categories that had not been covered by Virginia law but were covered by federal law, but then stated that "I need not opine, however, on the impact of federal law and reliance thereon for an executive order as it is not relevant to the current inquiry," apparently not regarding the U.S. Constitution as part of federal law. *See id.* In sum, due to various actions and inactions, most supervisors in the public sector are not provided with guidance as to their clear obligation not to discriminate, while supervisors in the private sector are given that instruction, whether or not a legal obligation exists.

Moreover, an individual government official can be held personally liable for discrimination, unlike Title VII.[28] The threat of having to pay out of pocket is very real, because courts have found the right to be free from LGBT discrimination in the public workplace so well-established that an official cannot claim qualified immunity.[29] Given that Section 1983 not only provides a clear remedy for discrimination in public employment, regardless of the jurisdiction's local laws, and given that an individual government official can be held personally liable, one might expect instances of discrimination and harassment in public employment to be rare. Sadly, that is not the case. Below are a few examples of Lambda Legal's work to combat LGBT discrimination at the state and local levels:

- *Grobeson v. City of Los Angeles* – Lambda Legal client Mitchell Grobeson was the first openly gay officer in the Los Angeles Police Department. In 1993, Grobeson settled a sexual orientation

[28] *See, e.g., Smith v. Lomax*, 45 F.3d 402, 407 (11th Cir. 1995).

[29] *Beall*, 2006 WL 1582447 at *15 (anti-gay discrimination was both objectively unreasonable and clearly proscribed so as to defeat qualified immunity); *see also Lovell*, 214 F. Supp. 2d at 325 (no qualified immunity); *Emblem*, 2002 WL 498634 at *11 (same); *Miguel*, 51 P.3d at 99 (same).

employment discrimination lawsuit he had filed against the city of Los Angeles after suffering harassment and discrimination when he was a sergeant. A settlement reached in the case resulted in his reinstatement to the force, but Grobeson soon had no option but to file a second lawsuit, charging the city and numerous police staff with violating the settlement agreement, as well as his federal and state constitutional and state statutory rights. Grobeson also challenged the LAPD's decision to suspend him for his "unauthorized recruiting" of lesbians and gay men to join the force, and for allegedly wearing his uniform without permission in a photo in a gay weekly, and at gay pride and AIDS-awareness events. This second lawsuit prompted the city to make widespread improvements in its sexual orientation employment policies.

- *Plymouth-Canton Education Association v. Plymouth-Canton Board of Education* - Openly gay teachers Mike Chiumento and Tom Salbenblatt, who were Lambda Legal clients, challenged their school district's order that they dismantle school displays that commemorated the historical role of lesbians and gay men, and addressed anti-gay harassment. The displays were in keeping with the school's theme of respect and dignity for all. In contrast to when similar, prior lesbian and gay history month displays were created by a non-gay staff member, Chiumento and Salbenblatt were attacked by the interim superintendent and members of the Board of Education for supposedly "promoting" their personal "lifestyles." The arbitrator who decided the case found the district had violated one teacher's constitutional right of free speech and had wrongfully discriminated against both teachers.

- *Glenn v. Brumby et. al.* - Vandy Beth Glenn worked for two years in the General Assembly's Office of Legislative Counsel as an editor and proofreader of bill language. After she was diagnosed with Gender Identity Disorder (GID), Glenn informed her immediate supervisor that she planned to proceed with her transition from male to female. Subsequently, Sewell Brumby, who is the head of the office in which Glenn worked, summoned Glenn to his office. After confirming that Glenn intended to transition, Brumby fired

her on the spot. On July 22, 2008, Lambda Legal brought a federal lawsuit on behalf of Glenn, which included a claim that her firing violated the Constitution's equal protection guarantee because it treated her differently due to her female gender identity and her nonconformity with gender stereotypes. In June 2009, a federal court denied a motion to dismiss the case, ruling that "Defendants do not claim that Glenn's transition would have rendered her unable to do her job nor do they present any government purpose whatsoever for their termination of Plaintiff's employment. . . . Anticipated reactions of others are not a sufficient basis for discrimination."

- *Shahar v. Bowers* - After graduating at the top of her class from Emory Law, Robin Shahar was offered a position in the Georgia Attorney General's Office. Before she began the job, state Attorney General Michael Bowers learned of her plans to hold a commitment ceremony with her same-sex partner and rescinded the job offer. Bowers claimed that Shahar's sexual orientation would prevent her from enforcing the sodomy law then on the state's books, and a Georgia district court upheld his decision. Appealing the decision, Shahar cited violations of her First Amendment rights to free association and Fourteenth Amendment rights to equal treatment. Shahar initially won on appeal; however, the Eleventh Circuit decided to rehear the case before the entire court, which then decided for Bowers.[30]

- *Mitchell v. Bremen Community High School District No. 228 and Gleason, et al.* - In 2004, Richard Mitchell interviewed for the position of superintendent of Bremen Community High School District No. 228 in Chicago. Following his interview, school board member Evelyn Gleason encouraged the board not to hire him because he is gay. But the board chose to hire Mitchell and in 2005 extended

[30] Lambda Legal submitted a friend-of-the-court brief to the 11th Circuit on Shahar's behalf and assisted with the petition to the Supreme Court. Lead counsel in the case, Ruth Harlow was working for the ACLU during Shahar's case. She subsequently became Legal Director of Lambda Legal and lead counsel in *Lawrence v. Texas*.

his three-year contract. Soon after, Gleason became president of the school board and was able to do what she'd always wanted: get rid of Mitchell. When Mitchell notified the board that he intended to pursue his rights under local laws prohibiting sexual orientation discrimination, Gleason retaliated by trumping up false allegations against Mitchell in the media. He was suspended and later fired. Lambda Legal filed a complaint charging that Gleason's and the school board's actions are illegal under the Cook County Human Rights Ordinance, which is currently pending.

- *Etsitty v. Utah Transit Authority* - Utah Transit Authority (UTA) hired Krystal Etsitty as a bus driver in 2001. Her work record was spotless. After telling her supervisor that she was undergoing gender transition and would be appearing more feminine at work, Etsitty gradually began to wear makeup and jewelry. Soon after, her supervisors decided that Etsitty's transition created an "image issue" for UTA, and they terminated her. Although UTA acknowledged that no one had complained about her performance or appearance, it claimed that the public would see Etsitty as "inappropriate." The U.S. District Court for the district of Utah ruled against Etsitty, holding that Title VII does not protect transgender employees.[31] Lambda Legal joined other groups in filing a friend-of-the-court brief in the Tenth Circuit Court of Appeals in Etsitty's support.[32] While the court ruled against Etsitty, it did, as urged by our brief, reject the district court's approach of excluding all transgender employees from the sex stereotyping discrimination protections of Title VII. [33]

- *Kastl v. Maricopa County Community College Dist* - During her gender transition, Rebecca Kastl worked an instructor for the Maricopa

[31] *Etstity v. Utah Transit Auth.*, 2:04CV616 DS, 2005 WL 1505610 *4 (D. Utah, June 24, 2005).

[32] See n.17, *supra.*

[33] *Etstity v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007).

> County Community College District ("MCCCD") while attending classes there. MCCCD banned Kastl from using the women's restroom until she could prove completion of sex reassignment surgery and then later refused to renew her teaching contract. The trial court ruled against Kastl on a novel theory potentially very damaging to the transgender community: that Kastl had failed to state a prima facie case because she had not provided "evidence that she was a biological female."[34] While the Ninth Circuit also ruled for Kastl, it did reject, as urged in Lambda Legal's amicus brief, the trial court's holding that Kastl failed to state a prima facie case of gender stereotyping discrimination under Title VII.[35]

Additionally, attached as an appendix is a brief synopsis of instances of public sector discrimination described by callers to Lambda Legal's help desk. Confidentiality concerns preclude our providing names or other identifying information or discussions of legal strategy. However, we wanted to provide these stories of discrimination, so that this Committee could have a fuller understanding of the problem of public sector discrimination against LGBT employees, even if any attempt to capture this problem necessarily understates the problem.

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[34] *Kastl v. Maricopa County Community College Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636 *6 (D. Ariz. Aug. 22, 2006).

[35] *Kastl v. Maricopa County Community College Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women. [citing *Smith v. Salem*]. Thus, Kastl states a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in MCCCD's actions against her.").

Again, we strongly urge you to support of ENDA and would be happy to answer any questions you may have or provide any other assistance you may request.

Respectfully yours,

Jon W. Davidson

Jon W. Davidson
Legal Director

APPENDIX

Examples of public sector discrimination based on sexual orientation or gender identity and expression

Caller	Employer	State	Year
Caller A 2009	municipality	NY	2009

Adverse employment action; demotion: Caller A is a long-time seasonal employee for a local board of education. After disclosing to the director that she and her lesbian partner were going to move in together, her director replied negatively, and the contract she had had renewed for ten years was not renewed again. Her director called her and instead offered her a job that paid $9 an hour instead of her usual $18 an hour, and employed her for only 3 hours a day instead of the full time she previously worked.

Caller B	municipality	VA	2009

Harassment; discrimination in terms and conditions of employment: Caller B is not a gay man but he is perceived as such by his coworkers and was subjected to relentless harassment. His supervisor talked incessantly about having anal sex with Caller B and would tell caller sexually-charged stories about the supervisor's time in jail. Caller B also has been forced by this supervisor to perform far more demanding work than his colleagues, despite his being physically smaller than they are.

Caller C	county school district	MO	2008

Non-renewal of contract: Gym teacher in a public school did not have her contract renewed and believes this was due to her sexual orientation. She overheard one of the school board members say that, had he known Caller C was a "dyke," he would never have hired her in the first place.

Caller D	municipal fire department	CA	2008

Failure to promote; harassment: Deputy fire marshal passed test for the position of battalion chief but was not promoted. He subsequently learned that the fire chief told another employee that he believed Caller D was not promotable because he is gay. After

Caller D filed an internal complaint, the work environment became progressively more hostile.

Caller E	municipal police department	OK	2008

Harassment; discrimination in terms and conditions of employment: Police officer transitioned on the job from male to female. She thereafter experienced severe harassment based on her gender identity. After her transition, the police department also insisted that she undergo psychological evaluations and transferred her to an unfavorable position.

Caller F	public high school	IL	2008

Harassment: Teacher was repeatedly harassed by students, who, among other things, wrote on the tables in his classroom that "[Caller F] is a fag" and included similar derogatory phrases in textbooks in his class. Caller F made complaints to the administration about this harassment but received no response. Caller F is perceived to be gay but in fact he is a married heterosexual man.

Caller G	municipal fire department	IL	2008

Harassment: Fire department paramedic experienced harassment based on his sexual orientation. Coworkers made comments such as "I wish all fags would die of AIDS." The fire chief said to Caller G: "I want to give you some advice. You need to tone it down a bit." Caller G asked if he were being too loud, or if the chief meant he should "gay it down." The chief responded, "I can't say that, but I'm going to tell you to tone it down." The chief added that "any other chief would find you unfit for duty" and told Caller G to "change the way you are." In addition, Caller G's bedding was removed from the firehouse sleeping quarters, and his car window was the only one that someone broke in the department's secure parking lot. The harassment became so bad that Caller G would sleep in the ambulance during his down time to avoid his coworkers. Caller G believes that he is being set up for termination through an investigation of a false positive drug test that would not be handled in the manner it is were he not gay.

Caller H	municipal code enforcement office	TX	2007

Harassment; failure to promote: After a code compliance inspector designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that Caller H is a lesbian. Coworkers made repeated derogatory comments

about "faggots" and one female religious employee told Caller H that, because she did not have a boyfriend, she "wasn't whole ... that's your problem." A picture of Janet Jackson's breast was placed on Caller H's computer. Complaints to her manager were rejected. When a new supervisor was hired, he would ignore Caller H and avoid eye contact with her at meetings. He also required caller H to train three replacements for a management position that she was qualified for and that she had been told she would receive prior to his arrival.

Caller I	municipal police department	SC	2007

Failure to hire: Caller I had quit the state police academy in another state to move to South Carolina. She received a good reference from her former employer and, according to Caller I, she also has a "good background and a degree." Caller I applied to a police department in South Carolina and, during a routine polygraph test, she was asked if she is a lesbian. She responded truthfully that the answer was "yes." She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.

Caller J	municipal fire department	OK	2007

Harassment: Caller J has been an electronic technician who repairs city traffic lights and works out of a city firehouse. After another employee learned that Caller J is gay, Caller J began to experience mounting harassment from coworkers, including being called a "cocksucker," being whistled at, being told that "Queers are just shit; people like you float," and being lectured that homosexuality is "against the Bible" and that gay people are "an abomination to god." When a new employee complained about having to clean the showers at the firehouse, Caller J commented that they were so filthy that he wouldn't take a shower with his male coworkers. The new employee replied that, according to what he had heard from others, he had thought that "you'd like that." Most serious is that a coworker repeatedly screamed at Caller J, physically intimidated him, and twice threatened to kill him. When Caller J complained, his shift was changed against his wishes so that he would not work the same time as that coworker. The department administrator has refused to give Caller J a copy of the employee policies on sexual harassment and nondiscrimination.

Caller K	county sheriff department	IL	2007

Harassment; failure to promote: Caller K is a corrections officer. A fellow officer repeatedly referred to Caller K as a "motherfuckin' faggot" in front of other officers and inmates. The officer who did this was not suspended, even though two employees who

had used the "N-word" around the same time had been immediately terminated. After Caller K commenced a union grievance, shift commanders told Caller K to "leave it alone" and warned him that he was "playing with fire." Thereafter, even though Caller K was qualified for a promotion, the position was awarded to a heterosexual candidate from "off the street" with much less experience than Caller K. Caller K eventually resigned over his treatment.

Caller L	state university	CO	2007

Harassment; discrimination in terms and conditions of employment: Professor at state university for more than two decades, who has long been open about his being gay, began to experience problems when the former provost of the university retired. The dean thereafter began making derogatory comments about Caller L in meetings, including referring to him as a girl. Caller L was then passed over as chair of his department in favor of a heterosexual woman with much less tenure, even though Caller L previously had been the chair of a related department. Caller L has also been stripped of graduate courses that he has taught for years and has been given only undergraduate courses to teach, based on a false claim that he did not turn his lesson plans on time.

Caller M	municipality	AL	2007

Harassment; discrimination in terms and conditions of employment: City communication technician began to experience workplace harassment based on her gender identity when a new supervisor was hired. In addition, Caller M's new supervisor assigned her to work with coworkers who did not want to work with her because she is transgender and gave her unfavorable work assignments, which entailed more difficult tasks than those required of other employees.