

**AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION**

**YOUNG LAWYERS DIVISION COMMITTEE
ON SEXUAL ORIENTATION AND GENDER IDENTITY**

**RECOMMENDATION AND REPORT TO THE
ASSEMBLY OF THE YOUNG LAWYERS DIVISION**

RECOMMENDATION

RESOLVED, that the American Bar Association urges Congress to enact laws prohibiting discrimination and harassment in employment on the basis of sexual orientation or gender identity, and providing remedies therefore.

REPORT

“It doesn’t make much sense, but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are – lesbian, gay, bisexual, transgender. And that’s wrong. We’re here to do what we can to make it right – to bend that arc of justice just a little bit in a better direction.

.....

[I]n too many states and in too many workplaces, simply being gay, lesbian, bisexual or transgender can still be a fireable offense. There are people here today who’ve lost their jobs for that reason. This is not speculative, this is not a matter of political correctness – people lose their jobs as a consequence of this. Their livelihoods are threatened, their families are threatened. In fact, more states now allow same-sex marriage than prohibit discrimination against LGBT workers. So I firmly believe that it’s time to address this injustice for every American.

.....

For more than two centuries, we have strived, often at great cost, to form “a more perfect union” – to make sure that “we, the people” applies to all the people. Many of us are only here because others fought to secure rights and opportunities for us. And we’ve got a responsibility to do the same for future generations. We’ve got an obligation to make sure that the country we love remains a place where no matter who you are, or what you look like, or where you come from, or how you started out, or what your last name is, or who you love – no matter what, you can make it in this country.

That’s the story of America. That’s the story of this movement.

- President Barack Obama.¹

1. Introduction.

2015 has proven to be a monumental year for equality in the United States of America. Despite the progress that has been accomplished, there remains much to be done to ensure full equality and inclusion of all Americans. Among these outstanding issues is the need to enact and implement meaningful workplace discrimination protections for Gay, Lesbian, Bisexual, and Transgendered (“LGBT”) workers. “Sexual orientation-based and gender

¹ Barack Obama, President of the United States of America, Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination>.

identity discrimination is a common occurrence in many workplaces across the country.”² Yet, there is no federal law uniformly, expressly, and meaningfully preventing employment discrimination on the basis of sexual orientation³ or gender identity⁴ in the private industry.⁵ Most federal courts that have considered the issue have held that existing anti-discrimination laws do not provide protection against discrimination based on sexual orientation or gender identity.⁶ A number of states have enacted laws that seek to impose such protection; however, many of these efforts are proven to be under-inclusive or ineffective to fully address or protect against instances of discrimination. The prevalence of such discrimination—and the devastating ramifications of the same—demonstrate a disturbing gap in American public policy and demand uniform and meaningful federal non-discrimination protections.

2. The Practical and Legal Landscape of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity.

2.1. Ongoing Prevalence of Workplace Discrimination on the Basis of Sexual Orientation and Gender Identity.

The United States government has acknowledged that “there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well

² M.V. LEE BADGETT, BRAD SEARS, HOLNING LAU, & DEBORAH HO, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 561 (2009).

³ As used in this report, “sexual orientation” describes a person’s emotional and physical attraction based on gender, such a lesbian, gay, bisexual, and heterosexual. The term “gay” refers to individuals who are physically and emotionally attracted to someone of the same sex. “Lesbian” is the word most often used by women who are physically and emotionally attracted to women. “Bisexual” refers to individuals who are both emotionally and physically attracted to both men and women. “Transgender” is a term used to describe people whose gender identity or gender expression differ from the sex they were assigned at birth. This term is often used as an umbrella term for a wide-range of non-conforming gender identities and behaviors, including but not limited to, transsexual men and women, cross-dresses, and gender queer people.

⁴ Significantly, the terms “sex” and “gender” have distinct meanings and are not interchangeable. See CANDACE WEST & DON H. ZIMMERMAN, *Doing Gender*, 1 GENDER & SOCIETY 125 (1987). This distinction is significant in the context of this report. For purposes of this report, “gender identity” refers to a person’s understanding, definition, or express of their own gender regardless of biological sex. Sometimes this internal self-identification does not correspond with the person’s gender assignment. Related, “gender expressions” refers to a person’s external expression of gender identity, often through “masculine” or “feminine” behavior, names, pronouns, and clothing.

⁵ On July 21, 2014, President Barack Obama signed Exec. Order No. 13672, which prohibits federal contractors from discriminating on the basis of sexual orientation or gender identity. Exec. Order No. 13672, 79 Fed. Reg. 42, 971 (Jul. 14, 2014).

⁶ ALEX B. LONG, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, I. ILL. L. REV. 2015-16 (forthcoming), U. Tenn. L. Studies Research Paper No. 263, at 9 (2015), available at <http://ssrn.com/abstract=2588594>; NEEL RANE, Note, *Twenty Years of Shareholder Proposals After Cracker Barrel: An Effective Tool for Implementing LGBT Employment Protections*, 162 U. PA. L. REV. 929, 933 (2014).

as private entities.”⁷ To be certain, LGBT employees continue to face uncertainty as discrimination and harassment on the basis of sexual orientation and gender identity remains prevalent in the workplace. By some counts, eight million people (or four percent of the American workforce) identify as gay, lesbian, bisexual, or transgender.⁸ At the most extreme level, employees can be legally terminated merely because of their sexual orientation in as many as twenty-nine states.⁹ Likewise, transgender employees in thirty-three must go to work every day aware that they have no legal protection against being terminated simply because of their gender identity.¹⁰

“Research conducted over the past four decades yields compelling evidence that employment discrimination against LGBT people exists and that it has a range of negative effects on LGBT employees.”¹¹ Studies conducted in the 1980s and 1990s revealed that 16% to 68% of self-identifying lesbian, gay, and transgender respondents “reported experiencing employment discrimination at some point in their lives.”¹² Since the mid-1990s, fifteen studies found that 15% to 43% of lesbian, gay, and transgender respondents experienced discrimination in the workplace. Forms of discrimination varied, ranging from being fired or denied employment, being overlooked for promotions, receiving unequal pay or benefits, receiving negative performance evaluations, and being victimized by vandalism or verbal or physical abuse.

Transgendered individuals are particularly susceptible to workplace discrimination and disparate treatment. Studies conducted between 1996 and 2006 revealed that 20% to 57% had been subject to mistreatment, including termination, being refused employment, harassment, and denial of promotion.¹³ “As recently as 2011, **90 percent** of respondents to the largest survey of transgender people to date reported having experienced harassment or

⁷ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker of U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223/html>.

⁸ See JENNIFER C. PIZER, BRAD SEARS, CHRISTY MALLORY & NAN D. HUNTER, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715, 719 (2012).

⁹ The Human Rights Campaign maintains a list detailing anti-discrimination laws prohibiting discrimination on the basis of sexual orientation or gender identity enacted by individual states at http://www.hrc.org/state_maps. These states have enacted various anti-discrimination measures. Some states only protect public sector employees, while others have enacted laws with broader scope. Others prohibit discrimination based on sexual orientation, and do not prohibit against discrimination based on gender identity. Still other states have interpreted pre-existing laws to include against discrimination on the basis of sexual orientation or gender identity.

¹⁰ See *id.*

¹¹ Pizer et al., *supra* note 8, at 720-21.

¹² Badgett et al., *supra* note 2, 559.

¹³ *Id.*

mistreatment at work, or had taken actions to avoid it, and 47 percent reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.”¹⁴

Evidence demonstrates that such workplace discrimination and harassment can have a negative impact on the wages and mental and physical health of LGBT people.¹⁵ A significant body of empirical data suggests that the fear of discrimination, in and of itself, is associated to poor workplace performance and negative health outcomes.¹⁶ A 1999 study indicated that LGBT employees who had experienced discrimination suffered from higher rates of psychological distress and other health-related problems.¹⁷ Likewise, they reported lower job satisfaction and were more likely to be absent from work, or quit altogether.¹⁸

2.2. Moving Past Statistics—Real Examples of Discrimination.

A simple google search demonstrates the need for uniform anti-discrimination protections:

Brett Bigham, Oregon’s 2014 Teach of the Year and the Oregon Education Association’s 2015 Teacher of the Year, was terminated after complaints that he had publically disclosed that he was gay.¹⁹

Brian Stone, a former manager at a Red Robin restaurant in West Nyack, New York, was terminated because of his sexual orientation.²⁰ Mr. Stone, who had previously worked at Red Robin locations in Virginia, Maryland, and New Jersey, was transferred to the West Nyack location in April 2013. Mr. Stone’s regional manager began harassing him, joked with other employees about Stone attending LGBT events, and hired a close friend to replace Stone. The manager placed Mr. Stone in on a performance improvement plan, which Mr. Stone claims was in retaliation to his objections to the workplace harassment. The regional manager admitted that the restaurant improved under Mr. Stone’s management, but he nevertheless kept Mr. Stone on the performance improvement plan. Finally, the regional manager fired Mr.

¹⁴ Pizer, *supra* note 8, at 721 (emphasis added).

¹⁵ VICKIE M. MAYS & SUSAN D. COCHRAN, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001); ILAN H. MEYER, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2003).

¹⁶ See Pizer, *supra* note 8, at 735.

¹⁷ CRAIG R. WALDO, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 COUNSELING PSYCHOL. 218, 229 (1999).

¹⁸ *Id.*

¹⁹ Shasta Kearns Moore, *Oregon’s Teach of the Year Brett Bingham Fired*, PORTLAND TRIBUNE (Apr. 3, 2015), <http://portlandtribune.com/pt/9-news/255876-126292-breaking-oregons-teacher-of-the-year-brett-bingham-fired>.

²⁰ Jorge Fitz-Gibbon, *Red Robin Manager Says He Was Fired For Being Gay*, USA TODAY (Mar. 5, 2015), <http://www.usatoday.com/story/money/business/2015/03/05/red-robin-manager-says-fired-gay/24466277/>.

Stone after Mr. Stone again complained to the human resources department about the ongoing harassment.

The first female police chief of Latta, South Carolina, Crystal Moore, was fired in April of 2014.²¹ The town's mayor claimed the termination was because of "sheer insubordination,"²² but the mayor's recorded telephone calls revealed him saying things such as:

I would much rather have . . . and I will say this to anybody's face . . . somebody who drank and drank too much taking care of my child than I had somebody whose lifestyle is questionable around children.

. . . .

Because that ain't the damn way it's supposed to be. You know . . . you got people out there - - I'm telling you buddy - - I don't agree with some of the lifestyles that I see portrayed and I don't say anything because that is the way they want to live, but I am not going to let me child be around.²³

Chief Moore was rehired after the town residents rallied against the mayor.²⁴

A soccer coach at Belmont University, Lisa Howe, was forced to resign after she shared with her students that she and her partner of eight years had made the decision to have a baby.²⁵ Ms. Howe had lead the team to two conference championships and the University's athletic director confirmed that the "baby 'was going to be a problem' and would conflict with the university's 'don't ask, don't tell' approach."²⁶

Alexia Daskalakis, who had worked for a popular retail store in Brooklyn, New York, sued after experiencing severe discrimination, harassment, and eventual termination from her position because she was a transgender woman.²⁷ Daskalakis's Complaint recounts numerous instances of discrimination, including her supervisors calling her "disgusting" and a "hot mess."

²¹ Tara Fowler, *Fired Lesbian Police Chief Re-Hired After South Carolina Town Rallies Against Mayor*, PEOPLE (July 17, 2014), <http://www.people.com/article/fired-lesbian-police-chief-crystal-moore-reinstated-after-south-carolina-town-rallies-against-mayor>.

²² *Id.*

²³ *Residents Question Why Latta Mayor Fired The Town's First Female Police Chief*, WBTW NEWS (Apr. 16, 2014), <http://www.wbtw.com/story/25266895/folks-question?autoStart=true&topVideoCatNo=default&clipId=10060624>.

²⁴ See Fowler, *supra* note 21.

²⁵ Campbell Robertson, *Lesbian Coach's Exit from Belmont U. Has Nashville Talking*, N.Y. TIMES (Dec. 17, 2010), http://www.nytimes.com/2010/12/18/education/18belmont.html?_r=0.

²⁶ *Id.*

²⁷ Kristin Gallagher, *Forever 21 Transgender Case Marks Legal Flashpoint*, WOMEN'S NEWS (May 18, 2015), <http://womensenews.org/story/in-the-courts/150515/forever-21-transgender-case-marks-legal-flashpoint>.

This is just a small sampling of the people who have faced discrimination and harassment in the workplace, based not on their merits or ability to perform their jobs, but rather on the basis of sexual orientation or gender identity. This list fails to capture the ongoing struggles and fears of LGBT individuals who continue to report to work every day with the understanding that any given day could be their last at work, for reasons entirely distinct from their performance.²⁸

3. Non-Discrimination Laws in the United States.

3.1. Generally.

“Anti-discrimination laws are part of public policy, aimed toward achieving social equality.”²⁹ Throughout relatively-recent American history, Congress and courts have determined classification based on certain identity characteristics are impermissible.³⁰ Three federal statutes are often regarded as the predominant anti-discrimination policies in American law: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (“Title VII”), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-122213.³¹ Each law seeks to extend protections to a defined population.

The Equal Employment Opportunity Commission (the “EEOC”) is the federal agency responsible for enforcing most federal non-discrimination laws.³² Employees who believe they have been discriminated against because of race, color, national origin, religion, sex, pregnancy, age, disability, or another recognized basis are required to first exhaust

²⁸ The list goes on. A quick google search resulted in numerous instances of people being subject to employment discrimination based on sexual orientation or gender identity. See, e.g., Daniel Wiessner, *Zara Ex-Lawyer Sues Claiming He Was Fired For Being Gay, Jewish*, REUTERS (Jun. 3, 2015), <http://news.yahoo.com/lawsuit-says-zara-lawyer-harassed-fired-being-gay-170308253--finance.html>; Medic: *I Was Fired For Being Gay*, EMS1.COM (Jan. 29, 2015), <http://www.ems1.com/colorado/articles/2094305-Medic-I-was-fired-for-being-gay/>; Miles Bryan, *For People Fired For Being Gay, Old Court Case Becomes A New Tool*, NPR (Nov. 10, 2014), <http://www.npr.org/2014/11/10/363049315/for-people-fired-for-being-gay-old-court-case-becomes-a-new-tool>; Sunnive Brydum, *Meet the People Fired for Being LGBT in 2013*, ADVOCATE (Dec. 12, 2013), <http://www.advocate.com/year-review/2013/12/18/meet-people-fired-being-lgbt-2013?page=full>.

²⁹ BRADLEY A. AREHEART, *The Anticlassification Turn in Employment Discrimination Law*, 63 AL. L. REV. 955, 960 (2012).

³⁰ *Id.* at 963.

³¹ This list falls short from listing the various antidiscrimination laws in the United States. These statutes are not cited to provide an exhaustive survey of employment discrimination law, but are merely referenced as examples of the sort of laws already in place which provide protections that could easily be extended to expressly protect against discrimination or harassment on the basis of sexual orientation and gender identity.

³² MARGO SCHLANDER & PAULINE KIM, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH U. L. REV. 1519, 1538 (2014).

administrative remedies by filing a charge with the EEOC.³³ The EEOC, which receives tens of thousands of claims each year, will in turn investigate the allegations to determine whether discrimination has occurred. The EEOC will frequently seek to mediate between the employee and the employer to seek a mutually-satisfactory resolution or settlement. If no agreement can be reached, the EEOC must determine whether to file a lawsuit on behalf of the employee. After 180 days have passed from the time the employee files a complaint with the EEOC, the EEOC must provide the employee with a “Right to Sue” letter, which authorizes the employee him or herself to seek redress against the employer in federal district court. If the EEOC files a lawsuit on behalf of the employee, the employee may retrain legal counsel and intervene in the matter.

Neither sexual orientation nor gender identity is directly referenced in any federal non-discrimination law. “[C]ourts in the 1970s and 1980s determined that ‘sex’ took its most traditional meaning, defining ‘sex’ discrimination as a male being discriminated against because he is a male, or a female being discriminated against because she is a female.”³⁴

In certain instances, however, some courts have relied on Supreme Court precedent to hold that discrimination on the basis of sexual orientation or gender identity to be a form of sex discrimination. In 1989, the Supreme Court of the United States decided the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Ann Hopkins was a senior manager who had worked for Price Waterhouse—a nationwide professional accounting partnership—for five years when she was proposed for partnership in 1982.³⁵ Of the 88 persons proposed for partnership that year, Ms. Hopkins was the only woman.³⁶ The trial court found that “Hopkins had played a key role in Price Waterhouse’s successful effort to win a multi-million dollar contract with the Department of State” and that “none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.”³⁷ Yet, Ms. Hopkins was denied partnership.

The evidence presented at trial showed that “some of the partners reacted negatively to Hopkin’s personality because she was a woman.”³⁸ Ms. Hopkins was described as “macho” and it was suggested that she was overcompensating for being a woman. Some partners advised Ms. Hopkin to take a course at charm school, and others objected to Ms. Hopkin’s use of profanity—a regular occurrence by men in their offices—“because it’s a lady using foul language.” Ms. Hopkins was advised that, to have a better chance of becoming partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up,

³³ *Id.* at 1538, n. 86.

³⁴ KATIE KOCH & RICHARD BALES, *Transgender Employment Discrimination*, 17 UCLA WOMEN’S L. J. 243, 246-47 (2008).

³⁵ 490 U.S. at 232-33.

³⁶ *Id.*

³⁷ *Id.* at 233-34.

³⁸ *Id.* at 235.

have her hair styled, and wear jewelry.” Her nomination was continued to the next year, but the partners refused to re-nominate her.

Ms. Hopkins quit her job and filed suit, alleging that Price Waterhouse had engaged in impermissible gender discrimination. The lower courts held in her favor, and the case found itself before the Supreme Court of the United States. In delivering its opinion, the Supreme Court showed a broad understanding of sex based discrimination. The Court construed Title VII “to mean that gender must be irrelevant to employment decisions.”³⁹ Notably, the Court announced a prohibition against gender stereotyping:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they do not. Title VII lifts women out of this bind.⁴⁰

Alternatively stated, sex discrimination does not depend merely on an employer discriminating based on whether an employee is male or female. Discrimination also occurs where an employer discriminates on whether a male or female comports with gender stereotypes associated with being male or female.

Price Waterhouse has proved to be a significant ruling in the struggle for LGBT equality. For example, in *Nichols v. Azteca*,⁴¹ a male employee endured an “unrelenting barrage” of verbal abuse, including being referred to with feminine pronouns, name-calling, vulgarities, and mockery. The Ninth Circuit held that this treatment was based on the notion that a man should be virile rather than effeminate. Relying on *Price Waterhouse*, the Ninth Circuit concluded that discrimination based upon perceived male effeminacy is actionable under Title VII. The Sixth Circuit has likewise held that:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.⁴²

³⁹ *Id.* at 240.

⁴⁰ *Id.* at 251.

⁴¹ 256 F.3d 864 (9th Cir. 2002).

⁴² *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004).

The Eleventh Circuit has likewise provided another example of this broad regarding of Title VII, permitting a transgender employee to pursue a sex discrimination claim.⁴³ Perhaps one of the most far-reaching opinion comes from the United States District Court for the District of Columbia, *Schroer v. Billington*, in which the Court held that discrimination on the basis of gender identity is sex discrimination *per se*.⁴⁴ In 2014, the same court permitted a case to proceed when a gay man alleged he had been discriminated against based on sexual orientation.⁴⁵ Although *Schroer* distinguished between sex stereotype discrimination (a claim covered by Title VII) and discrimination on the mere fact that the employee is transgender (which may not be covered by Title VII), the United States District Court for the District of Maryland has held that a plaintiff's "claim that she was discrimination against 'because of her obvious transgender status' is a cognizable claim of sex discrimination under Title VII. To hold otherwise would be to 'deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.'"⁴⁶

The EEOC has likewise interpreted the Title VII similarly, accepting claims of discrimination based on sexual orientation or gender identity as sex discrimination claims when the complaints can be framed as sex stereotyping.⁴⁷ In *Macy v. Dep't of Justice*,⁴⁸ for example, the EEOC determined that

a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.⁴⁹

Since *Macy*, the EEOC has routinely accepted claims against employees on the basis of gender identity.⁵⁰ Most recently, the EEOC concluded that "[d]iscrimination on the basis of

⁴³ See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁴⁴ See *Schroer v. Billington*, 577 F. Supp. 2d 293 (D. D.C. 2008).

⁴⁵ See *Terveer v. Billington*, 34 F. Supp. 3d 100 (D. D.C. 2014).

⁴⁶ *Finkle v. Howard Cnty.*, Civil No. JKB-13-3236 (D. Md. Apr. 10, 2014), available at https://scholar.google.com/scholar_case?case=15174602505787488496&hl=en&as_sdt=6.43, (quoting *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 n. 2 (10th Cir. 2007)).

⁴⁷ Professor Brian Soucek comments that "[c]ompared to sexual orientation cases, gender identity cases have had far more success under stereotyping theories." See BRIAN SOUCEK, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 726 (2014).

⁴⁸ EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

⁴⁹ *Id.* at *10.

⁵⁰ See, e.g., *Lusardi v. Dep't of the Army*, EEOC Appeal No. 1020133395, 2015 WL 1507756 (April 1, 2015) (Holding that restrictions on transgender female's ability to use a common female restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions combined with hostile

sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.”⁵¹ Of course, these decisions are binding only on the internal operations of the EEOC. Courts are not bound by the EEOC’s interpretation of the laws, nor do EEOC ruling fully redress the issues involved in the cases.

Yet, a number courts have not been willing to apply *Hopkins* so expansively. In *Dawson v. Bumble and Bumble*, the Second Circuit refused to permit a lesbian who had alleged that she had not been promoted because of her masculine appearance to proceed under Title VII. The Second Circuit explained:

Realizing that discrimination based upon sexual orientation is not actionable under Title VII, Dawson avails herself of the ‘gender stereotyping’ theory of Title VII liability according to which individuals who fail or refuse to comply with socially accepted gender roles are members of a protected class. As will be considered in more detail below, this theory rests upon the premise that in enacting Title VII ‘Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ [citing *Price Waterhouse*]. As a result, ‘sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination. That is, individual employees who face adverse employment actions as a result of their employer’s animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII.

When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’ Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’

Certainly, this trend is remarkable and significant for LGBT citizens. But it falls short of offering the necessary protections. First, the split in decisions among federal courts demonstrates that the scope of Title VII is anything but certain. LGBT employees continue to face uncertainty, danger, and insecurity in the workplace. Second, although discrimination based on sexual orientation or gender identity has been found to be cognizable as sex stereotyping claims to the extent the employee fails or refuses to comport with gender norms, Title VII has rarely—if ever—been interpreted to expressly cover discrimination on the basis

remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex); *Complainant v. Dep’t of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014) (Holding that a sex discrimination allegation involving the failure to revise agency records pursuant to changes in gender identity state a valid Title VII claim); *Jameson v. U.S. Postal Service*, EEOC Appeal No. 0120130992, 2013 WL 2368729 (May 21, 2013) (Holding that intention misuse of the employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment).

⁵¹ *Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (Jul. 16, 2015).

of sexual orientation or gender identity to be cognizable per se. Rather, LGBT employees remain largely unprotected against discrimination merely because they are gay, lesbian, bisexual, or transgender. As one scholar describes, “[t]he challenge facing the lower courts since *Price Waterhouse* is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously *not* protecting against the stereotype that people should be attracted only to those of the opposite gender.”⁵² This Resolution presents the opportunity to close this gap and enact these necessary protections.

3.2. Attempts to Protect Against Discrimination and Harassment Based on Sexual Orientation and Gender Identity.

3.2.1. Federal Legislation.

There is currently no federal law that consistently protects LGBT individuals from employment discrimination, but not because of a lack of effort. Numerous attempts have been made to persuade Congress to enact federal non-discrimination laws prohibiting discrimination on the basis of sexual orientation and gender identity. The first effort was the “Equality Act” on May 14, 1974, the fifth anniversary of the events at Stonewall.⁵³ The legislation, introduced by Reps. Ed Koch and Bella Abzug, added sexual orientation to the protected classes specified in the Civil Rights Act of 1964.⁵⁴ Such an addition would have prohibited discrimination in employment, as well as access to public accommodations and facilities.⁵⁵ The bill, however, failed.

The Employment Non-Discrimination Act (“ENDA”) is legislation currently proposed in the United States Congress that would prohibit discrimination in hiring and employment on the basis of sexual orientation and gender identity.⁵⁶ The objective of this legislation is to “address the history and persistent, widespread pattern of discrimination, including unconstitutional discrimination, on the basis of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers.”⁵⁷ The current legislation grants the needed protections; however, it exempts small businesses (businesses with 15 or less employees), religious organizations, educational institutions, and the military.⁵⁸

⁵² Soucek, *supra* note 47, at 726.

⁵³ Equality Act, H.R. 14752, 93rd Cong. (1974).

⁵⁴ H.R. 14752 - Equality Act, available at <https://www.congress.gov/bill/93rd-congress/house-bill/14752>.

⁵⁵ *Id.*

⁵⁶ Employment Non-Discrimination Act, S. 815, 113th Cong. (2013).

⁵⁷ JODY FEDER AND CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) SUMMARY (2013).

⁵⁸ *Id.* at 1.

Several courts have taken advantage of Congress's silence and refusal to enact such protects to conclude that Congress does not intend for such protections to exist.⁵⁹

Most recently, a revised form of ENDA inclusive of gender identity was introduced in the U.S. Senate and passed with bipartisan support by a vote of 64-32 on November 7, 2013⁶⁰. The bill has yet to be introduced in the House; however, President Barack Obama has publically supported the bill's passage.⁶¹

ENDA, if enacted, would make it an unlawful employment practice for an employer to discriminate against an individual "because of such individual's actual or perceived sexual orientation or gender identity."⁶² This would greatly improve the protections afforded to an LGBT individual in the workplace. Indeed, "all forms of employment and pre-employment discrimination would be forbidden, including discrimination in hiring, discharge, promotion, layoff and recall, compensation and fringe benefits, classification, training, apprenticeship, referral, union membership, and other terms, conditions, or privileges of employment."⁶³ Most of the protections, largely borrowed from Title VII, also include protections from retaliation against employees who complain of discriminatory conduct.⁶⁴

Although ENDA provides the clearest resolution to the problem of discrimination against LGBT employees, it is not without its criticisms. Several gay rights affinity groups withdrew their support of ENDA following the U.S. Supreme Court's decision for *Burwell v. Hobby Lobby Stores, Inc.*,⁶⁵ in which the Court held that requiring family-owned businesses to provide their female employees with no-cost access to contraception violates the Religious Freedom Restoration Act.⁶⁶ In a joint statement, the American Civil Liberties Union, Lambda Legal and the National Center for Lesbian Rights stated that the bill's religious exemptions clause is "written so broadly that 'ENDA's discriminatory provision, unprecedented in federal

⁵⁹ See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); see also Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, (2014); Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 569 (2007).

⁶⁰ S.815 – Employment Non-Discrimination Act of 2013, available at <https://www.congress.gov/bill/113th-congress/senate-bill/815>.

⁶¹ Valerie Jarrett, *President Obama Speaks Out in Support of ENDA*, THE WHITE HOUSE BLOG (Nov. 04, 2013, 12:00 PM), <https://www.whitehouse.gov/blog/2013/11/04/president-obama-speaks-out-support-enda>.

⁶² Employment Non-Discrimination Act, *supra* note 1, §4.

⁶³ Feder, *supra* note 56, at 2.

⁶⁴ *Id.*

⁶⁵ Ed O'Keefe, *Gay rights groups withdraw support of ENDA after Hobby Lobby decision*, The Washington Post (Jul. 8, 2014, 12:04 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision>.

⁶⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 1 (2014), available at www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

laws prohibiting employment discrimination, could provide religiously affiliated organizations, including hospitals, nursing homes and universities a blank check to engage in workplace discrimination against LGBT people.⁶⁷ Others are concerned that the enactment of ENDA could be interpreted as a repudiation of the sex stereotyping theories of discrimination that have developed in the wake of *Price Waterhouse*.⁶⁸ Professor Jennifer Hendricks also advocates that these protections come in the form of an amended to Title VII, rather than a separate statute with a separate remedial structure, so as to avoid risk of face finders to isolate the varying components of discrimination claims.⁶⁹ Professor Angela Clements expresses concerns that ENDA as presently written, unlike Title VII, excludes disparate impact claims.⁷⁰

The point of this resolution is not necessarily to urge Congress to pass ENDA as currently drafted. Rather, in light of the gaps in law and policy, the inconsistent court holdings, states acting on their own to protect their LGBT constituents (discussed in the next section), the need for an express Congressional mandate regarding how to handle LGBT employment discrimination is apparent. To that end, Obama issued an executive order⁷¹ banning discrimination against gay, lesbian, and transgender employees of federal contractors, which did not include a broad religious exemption. This was the last significant step taken to provide protections to LGBT individuals in the workplace. Certainly, substantial achievement has been made, but there remains much to be done.

3.2.2. State, Local, and Corporate Protections.

In 1982, Wisconsin became the first state in the country to ban employment discrimination based on sexual orientation.⁷² Since then, twenty-one states, as well as the District of Columbia, have passed laws prohibiting employment discrimination based on sexual orientation.⁷³ Eighteen of those states, and D.C., prohibit discrimination based on gender identity.⁷⁴ Moreover, many companies have enacted non-discrimination policies inclusive of

⁶⁷ O'Keefe, *supra* note 64.

⁶⁸ Soucek, *supra* note 47, at 727.

⁶⁹ See JENNIFER S. HENDRICKS, *Instead of ENDA, A Course Correction on Title VII*, 103 NEV. U. L. REV. COLLOQUY 2009, 214 (2008) (“[Referring to lesbian plaintiffs] [I]f ENDA is passed as a stand-alone statute rather than as a gender amendment to Title VII: if straight women and gay men have fared well, the lesbian plaintiff will lose on both ENDA and Title VII counts [H]aving separate statutes with separate remedial structures will make it even more important for the factfinder to isolate the claims, parse the evidence more finely, and ignore intersectionality.”).

⁷⁰ Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales From Title VII*, 24 BERKLEY J. GENDER L. & JUST. 166, 194 (2013).

⁷¹ Exec. Order No. 13672, 79 Fed. Reg. 42,971 (Jul. 14, 2014).

⁷² See LINDA A. MOONEY, DAVID KNOX, & CAROLINA SCHACHT, UNDERSTANDING SOCIAL PROBLEMS 467 (6th ed. 2009).

⁷³ *Employment Non-Discrimination Act*, HRC.ORG, <http://www.hrc.org/resources/entry/employment-non-discrimination-act> (last visited Jun. 1, 2015).

⁷⁴ *Id.*

LGBT individuals.⁷⁵ Although this is a significant development, state laws are inconsistent in scope, definitions, and remedies. A federal, uniform law is necessary to afford full protection to LGBT individuals.

4. The American Bar Association's Role in Promoting Diversity and Inclusion.

“The American Bar Association [(the “ABA”)] is the leading association of legal professionals and one of the largest voluntary professional membership organizations in the United States.”⁷⁶ Since its founding in 1878, “the ABA has taken special responsibility for protecting the rights guaranteed by the Constitution, including the elimination of discrimination.”⁷⁷ This is fitting, considering the ABA’s mission to “serve equally our members, our profession and the public by defending liberty and defending justice as the national representative of the legal profession.”⁷⁸ Specifically, the ABA has designated the elimination of bias and enhancement of diversity as one of its goals in pursuing its mission.⁷⁹ The stated objectives of this goal are to: (1) Promote full and equal participation in the association, our profession, and the justice system by all persons; and (2) Eliminate bias in the legal profession and the justice system.⁸⁰ Further, the ABA has also identified the advancement of the rule of law to be one of its driving goals.⁸¹ One of the key objectives of this goal is to “[w]ork for just laws, including human rights, and a fair legal process.”⁸²

Despite these policy issues, workplace discrimination on the basis of sexual orientation and gender identity remains an outstanding issue in the United States, and has particular implications for the legal field. As the ABA’s Presidential Diversity Initiative has explained: “Without a diverse bench and bar, the rule of law is weakened as people see and come to distrust their exclusion from mechanisms of justice.”⁸³ In turn, diversity and inclusion has is

⁷⁵ *Id.*

⁷⁶ AMERICAN BAR ASSOCIATION, http://www.americanbar.org/about_the_aba.html (last visited June 8, 2015).

⁷⁷ Brief for the American Bar Association as Amici Curiae Supporting Respondents, *Deboer v. Snyder, Bourke v. Beshear*, Nos. 14-571 & 14-574, at 1 (2015), available at http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2013_12_307_bsac_ABA_authcheckdam.pdf (last visited July 21, 2015).

⁷⁸ ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited June 8, 2015).

⁷⁹ *Id.* Specifically, the ABA has designated this to be “Goal III.”

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ AM. BAR. ASS’N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 9 (2010.); see also ABA Policies Related to Issues of Sexual Orientation and Gender Identity, http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2014_policies_related_to_issues_of_sexual_orientation_and_gender_identity_dec_2014_authcheckdam.pdf (last visited July 21, 2015).

being increasingly seen as a fundamental value of the legal profession.⁸⁴ Yet, how can LGBT lawyers be fully and equally involved in bar service when they must constantly be concerned that they may suffer discrimination or harassment on the basis of their sexual orientation or gender identity? These lawyers are entitled to equal treatment under the law, as are all employees throughout the country. Not only is the resolution essential to the ABA's mission and goals, but it is also the right thing to do.

5. Conclusion.

Employment discrimination against LGBT employees remains a pervasive issue in the contemporary American workplace. The absence of such protections leaves the livelihood of a significant number of Americans in question. American history demonstrates an ever-expanding view of the meaning of "we the people," and basic anti-discrimination protections represents a natural and necessary evolution of our concepts of justice and equality. Certainly, no one benefits from the lingering uncertainty embedded in our legal system, and these protections are long overdue. Accordingly, the American Bar Association Young Lawyers Division should urge Congress to extend employment non-discrimination laws and policies to afford protections on the grounds of sexual orientation and gender identity.

Respectfully submitted,

John Towers Rice
YLD Liaison to the Commission on Sexual Orientation and Gender Identity
June 2015

Collin Cooper
Vice-Chair of the YLD Sexual Orientation and Gender Identity Committee
June 2015

⁸⁴ See CHRISTOPHER J. WHELAN & NETA ZIV, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHIC 153, 182 (2013).

**ABA/YLD RECOMMENDATION
GENERAL INFORMATION FORM**

Submitting Entity: ABA/YLD Committee on Sexual Orientation and Gender identity

Submitted By: John Towers Rice, YLD Liaison to the Commission on Sexual Orientation and Gender Identity

Collin Cooper, Vice Chair of the ABA/YLD Committee on Sexual Orientation and Gender Identity

1. Summary of Recommendations:

This resolution recommends that the American Bar Association urge Congress to enact laws prohibiting discrimination and harassment in employment on the basis of sexual orientation or gender identity, and providing remedies therefore.

2. Date of Approval by Submitting Entity:

Approved June 23, 2015 by Executive Committee of YLD Committee on Sexual Orientation or Gender Identity.

3. Has this or a similar recommendation been submitted to the Assembly or ABA Previously?

Not to which we are aware; however, the ABA House of Delegates has passed 2014 AM 114B, and therefore, ABA policy recognizes that lesbian, gay, bisexual and transgender (LGBT) people have a human right to be free from discrimination, threats and violence based on their LGBT statutes and condemns all laws, regulations and rules and practices that discriminate on the basis that an individual is a LGBT person. See 2014 AM 114B. The current resolution furthers existing ABA policy.

4. Are there any Division or ABA policies that are relevant to this recommendation, and if so, would they be affected by its adoption?

Yes. The ABA is devoted to diversity and inclusion throughout the legal profession. Specifically, this Recommendation falls squarely within the policies associated with the ABA's Goal III initiatives. Adoption of this recommendation will only advance the ABA's existing policies. Also, see answer to question 3.

5. Does this recommendation require immediate action at the next Assembly? If so, why?

Due to the recent legal developments with regard to LGBT rights in the United States, this is a unique opportunity for the ABA to again demonstrate its national leadership and to serve at the forefront of pursuing and securing equal rights for all Americans.

6. Status of Legislation (if applicable):

Related litigation has been presented in every recent session of Congress; however, this recommendation does not endorse any specific litigation.

7. Cost to the Association:

No direct costs.

8. Disclosure of Conflict of Interest (if applicable):

None.

9. Referrals:

None.

10. Contact Person (Prior to the Meeting):

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11. Contact Person (Who will present the report to the Executive Council and/or Assembly)

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