

From: [Nathan Triplett](#)
To: [MCRC-Comments](#)
Cc: [Levy, Daniel \(MDCR\)](#); [Arbulu, Agustin \(MDCR\)](#)
Subject: Supplemental Information & Comment from EQMI re Interpretative Statement Request
Date: Tuesday, August 15, 2017 2:21:21 PM
Attachments: [Lambda Legal Comments to PAHRC.pdf](#)
[Employment-Discrimination-Complaints-2008-2014-3.pdf](#)
[Housing-Discrimination-Complaints-2008-2014-2.pdf](#)
[Public-Accommodations-Discrimination-Complaints-2008-2014-2.pdf](#)

Michigan Civil Rights Commission
110 West Michigan Avenue, Suite 800
Lansing, MI 48913

August 15, 2017

Commissioners,

Thank you for forwarding Equality Michigan's request for an interpretative statement to the Michigan Department of Civil Rights' ("the Department") staff for review and recommendation and for opening up a public comment period on our request. As the comment period closes, we trust that the members of the Michigan Civil Rights Commission ("the Commission") will see the broad and deep public support that exists for ensuring that LGBTQ Michiganders are protected from discrimination in our state. This public support should serve to buttress the clear legal support for the requested legal interpretation. I write today to provide the Commission with additional information that I hope you will find useful in your deliberations.

This evening, I'll be driving to Jackson, Michigan to attend a fundraiser for Nikki Joly and Chris Moore. Nikki is the director of the Jackson Pride Center and he was a leading voice in the 20-year effort to pass a local nondiscrimination ordinance in Jackson. Nikki and Chris' home was burned to the ground, along with all their worldly possessions, last week in a suspected arson. Their five pets were also killed in the blaze. I share this terrible story to underscore the importance and necessity of the action that Equality Michigan is requesting. Michiganders like Nikki and Chris are counting on the Commission to act.

LGBTQ people in Michigan continue to face widespread discrimination, which the Commission itself has already concluded "exists and is significant." The lack of clarity about the meaning of sex discrimination under the Elliott-Larsen Civil Rights Act, and the legislature's protracted failure to act to explicitly protect LGBTQ people, leaves these Michiganders without a remedy for the wrongs they face. The interpretative statement we are requesting will clarify a glaring legal ambiguity and give LGBTQ people access to the legal protection they deserve and to which they are entitled.

Commission Action is Required

I understand that some Commissioners are questioning whether or not Commission action is required or if the present situation can be addressed by the Department acting alone. I want to be perfectly clear on this point: Only Commission action will suffice. A strong and unambiguous signal must be sent that discrimination complaints will be accepted and processed. Today, the Department has a practice of not accepting complaints of anti-LGBTQ discrimination. This practice is unsupported by any written departmental policy on the scope

of sex discrimination, any controlling state court precedents, or specific statutory direction. In other words, there's no reason that the Department could not have been and should not have been accepting individual complaints from LGBTQ people already. As a result, a statement from the Department would be little more than a reframing of the status quo. In order to make the obligations of those covered by the act clear and to let victim's of discrimination know that a remedy is available, more than informal Department action. We need the Commission's leadership.

Moreover, it is clear that the Commission has the legal authority to grant the request that has been made. The same cannot be said for the Department. The Michigan Constitution (Article V § 29), ELCRA (MCL 37.2601(f)), and the Administrative Code (R 37.23) clearly grant the Commission the authority to issue interpretative statements. On the other hand, none of these authorities grant the Department such authority. Additionally, I'd urge the Commission to think about the precedent Departmental action would be setting. The Commission should guard its interpretative authority jealously and not be quick to devolve any portion of it to staff.

Finally, I wish to note that Equality Michigan's request follows a clear pattern already followed by the Commission of using interpretative statements to provide clarity when confronted by statutory ambiguity. For example, the Commission adopted an interpretive statement on the subject of qualified interpreters on May 21, 2012. The course of action that EQMI is proposing is consistent with existing legal authority and the Commission's past practice. Departmental action is not.

Content of the Interpretative Statement Itself

It is our understanding that the Department will present the Commission with a proposed interpretative statement on September 18. It is imperative that the statement explicitly adopts all of the rationales for why sex discrimination encompasses discrimination based on sexual orientation and gender identity. Limiting the interpretation to, for example, the sex-stereotyping rationale alone would force the Commission to parse the distinction between sex-stereotyping claims filed by LGBTQ people and sexual orientation or gender identity claims. That distinction is illusory and serves only to confuse all parties involved.

Discrimination based on sexual orientation has been recognized as prohibited sex discrimination for at least three reasons:

1. The "Sex-Plus" Theory
2. Discrimination based on romantic involvement with someone of the same-sex.
3. The Sex-Stereotyping Theory

Discrimination based on gender identity has also been recognized as prohibited sex discrimination for at least three reasons:

1. Discrimination based on gender identity and transgender status is *per se* sex discrimination.
2. Discrimination based on gender identity or transgender status is rooted in sex stereotypes.
3. Discrimination based on gender transition is also based on sex.

Attached to this letter, you will find a copy of a memorandum provided to your counterparts

on the Pennsylvania Human Relations Commission from Lambda Legal that outlines each of these theories in detail. It also contains proposed language for an administrative rule recommend by Lambda Legal. Equality Michigan concurs that such language would be a strong starting point for the Commission's interpretative statement in Michigan. We stand ready to assist Department staff with the drafting of the statement in any way that is helpful to you.

Data on Complaints

Finally, questions have been raised about the number of complaints that result when nondiscrimination protections are provided to LGBTQ people. For your reference, I have attached several reports from the Williams Institute that summarize the experience of states that have adopted these protections.

Conclusion

Having provided this supplemental information, Equality Michigan once again respectfully requests that the Michigan Civil Rights Commission, pursuant to its authority to interpret the Elliott-Larsen Civil Rights Act, issue an interpretative statement finding that it is unlawful sex discrimination to discriminate in employment, housing, or public accommodations based on an individual's gender identity or sexual orientation.

We appreciate the opportunity to submit this request for the Commission's consideration and look forward to your September 18 meeting.

Should you have any questions or wish to discuss any of this information in greater detail, I can be reached at 517-719-6499 or ntriplett@equalitymi.org.

Sincerely,

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Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014



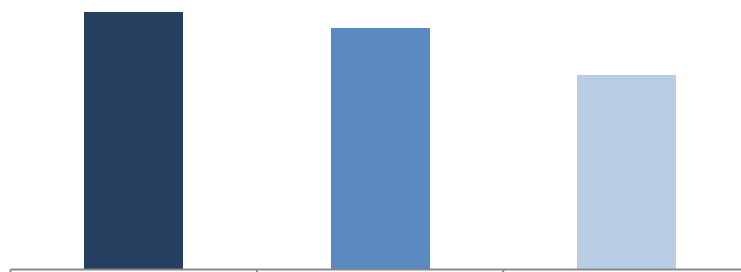
the
Williams
INSTITUTE

Christy Mallory and Brad Sears

October 2015

Executive Summary

As of October 2015, twenty-two states and the District of Columbia expressly prohibited employment discrimination on the basis of sexual orientation.¹ Of those states, nineteen and the District of Columbia also expressly prohibited discrimination on the basis of gender identity.² This report measures how frequently these laws are used by LGBT people, compared to how frequently race non-discrimination laws are used by people of color, and sex non-discrimination laws are used by women.



An aggregation of all available state-level data shows that sexual orientation and gender identity employment non-discrimination laws are used by LGBT people at a similar rate to the use of race non-discrimination laws by people of color and sex discrimination laws by women. Nationally, on average, approximately 4.6 complaints of sexual orientation and gender identity discrimination are filed for every 10,000 LGBT workers each year, compared to approximately 4.9 complaints of race discrimination filed for every 10,000 workers of color, and 3.7 complaints of sex discrimination filed for every 10,000 female workers.

The findings refute the argument that discrimination against LGBT people does not occur often enough to establish a need for protective laws. Additionally, even with similar filing rates, sexual orientation and gender identity complaints will not overwhelm government agencies because the absolute number of such complaints filed is low. The annual average number of sexual orientation and gender identity complaints for all 14 states that provided data was 1,600, compared to 9,800 complaints of race discrimination and 13,700 complaints of sex discrimination.

Introduction

In the U.S., nearly 6.5 million workers identify as LGBT. Just under half of these workers (49%) live in the twenty-two states that expressly prohibit employment discrimination based on sexual orientation, and approximately 40% live in states that expressly prohibit employment discrimination based on gender

identity. Over half (51%) of the LGBT workforce in the U.S. is not covered by state-level laws that provide express protection from employment discrimination based on sexual orientation or gender identity.

Previous studies have analyzed discrimination complaints filed with administrative agencies in those states that prohibit sexual orientation and gender identity discrimination.³ These studies have shown that when adjusted for population size, sexual orientation and gender identity laws are used by LGBT workers at similar rates as sex discrimination laws are used by female workers, and that race discrimination complaints are filed at slightly higher rates. The results of these studies, when combined with other research documenting discrimination against LGBT people, support that there is both a need for laws that prohibit discrimination on the basis of sexual orientation and gender identity, and that prohibiting these forms of discrimination will not overwhelm administrative enforcement agencies.

This report updates these prior studies by applying a similar methodology to more recent data on administrative complaints. In the present study, overall, we find that sexual orientation and gender identity employment discrimination complaints are filed by LGBT people at a similar rate to the rate of sex discrimination filings by women and race discrimination filings by people of color. The filing rate for sexual orientation and gender identity discrimination complaints is 4.6 per 10,000 LGBT workers, compared to 3.7 sex discrimination complaints per 10,000 female workers and 4.9 race discrimination complaints per 10,000 workers of color. The findings of this study are consistent with the findings of the prior studies.

Methodology

This study largely replicates the methodology used in the two prior studies. Slight changes were made to the previous methodologies because better data on the size of the LGBT population in each state has since become available.

First, we collected data on employment discrimination complaints from the administrative agencies responsible for enforcing non-discrimination laws in states that prohibited sexual orientation and gender identity discrimination by statute at the time of data collection. Specifically, we collected data on the number of employment discrimination complaints filed each year, from 2008 through 2014, based on race, sex, sexual orientation and gender identity. In many cases, state agencies made this information available in their annual reports published online. Where the data were not available online or only limited data were available, we contacted the state agencies directly and requested the information. We were able to collect data, either online or through direct contact with the agencies, from 14 of 21 states that prohibited discrimination based on sexual orientation or gender identity at the time of data collection (Appendix). For 10 states, we were able to gather complete data for all years; for the other four states we were able to gather data for at least four years. One state, Utah, was excluded from our analysis because the sexual orientation and gender identity non-discrimination law had not been in effect for a full year at the time of data collection. Additionally, we did not obtain information about the number of complaints that alleged discrimination based on more than one of the studied characteristics. That is, we do not know the number of complaints alleging, for example, discrimination

based on both sexual orientation and sex. For purpose of this analysis, complaints of discrimination based on multiple characteristics are counted as individual complaints under each characteristic.

Next, we divided the number of complaints filed each year on each basis by the number of people most likely to file these types of discrimination complaints in the state's workforce, and then multiplied that figure by 10,000 to get the rate of complaints filed per 10,000 workers. We assume that race discrimination complaints are most likely to be filed by people of color, sex discrimination complaints are most likely to be filed by women, and sexual orientation complaints are most likely to be filed by LGBT people. We used yearly data from the American Community Survey (ACS) to find the workforce population totals for women and people of color each year. For the underlying population for race discrimination complaints, we included all non-whites and all Hispanic or Latino-identified people in in the workforce. People in the armed forces were excluded from workforce totals because they are not covered by state-level non-discrimination laws.

The ACS does not collect data on sexual orientation or gender identity, so it is not possible to determine the size of the LGBT workforce directly from ACS data. In order to estimate the number of LGBT workers in each state, we applied the percentage of people in the workforce who identified as LGBT in Gallup polling data collected between 2012 and 2014 to the number of people each state's workforce from yearly ACS data (again, we excluded people in the armed forces).

We subtracted the estimated number of transgender workers from the LGBT workforce in several states where gender identity complaint data were not available, so that our underlying population for purposes of adjusting sexual orientation complaints was LGB only. First, we subtracted transgender workers from the LGBT workforce for all years in four states because three of the states do not include gender identity in their non-discrimination statutes (New Hampshire, New York, and Wisconsin) and one state did not add the protections until October 2014 (Maryland), so these four states did not collect any data on gender identity discrimination complaints during the time period of this study.⁴ Second, we subtracted transgender workers from the LGBT workforce in two other states (Connecticut and Hawaii) for the years before gender identity protections were added to their laws.⁵ Finally, we subtracted transgender workers in California for four years of data (2008-2011) because the state could not provide the number of complaints filed on the basis of gender identity for those years. We estimated the number of transgender workers in these states by applying the percentage of the U.S. population that identifies as transgender (0.3%)⁶ to the state's workforce number, excluding people in the armed forces.

This methodology was followed for each of the 14 states from which we were able to collect data on discrimination complaints, across all years of complaint data. After all annual population-adjusted complaint rates were determined for a state, we averaged the annual rates by filing basis. This provided annual population-adjusted complaint rates for sexual orientation and gender identity complaints, race discrimination complaints, and sex discrimination complaints in 14 states.

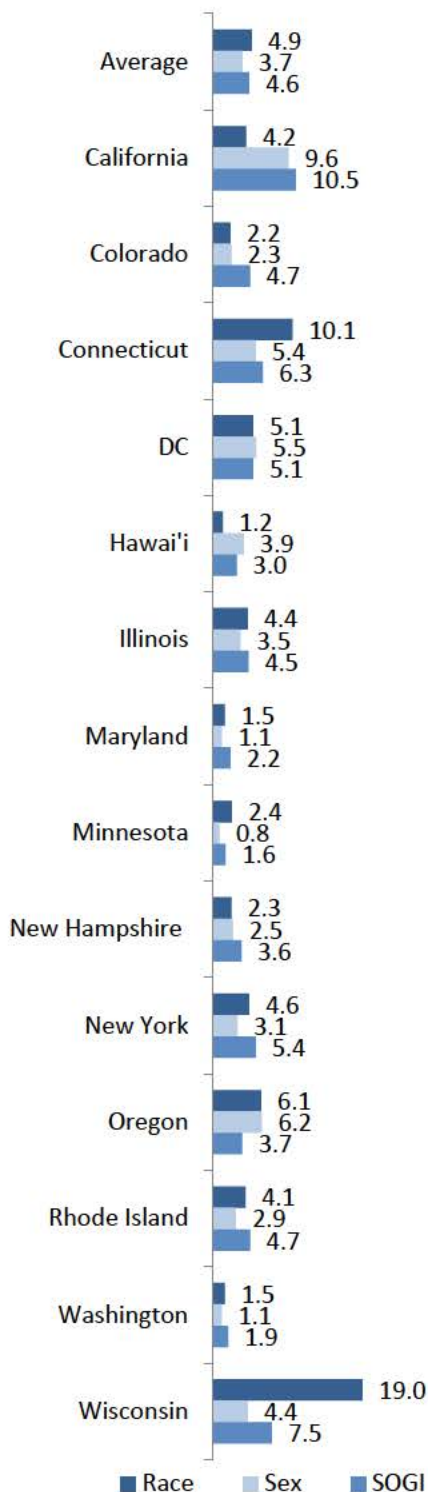
We were unable to analyze the per capita rate of gender identity complaints separately because very few states were able to provide separate data on complaints filed on the basis of sexual orientation and complaints filed on the basis of gender identity. Most states combine these filing bases in their records.

Findings

When the size of the LGBT workforce is incorporated into the analysis of complaint rates, our measure shows that per capita sexual orientation and gender identity employment discrimination complaints are filed at similar rates to sex and race discrimination complaints.

- At the national level, on average, approximately 4 to 5 complaints per 10,000 protected workers are filed per year: 4.6 complaints of sexual orientation and gender identity discrimination are filed for every 10,000 LGBT employees each year; 4.9 complaints of race discrimination are filed for every 10,000 workers of color; and 3.7 complaints of sex discrimination filed for every 10,000 female workers.
- The adjusted rate for sexual orientation and gender identity complaints is similar to, although on average slightly higher than, the adjusted rate for sex discrimination complaints.
- The adjusted rate for sexual orientation and gender identity discrimination is similar to, though on average slightly lower than, the adjusted rate for race discrimination complaints.

Population-Adjusted Complaint Rates (per 10,000)



Population-adjusted complaint rates provide an important context in which to analyze the raw complaint data

Population-adjusted complaint rates provide the context in which we can effectively analyze discrimination complaint rates based on race, sex, and sexual orientation and gender identity. The raw data alone suggest that the number of sexual orientation discrimination complaints is small compared to large numbers of complaints based on race and sex. However, even the most disparate adjusted rates significantly decrease the differences suggested by the raw data.

For example, in California from 2008 through 2014, an average of 4,561 complaints of race discrimination and 8,250 complaints of sex discrimination were filed annually. By contrast, an average of 946 complaints of sexual orientation discrimination and gender identity discrimination were filed each year.

**TABLE 1: Sex and Sexual Orientation & Gender Identity
(Complaints Per 10,000 Workers)**

	Sexual Orientation & Gender Identity	Sex
Average	4.6	3.7
California	10.5	9.6
Colorado	4.7	2.3
Connecticut	6.3	5.4
DC	5.1	5.5
Hawai'i	3.0	3.9
Illinois	4.5	3.5
Maryland	2.2	1.1
Minnesota	1.6	0.8
New York	3.6	2.5
New Hampshire	5.4	3.1
Oregon	3.7	6.2
Rhode Island	4.7	4.7
Washington	1.9	1.9
Wisconsin	7.5	7.5

Those raw numbers suggest that sex discrimination complaints are filed almost nine times more often than sexual orientation and gender identity complaints, and race discrimination complaints are filed almost five times more often than sexual orientation and gender identity complaints. But the number of people of color in California's workforce (11,548,044 in 2014) is higher than the number of women (8,853,538 in 2014) and both populations are greater than the number of LGBT people in the state's workforce (944,559 in 2014). Once we adjust the data for the workforce population of each group, we are able to make more relevant comparisons. Adjusted rates show that annually, on average, 9.6 complaints of sex discrimination were filed per 10,000 female workers, 4.2 complaints of race discrimination were filed per 10,000 workers of color, and 10.5 sexual orientation and gender identity discrimination complaints were filed per 10,000 LGBT workers. Although a seemingly small number of sexual orientation and gender identity discrimination complaints were filed, they are actually filed by LGBT workers at a higher frequency than race discrimination complaints and sex discrimination complaints.

Sexual orientation and gender identity discrimination complaints are filed at a rate similar to, although on average slightly higher than, sex discrimination complaints

Table 1 compares the adjusted rate for sexual orientation and gender identity complaints with that for sex discrimination complaints in the 14 states for which data were collected. On a national level, the adjusted complaint rate for sexual orientation and gender identity is similar to, though on average slightly higher than, the adjusted complaint rate for sex discrimination complaints. In 11 states (California, Colorado, Connecticut, Illinois, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Washington, and Wisconsin), sexual orientation and gender identity complaints were filed at a slightly higher rate than sex discrimination complaints. The disparities in filing rates in the remaining states are small, varying from approximately one to three more complaints of sex discrimination than sexual orientation and gender identity discrimination per 10,000 protected workers each year.

Sexual orientation and gender identity discrimination complaints are filed at a rate similar to, although on average slightly lower than, race complaints

Table 2 compares the adjusted rates for sexual orientation and gender identity complaints with that for race discrimination complaints in the 14 states for which data were collected. In eight states (California, Colorado, Hawaii, Maryland, New Hampshire, New York, Rhode Island, and Washington), sexual orientation and gender identity complaints were filed at a higher rate than race discrimination complaints. In two additional states, sexual orientation and gender identity discrimination complaints were filed at the same, or nearly the same, rate as race discrimination complaints (DC and Illinois). The disparities in filing rates in the remaining states varied from approximately one to eleven more complaints of race discrimination than sexual orientation and gender identity discrimination per 10,000 protected workers each year.

Comparison of findings to previous reports

Our findings are consistent with findings of two previous studies which analyzed older data using a similar methodology, *Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007* (2008)⁷ and *Do Gay Rights Matter?: An Empirical Assessment* (2001).⁸

**TABLE 2: Race and Sexual Orientation & Gender Identity
(Complaints Per 10,000 Workers)**

	Sexual Orientation & Gender Identity	Race
Average	4.6	4.9
California	10.5	4.2
Colorado	4.7	2.2
Connecticut	6.3	10.1
DC	5.1	5.1
Hawai'i	3.0	1.2
Illinois	4.5	4.4
Maryland	2.2	1.5
Minnesota	1.6	2.4
New York	3.6	2.3
New Hampshire	5.4	4.6
Oregon	3.7	6.1
Rhode Island	4.7	4.1
Washington	1.9	1.5
Wisconsin	7.5	19.0

Our findings are more similar to the more recent (2008) study's findings. Our study and the 2008 study found that, nationally, race, sex, and sexual orientation and gender identity complaints are all filed at average rates of about 4 to 7 complaints per 10,000 protected workers each year. The sexual orientation and gender identity complaint rate found in the present study is nearly identical to the rate found in the 2008 study: 4.6 complaints per 10,000 LGBT workers in the present study compared to 4.7 complaints per 10,000 LGB workers in the 2008 study. The rates of sex discrimination complaints and race discrimination found in the present study are slightly lower than the rates found in the 2008 study: 3.7 complaints of sex discrimination per 10,000 female workers in the present study compared to 5.4 complaints in the 2008 study, and 4.9 complaints of race discrimination per 10,000 workers of color in the present study compared to 6.5 complaints in the 2008 study. All three studies found that race discrimination complaints are filed at the highest rates.

The findings of the present study are less similar to, but still consistent with, the findings of the 2001 study. Generally, the complaint rates found in the 2001 study, across all types of discrimination, were higher than the rates found in the present study as well as the 2008 study. The 2001 study calculated a range for the sexual orientation complaint rate because data available at that time did not allow for reliable estimates of the size of the LGBT workforce in each state. The range was from 3.4 complaints to 18.2 complaints per 10,000 LGB workers. Our finding on the sexual orientation complaint rate, along with that of the 2008 study, is at the low end of this range. The rate of sex discrimination complaints found in the present study was slightly lower than, but similar to, the rate found in the 2001 study (3.7 complaints per 10,000 female workers compared to 5.4 complaints). The rate of race discrimination complaints found in the 2001 study was approximately four times greater than the rate of race complaints found in the present study: 20.2 complaints per 10,000 workers of color in the 2001 study compared to 4.9 complaints per 10,000 workers in the present study.

Potential Impact of Complaints Alleging More than One Type of Discrimination

From the data provided by the agencies, we were unable to determine how many complaints alleged discrimination based on more than one of the studied characteristics. For example, we could not determine how many complaints of gender identity discrimination also alleged sex discrimination. In the data provided, complaints alleging more than one type of discrimination were considered separate complaints of each type of discrimination. Because there may be overlap in complaints alleging discrimination based on sexual orientation or gender identity and another characteristic protected under state law (such as race, sex, or disability), the addition of sexual orientation and gender identity to existing state non-discrimination laws may result in fewer new complaints filed with state agencies than our estimate suggests.

Limitations on the separate analysis of gender identity employment discrimination complaint rates

Various studies have found that transgender individuals experience substantially higher rates of employment discrimination than LGB people. However, due to inadequate data collection and recording methods, we were unable to analyze the rate of gender identity complaints filed by transgender employees separately. This is a result of most states combining data on sexual orientation and gender identity discrimination filings. Of the 14 states that provided data for this study, only three states (Colorado, DC, and Rhode Island) were able to provide separate data on gender identity complaints for at least three years. Additionally, there are no reliable data on the percentage of the workforce that identifies as transgender in each state, making it difficult to accurately estimate the underlying population numbers for a population-adjusted complaint rate. The omission of a separate analysis of gender identity discrimination complaints in this report indicates a need for further research on the transgender population.

Conclusion

When comparing population-adjusted rates for filing employment discrimination complaints with state enforcement agencies, we find that LGBT people file complaints of sexual orientation and gender identity discrimination at a rate similar to women filing sex discrimination complaints and people of color filing race discrimination complaints. At the national level, based on the states with available data, the average adjusted complaint rates for each type of discrimination are around 4 to 5 complaints per 10,000 protected workers per year. The findings of this report are consistent with earlier studies that applied a similar methodology to older data.

Endnotes

¹ These states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin. For purposes of this report, DC is considered a “state.”

² All states listed above except New Hampshire, New York, and Wisconsin.

³ CHRISTOPHER RAMOS, M.V. LEE BADGETT & BRAD SEARS, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 1999-2007 (2008), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Ramos-Emphy-Discrim-1999-2007-Nov-08.pdf>; William B. Rubenstein, *Do Gay Rights Laws Matter? An Empirical Assessment*, 75 S. Cal. L. Rev. (2007), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rubenstein-Do-Gay-Rights-Laws-Matter-2001.pdf>.

⁴ Connecticut added gender identity protections to its non-discrimination law in 2011, but the Connecticut Commission on Human Rights and Opportunities did not begin reporting gender identity complaints until fiscal year 2013. H.B. 6599, 2011 Gen. Assem., Jan. Sess. (Conn. 2011). *Compare* CONN. COMM. ON HUM. RIGHTS AND OPPORTUNITIES, FISCAL YEAR JULY 1, 2011 TO JUNE 30, 2012: CASE PROCESSING REPORT, CUMULATIVE DATA (2012), *available at* http://www.ct.gov/chro/lib/chro/2011-2012_Finished.pdf to CONN. COMM. ON HUM. RIGHTS AND OPPORTUNITIES, FISCAL YEAR JULY 1, 2012 TO JUNE 30, 2013: CASE PROCESSING REPORT, CUMULATIVE DATA (2013), *available at* http://www.ct.gov/chro/lib/chro/2012-2013_Finished.pdf. Hawaii clarified that the sexual orientation provisions of the state’s non-discrimination law also prohibit discrimination based on gender identity. H.B. 546, 26th Leg., Reg. Sess. (Haw. 2011).

⁵ S.B. 212, 2014 Gen. Assem., Reg. Sess. (Md. 2014).

⁶ GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>.

⁷ CHRISTOPHER RAMOS, M.V. LEE BADGETT & BRAD SEARS, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 1999-2007 (2008), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Ramos-Emphy-Discrim-1999-2007-Nov-08.pdf>.

⁸ William B. Rubenstein, *Do Gay Rights Laws Matter? An Empirical Assessment*, 75 S. Cal. L. Rev. (2007), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Rubenstein-Do-Gay-Rights-Laws-Matter-2001.pdf>.

Appendix

Sexual Orientation and Gender Identity, Race, and Sex Discrimination Complaints Filed with State Enforcement Agencies

California	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted Rate (per 10,000)
Sexual Orientation	821	807	717	727	880	1309	1360	946	10.5
Race	4208	3541	3668	3427	4030	6567	6488	4561	4.2
Sex	7151	7170	7156	7000	6966	11233	11074	8250	9.6

Source: California Department of Fair Employment and Housing

Colorado	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted Rate (per 10,000)
Sexual Orientation & Gender Identity	52	47	44	43	51	62	54	50	4.7
Race	220	166	192	140	129	139	153	163	2.2
Sex	332	316	261	230	304	297	316	294	2.3

Source: Colorado Civil Rights Division

Connecticut	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted Rate (per 10,000)
Sexual Orientation & Gender Identity	49	44	53	38	47	45	65	49	6.3
Race	544	490	517	564	541	534	538	533	10.1
Sex	551	516	483	518	437	479	544	504	5.4

Source: Connecticut Commission on Human Rights and Opportunities

DC	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted Rate (per 10,000)
Sexual Orientation & Gender Identity	30	25	22	18	15	19	22	22	5.1
Race	NA	104	109	79	63	63	103	201	5.1
Sex	NA	175	101	89	65	76	90	99	5.5

Source: District of Columbia Office of Human Rights

Hawaii	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	8	9	15	9	12	3	4	9	3.0
Race	59	66	62	75	60	61	57	63	1.2
Sex	139	137	125	87	92	154	146	126	3.9

Source: Hawaii Civil Rights Commission

Illinois	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	80	143	125	165	135	98	96	124	4.5
Race	1008	1138	1009	932	1025	906	851	981	4.4
Sex	1145	1259	1289	1095	1153	1017	913	1124	3.5

Source: Illinois Department of Human Rights

Maryland	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation	24	23	22	26	24	28	15	23	2.2
Race	241	237	193	161	230	222	174	208	1.5
Sex	199	173	188	144	169	201	111	169	1.1

Source: Maryland Commission on Human Relations

Minnesota	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	NA	NA	NA	6	5	6	2	5	1.6
Race	NA	NA	NA	10	22	14	7	13	2.4
Sex	NA	NA	NA	6	3	5	2	4	0.8

Source: Minnesota Department of Human Rights

New Hampshire	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation	7	4	8	12	9	11	4	8	3.6
Race	NA	NA	17	4	10	17	13	12	2.3
Sex	NA	NA	90	91	109	69	78	87	2.5

Source: New Hampshire Commission for Human Rights

New York	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation	263	227	247	234	215	228	204	231	3.6
Race	2252	2153	1191	1683	1871	1990	1734	1839	2.3
Sex	1666	1675	1624	1349	1460	1538	1281	1513	2.5

Source: New Hampshire Commission for Human Rights

Oregon	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	28	42	40	31	26	30	55	36	3.7
Race	301	190	263	255	197	231	255	242	6.1
Sex	623	551	616	577	599	521	554	577	6.2

Source: Oregon Civil Rights Division

Rhode Island	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	11	NA	7	NA	7	14	14	11	4.7
Race	50	NA	48	NA	37	64	51	50	4.1
Sex	84	NA	64	NA	51	102	103	81	2.9

Source: Rhode Island Commission for Human Rights

Washington	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation & Gender Identity	25	23	15	45	37	26	40	30	1.9
Race	158	129	67	242	112	109	103	131	1.5
Sex	208	199	111	246	147	172	172	179	1.1

Source: Washington Human Rights Commission

Wisconsin	2008	2009	2010	2011	2012	2013	2014	Annual Average	Population-Adjusted (per 10,000)
Sexual Orientation	57	69	82	59	69	63	54	65	7.5
Race	878	849	782	877	769	706	711	796	19.0
Sex	703	730	635	712	633	603	576	656	4.4

Source: Wisconsin Civil Rights Bureau

May 26, 2017

VIA ELECTRONIC MAIL

Attn: Christina Reese
PENNSYLVANIA HUMAN RELATIONS COMMISSION
333 Market Street, 8th Floor
Harrisburg, PA 17101-2210
chreese@pa.gov

Re: Comments to Proposed Guidance Concerning Protections for Lesbian, Gay, Bisexual, and Transgender Individuals in the Pennsylvania Human Relations Act

Comments to Proposed Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities Act

Dear Chairman Bolstein and Commissioners, Executive Director Edwards, and Ms. Reese:

Thank you for your and the Pennsylvania Human Relations Commission's (the "Commission") ongoing efforts to ensure that all people in the Commonwealth of Pennsylvania are able to live, work, and learn free from discrimination. As the nation's oldest and largest legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and everyone living with HIV through impact litigation, policy advocacy, and public education, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") appreciates the opportunity to provide comments in response to two proposed policy guidance documents by the Commission. These proposed guidance documents—*Guidance Concerning Protections for Lesbian, Gay, Bisexual, and Transgender Individuals in the Pennsylvania Human Relations Act*, and *Guidance Concerning Protections for Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning Individuals in the Pennsylvania Fair Educational Opportunities Act* (hereinafter, collectively referred to as the "Proposed Guidance")—reflect Pennsylvania's strong commitment to assuring equal opportunities to all individuals and to safeguarding their rights to live, work, and learn free from discrimination.

Lambda Legal strongly supports the Commission's efforts to eliminate discrimination against lesbian, gay, bisexual, transgender, and queer/questioning ("LGBTQ") and gender-nonconforming people, and commends the Commission for the issuance of the Proposed Guidance. The Proposed Guidance is necessary to help protect the rights of LGBTQ Pennsylvanians and their families, and to safeguard the "public welfare, prosperity, health and peace of the people of the Commonwealth of Pennsylvania."¹

Although we provide these comments in support of the Commission's efforts to achieve the purposes of the Pennsylvania Human Relations Act ("PHRA") and the Pennsylvania Fair

¹ Pa. Human Relations Act, § 2(c) (codified at 43 Pa. Stat. Ann. § 952(c)).

Educational Opportunities Act (“PFEOA”) to eliminate, remedy, and prevent discrimination in the Commonwealth of Pennsylvania, we believe that the Commission would better carry out these purposes by promulgating and implementing rules and regulations that *explicitly* set forth how LGBTQ and gender-nonconforming people are protected under the PHRA and PFEOA, and by adopting *all* of the rationales that have been laid out by several courts and agencies explaining why discrimination on the basis of sexual orientation or gender identity are forms of sex discrimination.

EXECUTIVE SUMMARY

In Pennsylvania and throughout the country, LGBTQ and gender-nonconforming people experience high rates of discrimination, harassment, stigma, violence, and other serious challenges. As the PHRA recognizes, the proliferation of discrimination, prejudice, and intolerance also threatens the very foundations and general welfare of the Commonwealth of Pennsylvania.² The Proposed Guidance represents a necessary step to ensure that the purposes of the PHRA and the PFEOA are effectively executed. To be sure, the prohibition on sex discrimination by the PHRA and the PFEOA already protects LGBTQ and gender-nonconforming people, but the Proposed Guidance is a necessary clarification to make such protections more explicitly apparent.

The Proposed Guidance accomplishes several important objectives, including educating the public about how the Commission interprets the prohibition on sex discrimination within the PHRA and the PFEOA to protect LGBTQ and gender-nonconforming people from discrimination on the basis of sexual orientation, gender identity, or sex stereotypes. It also aids employers, housing providers, businesses, organizations, service providers (including government), and other entities to understand their responsibilities under the PHRA and the PFEOA.

Accordingly, Lambda Legal’s comments address the following key points:

First, the Proposed Guidance is a necessary step to address the alarming rates of discrimination LGBTQ and gender-nonconforming people face in employment, housing, education, health care, and access to services and public accommodations within Pennsylvania.

Second, the Proposed Guidance’s definition of sex as inclusive of sexual orientation, gender identity, or sex stereotypes is in accordance with case law.

However, Lambda Legal recommends that the guidance be expanded to incorporate all of the rationales for why discrimination on the basis of sexual orientation or gender identity are forms of sex discrimination.

Third, the Proposed Guidance is in line with the Commonwealth’s statutory scheme because the Commission has explicit and broad authority to issue the Proposed Guidance.

² Pa. Human Relations Act, § 2(a) (codified at 43 Pa. Stat. Ann. § 952(a)).

However, Lambda Legal strongly recommends that the Commission promulgate and implement rules and regulations that *explicitly* set forth how the prohibition on sex discrimination within the PHRA and the PFEOA encompasses discrimination on the basis of actual or perceived sexual orientation, gender identity, gender expression, transgender status, or failure to conform to sex stereotypes.

LAMBDA LEGAL COMMENTS ON THE PROPOSED GUIDANCE

I. DISCRIMINATION AGAINST LGBTQ AND GENDER-NONCONFORMING PEOPLE.

LGBTQ and gender-nonconforming people—across our nation and the Commonwealth—face discrimination, harassment, stigma, and violence at alarming rates. Over 276,000 adults in Pennsylvania, including over 174,000 who are part of the Pennsylvania workforce, identify as LGBT.³ The challenges faced by these LGBTQ and gender-nonconforming individuals encompass all aspects of daily life, including employment, housing, education, health care, and access to services and public accommodations. “Lesbian, Gay, Bisexual, Transgender . . . Pennsylvanians face ongoing inequities in terms of their absence in statewide surveillance systems, discrimination by healthcare providers, and discrimination in the workplace and in social situations.”⁴

The Proposed Guidance is, therefore, not only necessary to clarify how the Commission interprets the law; it also sends a powerful reminder that the “[r]emoval of . . . discrimination and assurance of equal opportunity . . . are strong and fundamental policies of this Commonwealth.”⁵ As the United States Supreme Court noted earlier this year, “[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”⁶

a. Employment

The rates of employment discrimination against LGBTQ and gender-nonconforming people are alarming, in Pennsylvania and nationally. According to its most recent Survey of LGBT Americans, the Pew Research Survey reports that 21% of LGBT persons have been treated unfairly by their employer.⁷ And as recently as 2008, the General Social Survey (GSS), a national probability survey representative of the U.S. population, found that of LGB respondents, 27% had

³ Amira Hasenbush and Christy Mallory, The Williams Inst., *Employment Discrimination Based on Sexual Orientation and Gender Identity in Pennsylvania* (Sept. 2013), at 1, available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/PennsylvaniaNDReport-Nov-2013.pdf>.

⁴ Pa. Dept. of Health, *Pennsylvania Health Disparities Report 2012* (2012), available at: [http://www.health.pa.gov/Your-Department-of-Health/Offices%20and%20Bureaus/Health%20Equity/Documents/2012%20Health%20Disparities%20Report\(2\)Final.pdf](http://www.health.pa.gov/Your-Department-of-Health/Offices%20and%20Bureaus/Health%20Equity/Documents/2012%20Health%20Disparities%20Report(2)Final.pdf).

⁵ *Pennsylvania Human Relations Comm'n v. Chester Hous. Auth.*, 458 Pa. 67, 76, 327 A.2d 335, 340 (1974).

⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

⁷ Pew Research Ctr., *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* (June 2013), at 1, available at: http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf.

experienced at least one form of sexual orientation-based discrimination during the five years prior to the survey.⁸ More specifically, 27% had experienced workplace harassment and 7% had lost a job.⁹ The GSS found that among LGB people who are open about their sexual orientation in the workplace, an even larger proportion, 38%, experienced at least one form of discrimination during the five years prior to the survey.¹⁰

The numbers are even more staggering for transgender people. Nationally, 30% of respondents to the U.S. Transgender Survey¹¹ who had a job in the past year reported being fired, denied a promotion, or experiencing some other form of mistreatment related to their gender identity or expression.¹² And 77% of respondents who had a job in the past year took steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job.¹³ In Pennsylvania, 23% of transgender Pennsylvanians who held or applied for a job in the preceding year were fired, denied a promotion, or not hired for a job they applied for because of their gender identity or expression.¹⁴ And 18% of transgender Pennsylvanians also reported other forms of mistreatment in their employment based on their gender identity or expression, such as being forced to use a restroom that did not match their gender identity, being told to present in the wrong gender in order to keep their job, or having a boss or coworker share private information about their transgender status with others without their permission.¹⁵

b. Education

Discrimination against LGBT and gender-nonconforming Pennsylvanians also permeates educational settings throughout the Commonwealth. A 2015 survey showed that over two-thirds of LGBTQ students in Pennsylvania were harassed or assaulted based on their sexual orientation.¹⁶

⁸ Brad Sears and Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* (July 2011), at 2, available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ With almost 28,000 respondents, the U.S. Transgender Survey is the largest survey ever devoted to the lives and experiences of transgender people.

¹² James, S. E., et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), at 11, available at: <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> (hereinafter "U.S. Trans Survey").

¹³ *Ibid.*

¹⁴ Nat'l Ctr. for Transgender Equal., *2015 U.S. Transgender Survey: Pennsylvania State Report* (May 2017), at 1, available at: <http://www.transequality.org/sites/default/files/docs/usts/PA-USTS-Report.pdf> (hereinafter "U.S. Trans Survey: PA State Report").

¹⁵ *Ibid.*

¹⁶ GLSEN, *2015 State Snapshot: School Climate in Pennsylvania* (2017), at 1, available at: <https://www.glsen.org/sites/default/files/Pennsylvania%20State%20Snapshot%20-%20NSCS.pdf> (hereinafter "PA School Climate").

Specifically, 69% of LGBTQ students were verbally harassed, 27% were physically harassed, and 12% were physically assaulted based on their sexual orientation.¹⁷ Similarly, 50% of LGBTQ students were verbally harassed, 19% were physically harassed, and 7% were physically assaulted because of their gender expression.¹⁸ Moreover, according to the U.S. Trans Survey Pennsylvania State Report, 77% of those who were out or perceived as transgender at some point between Kindergarten and Grade 12 (K–12) experienced some form of mistreatment, such as being verbally harassed, prohibited from dressing according to their gender identity, disciplined more harshly, or physically or sexually assaulted because people thought they were transgender.¹⁹ Additionally, over 23% of LGBTQ students and 66% of transgender students in Pennsylvania were unable to use the school restroom that aligned with their gender, while 19% of LGBTQ students and 51% of transgender students were prevented from using their preferred name and gender pronouns in school.²⁰

The above-mentioned rates of discrimination are similar to those found by national surveys.²¹ For example, Lambda Legal’s *Protected and Served?* national community survey similarly revealed that one in four of the transgender and gender-nonconforming students who responded to the survey felt they were treated harshly by school officials because of their gender identity or gender expression.²²

Lambda Legal is very familiar with the discrimination faced by LGBTQ students in Pennsylvania. Indeed, we represent three transgender students in the Pine-Richland School District (Juliet Evancho, Elissa Ridenour, and A.S.) in a pending lawsuit seeking redress for the discrimination they have faced in school on account of their sex, gender identity, and transgender status. While we successfully obtained an injunction barring discrimination against them on constitutional grounds,²³ making clear that the Pennsylvania’s Fair Educational Opportunities Act’s prohibition on sex discrimination extends to cases like theirs would certainly help prevent

¹⁷ *Ibid.*

¹⁸ *Ibid.* See also U.S. Trans Survey: PA State Report, *supra* note 14, at 1 (“55% of those who were out or perceived as transgender in K–12 were verbally harassed, 26% were physically attacked, and 11% were sexually assaulted in K–12 because of being transgender.”).

¹⁹ U.S. Trans Survey: PA State Report, *supra* note 14, at 1.

²⁰ PA School Climate, *supra* note 16, at 1.

²¹ See Joseph G. Kosciw et al., GLSEN, *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools, A Report from GLSEN* (2016), at 22-23, available at: https://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf; Joel Baum et al., Human Rights Campaign and Gender Spectrum, *Supporting and Caring for our Gender Expansive Youth: Lessons from the Human Rights Campaign’s Youth Survey* (2012), at 10, available at: <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Gender-expansive-youth-report-final.pdf> (37% of gender-expansive youth reported “frequently or often” being verbally harassed and called names at school).

²² Lambda Legal, *Protected and Served? School Security, Policing and Discipline* (2015), available at <http://www.lambdalegal.org/protected-and-served/schools>.

²³ See *Evancho v. Pine-Richland Sch. Dist.*, No. CV 2:16-01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017).

future discrimination and harassment against students like Juliet, Elissa, and A.S. in Pennsylvania schools.

c. Housing

LGBTQ and gender-nonconforming Pennsylvanians also face alarming rates of discrimination in housing. As a result, 73% of LGBT persons are strongly concerned about some aspect of housing discrimination, either in purchasing a home or renting.²⁴ These concerns are not unfounded. For states with explicit protections from housing discrimination based on sexual orientation and gender identity, data shows that the rate of housing discrimination complaints based on sexual orientation and gender identity are similar to the rates for race and sex discrimination complaints.²⁵

Indeed, based on community-based surveys, up to 11% of LGB people have experienced discrimination in renting an apartment or buying a home.²⁶ Empirical studies have demonstrated that housing discrimination based on sexual orientation is even more pervasive. For example, a testing audit of housing discrimination based on sexual orientation found disparate treatment in 27% of the tests conducted.²⁷ And a matched-pair testing study, sponsored by U.S. Department of Housing and Urban Development, found that heterosexual couples were favored over same-sex couples in nearly 16% percent of tests.²⁸

Similarly, 21% of transgender Pennsylvanians have experienced some form of housing discrimination in the preceding year, and 29% of transgender Pennsylvanians have experienced homelessness in their lives.²⁹ Indeed, transgender persons are nearly four times less likely to own a home (16%) compared to the U.S. population (63%).³⁰

Addressing housing discrimination is also of particular salience for LGBTQ and gender-nonconforming older adults and youth. Studies confirm that LGBTQ and gender-nonconforming

²⁴ The Nat'l Assn. of Gay & Lesbian Real Estate Professionals, *2015 LGBT Home Buyer and Seller Survey* (2015), at 17, available at: <http://naglrep.com/lgbtsurvey/NAGLREPLGBTSurvey2015.pdf>.

²⁵ Christy Mallory and Brad Sears, *Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014* (Feb. 2016), at 4, available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Housing-Discrimination-Complaints-2008-2014.pdf>.

²⁶ Samantha Friedman et al., U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *An Estimate of Housing Discrimination Against Same-Sex Couples* (June 2013), at 3, available at: https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.

²⁷ *Id.* at 4.

²⁸ *Id.* at 20.

²⁹ U.S. Trans Survey: PA State Report, *supra* note 14, at 2.

³⁰ U.S. Trans Survey, *supra* note 12, at 11.

older adults in particular struggle to find senior housing where they are treated fairly.³¹ Indeed, in a national survey of LGBT older adults in long-term care facilities, nearly one in four of the LGBT older adults reported being verbally or physically harassed by other residents and nearly one in six reported being verbally or physically harassed by staff.³² In addition, because many LGBTQ and gender-nonconforming youth are forced out of their homes or run away due to family rejection or abuse, LGBTQ and gender-nonconforming youth use drop-in centers, street outreach programs, and housing programs at disproportionately high rates.³³ Yet, despite their overrepresentation in the homeless youth population (LGBTQ youth are almost 50% of youth experiencing homelessness),³⁴ LGBTQ and gender-nonconforming homeless youth report higher rates than the general homeless youth population of being unable to find services for short- and long-term housing.³⁵ Indeed, according to one study, approximately one in five LGBT youth were unable to access short-term shelter, and 16% could not get assistance with longer-term housing—rates that are approximately double those of non-LGBT homeless youth.³⁶

d. Health Care

Discrimination against LGBTQ and gender-nonconforming people in health care is also rampant. LGBTQ and gender-nonconforming people routinely report being refused needed care; health care professionals refusing to touch them or using excessive precautions; health care professionals using harsh or abusive language; being blamed for their health status; or health care professionals being physically rough or abusive. Indeed, almost 56% of LGB people and 70% of transgender and gender-nonconforming people have had one or more of these experiences.³⁷ In

³¹ Justice in Aging, *LGBT Older Adults In Long-Term Care Facilities: Stories from the Field* (June 2015), available at: <http://www.justiceinaging.org.customers.tigertech.net/wp-content/uploads/2015/06/Stories-from-the-Field.pdf>; Ctr. for Am. Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Feb. 2015), at 5, available at: <http://www.lgbtmap.org/file/paying-an-unfair-price-transgender.pdf> (hereinafter “Paying an Unfair Price”).

³² Justice in Aging, *supra* note 31, at 9.

³³ Soon Kyu Choi et al., The Williams Inst., *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness* (June 2015), at 4, 5, available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf>.

³⁴ Christina Wilson Remlin, M. Currey Cook, and Rosalyn Erney, *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (Apr. 2017), at 2, available at: https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf.

³⁵ Andrew Cray et al., Ctr. for Am. Progress, *Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth* (Sept. 2013), at 23, available at: <https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf> (last visited Dec. 17, 2015).

³⁶ *Ibid.*

³⁷ Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* (2010), at 5, available at: https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

fact, 8% of LGB people and 27% of transgender and gender-nonconforming people have been denied care altogether. In Pennsylvania, 24% of transgender people have experienced an insurance problem in the preceding year due to their transgender status, such as being denied coverage for care related to gender transition or being denied coverage for routine care because they were transgender.³⁸ And in the preceding year, 22% of respondents to the U.S. Trans Survey did not see a doctor when they needed to because of fear of being mistreated as a transgender person, and 30% did not see a doctor when needed because they could not afford it.³⁹ These numbers represent a serious public health problem because “[l]ack of timely access to prevention and treatment services results in poorer health outcomes and added costs by opening the door to life-threatening consequences such as advanced stage cancer diagnoses, HIV infection, and serious complications of conditions such as heart disease or diabetes.”⁴⁰

e. Access to Services and Public Accommodations

To compound the discrimination faced in employment, education, housing, and health care, LGBTQ and gender-nonconforming Pennsylvanians are also verbally harassed or disrespected in places of public accommodation or service—including hotels, restaurants, buses, airports, and government agencies—at alarming rates. For example, nationally, 23% of LGBT people have received poor service in a restaurant, hotel, or place of business because of their sexual orientation or gender identity, and 30% of LGBT people have been threatened or physically attacked.⁴¹ And of the transgender Pennsylvanians who participated in the U.S. Trans Survey and visited a place of public accommodation where staff or employees thought or knew they were transgender, 31% experienced at least one type of mistreatment in the past year.⁴² This included 16% who were denied equal treatment or service, 25% who were verbally harassed, and 2% who were physically attacked because of being transgender.⁴³ This pervasive discrimination prevents LGBTQ and gender-nonconforming Pennsylvanians from fully participating in the economic, cultural, and intellectual life of Pennsylvania.

Disturbingly, LGBTQ and gender-nonconforming Pennsylvanians are also denied equal treatment by government agencies or officials, including the court system. Indeed, Lambda Legal’s *Protected and Served?* national community survey found that 33% of transgender and gender-nonconforming people who responded to the survey and had been involved with the court system heard discriminatory comments about sexual orientation or gender identity/expression in

³⁸ U.S. Trans Survey: PA State Report, supra note 14, at 3.*Ibid.*

³⁹ *Ibid.*

⁴⁰ Paying an Unfair Price, supra note 31, at 7.

⁴¹ Pew Research Ctr., supra note 6, at 1.

⁴² U.S. Trans Survey: PA State Report, supra note 14, at 3.

⁴³ *Ibid.*

the courts, a number that increased to 53% if the transgender or gender-nonconforming person was a person of color.⁴⁴

* * *

Alarming, the rates of discrimination reported above do not differ much from those found 30 years ago, when it was reported that nearly a quarter of lesbian and gay Pennsylvanians had experienced discrimination in employment, housing, or public accommodations within the preceding year.⁴⁵ Importantly, the authors of the 1988 study cautioned that their sample was predominantly white, educated, and with a mean age of 35, while it is the poor, the less educated, the young, and racial minorities who are most likely to be victimized.⁴⁶ Thus, as with the 1988 study, it is important to caution that the actual rates of discrimination against LGBT people in Pennsylvania and nationally are probably even higher than the numbers indicated above— a cautionary note that is “particularly worrisome given the alarmingly high rates” of discrimination reported herein.⁴⁷

f. The Proposed Guidance is necessary to remedy the alarming rates of discrimination against LGBTQ and gender-nonconforming Pennsylvanians.

The alarming and disproportionate rates of discrimination against LGBTQ and gender-nonconforming Pennsylvanians illustrate clearly that the Commission’s Proposed Guidance is a necessary step towards remedying the untenable circumstances faced by LGBTQ and gender-nonconforming Pennsylvanians. And while the proscription on sex discrimination in the PHRA and the PFEOA already encompasses such discrimination, explicit protections, and efforts like the Proposed Guidance, clarify and make it unequivocally clear that discrimination on the basis of gender identity, gender expression, transgender status, and sex stereotypes is illegal.

Moreover, clarifying that the PHRA and the PFEOA protect LGBTQ and gender-nonconforming people from discrimination affirms the equal dignity of LGBTQ and gender-nonconforming Pennsylvanians. The Commonwealth’s imprimatur through the issuance of the Proposed Guidance would send a powerful message that invidious discrimination cannot be tolerated. Indeed, the Proposed Guidance “reflects the State’s strong historical commitment to

⁴⁴ Lambda Legal, *Protected and Served? Courts* (2015), available at <http://www.lambdalegal.org/protected-and-served/courts> (last visited Dec. 17, 2015).

⁴⁵ Larry Gross, Steven K. Aurand, and Rita Adressa, *Violence and Discrimination Against Lesbian and Gay People in Philadelphia and the Commonwealth of Pennsylvania: A Study by the Philadelphia Lesbian and Gay Task Force – Executive Summary* (June 1988), at 2, available at <https://www.ncjrs.gov/pdffiles1/Digitization/122918NCJRS.pdf>.

⁴⁶ *Id.* at 2-3.

⁴⁷ *Id.* at 3.

eliminating discrimination and assuring its citizens equal access” and opportunity—a compelling state interest of the highest order.⁴⁸

II. DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, OR TRANSGENDER STATUS IS SEX DISCRIMINATION.

The Commission’s Proposed Guidance is in keeping with the interpretations of similar provisions by courts and agencies across the country. Specifically, the Proposed Guidance states that the Commission “will take and investigate sex stereotyping claims filed by LGBTQ individuals” because “LGBTQ individuals do not comply with sexual stereotypes and that adverse action(s) against an LGBTQ individual due to that person’s failure to comply with sexual stereotypes amounts to discrimination based on sex.” While the Proposed Guidance is correct, it could be greatly improved upon by explicitly adopting all the rationales for why discrimination on the basis of sexual orientation, gender identity, or transgender status are forms of sex discrimination. Accordingly, Lambda Legal makes several recommendations to the Commission that would clarify the Proposed Guidance and ensure that its purposes are effectively carried out.

a. Discrimination on the basis of sexual orientation is sex discrimination.

For at least three reasons, “discrimination on the basis of sexual orientation is a form of sex discrimination.”⁴⁹ First, under a basic sex discrimination (or “sex-plus”) theory,⁵⁰ such discrimination necessarily involves sex-based considerations because the discrimination endured by a man attracted to men is not suffered by any woman with the same attraction to men. Second, just as discrimination against an employee who is romantically involved with someone of a different race has universally been recognized as race discrimination barred by Title VII, discrimination against an employee who is attracted to someone of the same sex must be recognized as sex discrimination equally barred by that law. Finally, under a sex stereotyping theory, sexual orientation discrimination is sex discrimination because LGB people do not conform to the stereotype that they should be attracted only to someone of a different sex.

⁴⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

⁴⁹ *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017). See also *Philpott v. New York*, No. 16-cv-6778, 2017 WL 1750398 (S.D.N.Y. May 3, 2017); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-cv-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Boutillier v. Hartford Pub. Sch.*, No. 13-cv-1303, 2014 WL 4794527 (D. Conn. Sept. 25, 2014).

⁵⁰ “Sex-plus” is the term for discrimination occurring not categorically against all members of one sex, but only those members sharing a certain trait (for instance, having young children), when members of the other sex who share that trait suffer no discrimination. Sex-plus discrimination is unquestionably barred by Title VII. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

- i. When someone discriminates based on sexual orientation, they inexorably consider a person's sex.

Discrimination on the basis of sexual orientation inherently involves differential treatment based on a person's sex, because one cannot consider an individual's sexual orientation without taking into account that individual's sex. It is a "common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."⁵¹ That is because "sexual orientation is inseparable from and inescapably linked to sex."⁵² Conceptually, this is a straightforward formulation. The Commission or a court need only ask the simple question whether a person would have been discriminated against if the person had been of a different sex.⁵³

Thus, where an employer fires a female employee because the employee is married to (or lives with, dates, or is attracted to) a woman but would not fire a male employee for identical conduct with (or attraction to) a woman, the employer has engaged in "paradigmatic sex discrimination."⁵⁴ Viewed in that way, one must conclude that "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex."⁵⁵ Numerous courts have ruled in favor of LGB plaintiffs using this logic.⁵⁶

It is of no import that the PHRA and the PFOA do not include the words "sexual orientation." As the Seventh Circuit recently recognized, sexual orientation discrimination is a form of sex discrimination. "Fundamental to the definition of homosexuality is the sexual

⁵¹ Hively, 853 F.3d at 351.

⁵² Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 16, 2015); accord Videckis, 150 F. Supp. 3d at 1160.

⁵³ See City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (articulating the controlling, yet "simple[,] test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" to determine whether a sex-based violation of Title VII occurred) (quotation omitted); see also Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682-83 (1983) (applying Manhart's "simple test").

⁵⁴ Hively, 853 F.3d at 345.

⁵⁵ Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring); see also Hively, 853 F.3d at 358 (Flaum, J., concurring) ("discrimination against an employee on the basis of their homosexuality is necessarily, in part, discrimination based on their sex.").

⁵⁶ See, e.g., Isaacs, 143 F. Supp. 3d at 1194 ("If a business fires Ricky because of his sexual activities with Fred, while this action would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.") (alterations, citation omitted); Hall v. BNSF Ry. Co., No. C13-2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); Heller v. Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); see also Videckis, 150 F. Supp. 3d at 1161.

attraction to individuals of the ‘same sex.’”⁵⁷ “It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”⁵⁸

ii. Discrimination based on same-sex relationships is analogous to discrimination based on interracial relationships.

There is unanimous judicial consensus that discrimination based on an employee’s interracial marriage or interracial associations constitutes race discrimination,⁵⁹ and, indeed, courts in Pennsylvania were pioneers in arriving at that judicial consensus.⁶⁰ It is impossible to reconcile that consensus with an argument that discrimination based on one’s same-sex intimate relationships is *not* sex discrimination under Title VII, which treats all its enumerated traits, such as race and sex, the same.

Thus, “to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate.”⁶¹

iii. LGB people’s same-sex sexual orientation defies sex stereotypes.

Finally, “sexual orientation discrimination is discrimination ‘because of . . . sex’ because such discrimination is inherently rooted in gender stereotypes.”⁶² Undeniably, an individual’s same-sex attraction “represents the ultimate case of failure to conform to [a sex] stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional).”⁶³

b. Discrimination on the basis of gender identity or transgender status is sex discrimination.

Similarly, discrimination based on gender identity or transgender status is sex discrimination. Indeed, the weight of federal circuit authority has recognized this. These precedents recognize discrimination against transgender persons as sex discrimination in at least

⁵⁷ Hively, 853 F.3d at 358 (Flaum, J., concurring).

⁵⁸ *Id.* at 350.

⁵⁹ See, e.g., Hively, 853 F.3d at 349; Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986); Scott Med. Health Ctr., 2016 WL 6569233, at *7 n.5; Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008).

⁶⁰ See Sperling v. United States, 515 F.2d 465, 484 (3d Cir. 1975); Holiday v. Belle’s Rest., 409 F. Supp. 904 (W.D. Pa. 1976).

⁶¹ Hively, 853 F.3d at 349; *id.* at 359 (Flaum, J., concurring); Christiansen, 852 F.3d at 204 (Katzmann, C.J., concurring).

⁶² Christiansen, 852 F.3d at 205 (Katzmann, C.J., concurring).

⁶³ Hively, 853 F.3d at 346; see also Christiansen, 852 F.3d at 205 (Katzmann, C.J., concurring) (citation omitted).

three ways: (1) discrimination based on gender identity and transgender status; (2) discrimination based on sex stereotypes; and (3) discrimination based on gender transition.

i. Discrimination based on gender identity and transgender status is *per se* sex discrimination.

Distinguishing between transgender persons and cisgender⁶⁴ persons constitutes unlawful sex discrimination because it allows people to be treated consistent with their gender identity only if that identity is consistent with their sex assigned at birth. In other words, discriminating against people because their birth-assigned sex and gender identity do not match necessarily is discriminating based on sex.

It is no answer that the law treats everyone consistently with their birth-assigned sex.⁶⁵ In analyzing whether “sex has been taken into account,”⁶⁶ “[w]hat matters” is that “the discrimination is related to . . . sex.”⁶⁷ Moreover, sex “is not a cut-and-dried matter of chromosomes,”⁶⁸ or genitalia. To the contrary, a robust body of case law has held that gender identity is a critical determinant of sex itself.⁶⁹ Indeed, “gender identity is entirely akin to ‘sex.’”⁷⁰ Gender identity “is deeply ingrained and inherent in the[] very beings” of transgender people, and like sex, it “is neither transitory nor temporary.”⁷¹

ii. Discrimination based on gender identity or transgender status is rooted in sex stereotypes.

Discrimination against transgender persons is inherently rooted in sex stereotypes. Sex discrimination encompasses any differential treatment on the basis of “sex-based

⁶⁴ Cisgender refers to people whose gender identity is the same as their assigned or presumed sex at birth.

⁶⁵ See Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1015 (D. Nev. 2016) (“Although CCSD contends that it discriminated against Roberts based on his genitalia, not his status as a transgender person, this is a distinction without a difference here. Roberts was clearly treated differently than persons of both his biological sex and the gender he identifies as—in sum, because of his transgender status.”). Cf. Loving v. Virginia, 388 U.S. 1, 8 (1967) (discarding “the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations”).

⁶⁶ Smith v. Virginia Commonw. Univ., 84 F.3d 672, 676 (4th Cir. 1996) (quotation marks omitted),

⁶⁷ Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000). Accord Fabian v. Hosp. of Cent. Connecticut, 172 F. Supp. 3d 509, 526-27 (D. Conn. 2016).

⁶⁸ Schroer, 424 F. Supp. 2d at 211,

⁶⁹ See, e.g., Schwenk, 204 F.3d at 1201-02 (holding that conduct motivated by an individual’s “gender or sexual identity” is because of “gender,” which is interchangeable with “sex”); Roberts, 215 F. Supp. 3d at 1011; Fabian, 172 F. Supp. 3d at 526-27; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Rumble v. Fairview Health Servs., No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015).

⁷⁰ Evancho, 2017 WL 770619, at *13.

⁷¹ *Ibid.*

considerations.”⁷² Discrimination based on sex “is not only discrimination because of maleness and discrimination because of femaleness,” but also “discrimination because of the properties or characteristics by which individuals may be classified as male or female.”⁷³ As such, “discrimination based on transgender status . . . is essentially the epitome of discrimination based on gender nonconformity, making differentiation based on transgender status akin to discrimination based on sex for these purposes.”⁷⁴ By definition, a transgender person’s gender “identity [does] not meet social definitions of masculinity [or femininity]” associated with one’s birth-assigned sex.⁷⁵ “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”⁷⁶ Ultimately, it does not matter whether a transgender person is viewed as “an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual,” because discrimination on any of these bases is based on sex.⁷⁷

iii. Discrimination based on gender transition is also based on sex.

Discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily based on religion. For example, firing an employee because she converts from Christianity to Judaism “would be a clear case of discrimination ‘because of religion.’”⁷⁸ Even if the employer “harbors no bias toward either Christians or Jews but only ‘converts[,]’ . . . [n]o court would take seriously the notion that ‘converts’ are not covered” by the statutory ban on religious discrimination.⁷⁹ “Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the ‘wrong’ way, is obviously discrimination ‘because of religion.’”⁸⁰

A similar analysis applies here: a policy or practice that treats men and women equally as a general matter but nonetheless discriminates against those who undertake gender transition, or who do not “complete” gender transition in someone’s view, constitutes discrimination because of sex.⁸¹

⁷² Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).

⁷³ Fabian, 172 F. Supp. 3d at 526.

⁷⁴ Evancho, 2017 WL 770619, at *11.

⁷⁵ Schwenk, 204 F.3d at 1201.

⁷⁶ Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

⁷⁷ Schroer, 577 F. Supp. 2d at 305.

⁷⁸ *Id.* at 306.

⁷⁹ *Ibid*; accord Fabian, 2016 WL 1089178, at *13; Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, *11 (E.E.O.C. Apr. 20, 2012).

⁸⁰ Fabian, 2016 WL 1089178, at *13.

⁸¹ *See Schroer*, 577 F. Supp. 2d at 306-07; Macy, 2012 WL 1435995, at *11.

c. Courts have had trouble distinguishing between sex stereotyping claims by LGBTQ people and sexual orientation and gender identity discrimination claims.

In the Proposed Guidance, the Commission states that it “will take and investigate sex stereotyping claims filed by LGBTQ individuals.” To the extent that this indicates or may be read to mean that the Commission will attempt to distinguish between sexual orientation, gender identity, or transgender status claims on the one hand, and sex stereotyping claims filed by LGBTQ individuals on the other, the Commission will end up engaging in an illusory quest. Lambda Legal recommends that the Commission change the aforementioned language to state that the Commission “will take and investigate *sexual orientation, gender identity, gender expression, transgender status, and sex stereotyping* claims filed by LGBTQ individuals *as sex discrimination claims*.”

Many courts, including courts in Pennsylvania, have recognized how “elusive” it is to try “to separate the discrimination based on sexual orientation from that based on sex stereotyping.”⁸² The reason for this is simple: “the line between a gender nonconformity claim and one based on sexual orientation” is not even “gossamer-thin; . . . it does not exist at all.”⁸³ And similarly, “[a]lthough most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination.”⁸⁴ Accordingly, the Commission should adopt the proposed language, and avoid, as many courts now have, engaging in such an illusory quest.

d. Recommendation

Because discrimination based on sexual orientation, gender identity, or transgender status is inherently sex discrimination, and because there are multiple ways to prove a claim of

⁸² Hively v. Ivy Tech Comm. Coll., S. Bend, 830 F.3d 698, 705 (7th Cir. 2016), as amended (Aug. 3, 2016), reh’g en banc granted, op. vacated, 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), and on reh’g en banc Hively, 853 F.3d 339. See also Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291 (3d Cir. 2009) (“the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”); Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (observing that “the borders” between sex and sexual orientation are “difficult to discern” and “imprecise”); Hamm, 332 F.3d at 1065 n.5 (“distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult.”); Christiansen v. Omnicom Grp., Inc., 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016), aff’d in part, rev’d in part, 852 F.3d 195; Videckis, 150 F. Supp. 3d at 1160 (“It is impossible to categorically separate ‘sexual orientation discrimination’ from discrimination on the basis of sex or from gender stereotypes,” because “to do so would result in a false choice.”); Centola v. Potter, 183 F.Supp.2d 403, 408 (D. Mass. 2002) (“the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”).

⁸³ Hively, 853 F.3d at 346.

⁸⁴ Macy, 2012 WL 1435995, at *10 (“Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination.”).

discrimination based on actual or perceived sexual orientation, gender identity, or transgender status aside from a sex stereotyping theory,⁸⁵ Lambda Legal recommends that the Proposed Guidance be changed as follows:

Currently, the [PHRA or PFEOA] does not set forth ~~specific~~ **explicit** protections against discrimination for people who are Lesbian Gay, Bisexual, Transgender, or Queer/Questioning (LGBTQ). However, the [PHRA or PFEOA], as set forth above, does specifically prohibit discrimination based on sex.

Federal courts and federal administrative agencies have held that discrimination claims filed by LGBT individuals may be taken, investigated, and analyzed as sex discrimination claims.

The gist of these claims is that ***discrimination based on sexual orientation, gender identity, or transgender status is sex discrimination***. LGBTQ individuals ***inherently*** do not comply with sexual stereotypes and ~~that~~ adverse action(s) against an LGBTQ individual due to that person's ***actual or perceived sexual orientation, gender identity, gender expression, transgender status, or*** failure to comply with sexual stereotypes amounts to discrimination based on sex.

Accordingly, it is the position of the Pennsylvania Human Relations Commission that it will take and investigate ***sexual orientation, gender identity, gender expression, transgender status, and*** sex stereotyping claims filed by LGBTQ individuals ***as sex discrimination claims***.

III. THE PROPOSED GUIDANCE IS IN HARMONY WITH THE TEXTS AND PURPOSES OF THE HUMAN RELATIONS ACT AND THE FAIR EDUCATIONAL OPPORTUNITIES ACT; THE COMMISSION, HOWEVER, SHOULD ALSO PROMULGATE RULES AND REGULATIONS PROHIBITING DISCRIMINATION AGAINST LGBTQ PEOPLE.

The Proposed Guidance is in harmony with the text and purpose of both the PHRA and the PFEOA. Nonetheless, in order to better ensure that its purposes are effectively carried out, and in order to provide clear notice to all Pennsylvanians that discrimination against LGBTQ people is unlawful, the Commission should promulgate rules and regulations that are binding in nature and ***explicitly*** protect LGBTQ Pennsylvanians from discrimination.

⁸⁵ Macy, 2012 WL 1435995, at *10 (“[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.”); Baldwin, 2015 WL 4397641, at *10 (“An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.”).

By enacting the PHRA and the PFEOA, “the legislature specifically announced a broad policy declaration against discrimination applicable to ‘all individuals.’”⁸⁶ In so doing, it “recognized the pervasive invidiousness of discrimination . . . and attempted . . . to address this persisting problem and to provide relief to citizens who have been unjustly injured.”⁸⁷

The Commission has the power to adopt, promulgate, amend or rescind rules and regulations to effectuate the policies and provisions of the PHRA and the PFEOA,⁸⁸ as well as to formulate policies to effectuate the purposes of these laws.⁸⁹ “Under Pennsylvania law, this language indicates that the scope of the [Commission]’s authority is broad and encompasses the delegated legislative power to define by regulation terms otherwise undefined by the statute.”⁹⁰ That is because such “statutory provisions . . . evidence . . . a legislative intent to empower the Commission to do a good deal more than merely interpret the Act[s].”⁹¹ Indeed, “the Legislature, in an attempt to deal comprehensively with the basic and fundamental problem of discrimination, clothed the Human Relations Commission . . . with broad remedial powers, exercising particular expertise, [so that it] could cope effectively with the pervasive problem of unlawful discrimination.”⁹² “[T]he Legislature vested in the Commission, quite properly, maximum flexibility to remedy and hopefully eradicate the ‘evils’ of discrimination.”⁹³ As such, the PHRA and the PFEOA must “be ‘construed liberally.’”⁹⁴

The Commission has used such powers before. For example, 44 years ago, the Pennsylvania Supreme Court upheld the Commission’s promulgation of formal policies defining the term “de facto segregation,” which was not contained within the PHRA.⁹⁵ In doing so, the Pennsylvania Supreme Court held that “[t]he Commission’s definition of the concept of De facto segregation is therefore upheld as within the legislative powers conferred by section 7 of the Act.”⁹⁶ Since then, the Commission has adopted rules and regulations with regards to

⁸⁶ Weaver v. Harpster, 601 Pa. 488, 504, 975 A.2d 555, 564 (2009).

⁸⁷ *Id.* at 511.

⁸⁸ 43 Pa. Stat. Ann. § 957(d) (The Commission has the power and duty “[t]o adopt, promulgate, amend and rescind rules and regulations to effectuate the policies and provisions of this act.”); 24 Pa. Stat. Ann. § 5006(6) (same).

⁸⁹ 43 Pa. Stat. Ann. § 957(e) (The Commission has the power and duty “[t]o formulate policies to effectuate the purposes of this act.”); 24 Pa. Stat. Ann. § 5006(5) (same).

⁹⁰ Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review, 603 Pa. 374, 386–87, 983 A.2d 1231, 1239 (2009).

⁹¹ Pennsylvania Human Relations Comm’n v. Uniontown Area Sch. Dist., 455 Pa. 52, 78, 313 A.2d 156, 170 (1973).

⁹² Pennsylvania Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n, 453 Pa. 124, 133–34, 306 A.2d 881, 887 (1973).

⁹³ *Id.* at 134.

⁹⁴ *Ibid.*

⁹⁵ See Uniontown Area Sch. Dist., 455 Pa. 52, 313 A.2d 156.

⁹⁶ *Id.* at 79.

discrimination based on disability, for example.⁹⁷ Even more pertinently, the Commission has adopted rules and regulations regarding discrimination based on pregnancy, which is not enumerated within the PHRA and the PFEOA, but which the Commission correctly understands to be a form of sex discrimination.⁹⁸

Thus, while Lambda Legal commends the Commission for its Proposed Guidance, which is “intended to provide both guidance and assistance to those who come under the jurisdiction of the Commission as it continues its effort to ensure that the right to equal opportunities . . . is achieved,” the Commission has much broader powers that allow it to promulgate rules and regulations with “binding force or effect.” Moreover, it is our understanding that the Commission has already accepted, and even found probable cause for, complaints alleging discrimination on the basis of sexual orientation or gender identity.⁹⁹

By promulgating formal rules and regulations, the Commission would not be embarking onto uncharted waters. Indeed, on January 20, 2016, the New York State Division of Human Rights finalized rules and regulations, pursuant to New York State’s Human Rights Law, explicitly defining “[t]he term ‘sex’ when used in the Human Rights Law [to] include[] gender identity and the status of being transgender.”¹⁰⁰ And several federal agencies have now done the same.¹⁰¹ Such an action has numerous benefits, among which are: (1) assisting employers, housing providers, businesses, organizations, service providers (including government), and other entities in understanding their responsibilities under the law; (2) educating the public about the prohibition of sex discrimination, particularly as it protects LGBTQ and gender-nonconforming people; (3)

⁹⁷ See 16 Pa. Code § 44.1 *et seq.*

⁹⁸ See 16 Pa. Code § 41.101 *et seq.*; Pa. Human Relations Comm’n, Definitions (“Discrimination based on pregnancy is considered sex discrimination.”), available at: <http://www.phrc.pa.gov/Resources/Pages/Definitions.aspx#.WST84GgrKM8> (last visited May 23, 2017).

⁹⁹ The Williams Inst., *Pennsylvania – Sexual Orientation and Gender Identity Law and Documentation of Discrimination* (Sept. 2009), available at: <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pennsylvania.pdf>.

¹⁰⁰ N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13.

¹⁰¹ These federal agencies include, *inter alia*, the Equal Employment and Opportunity Commission, see Baldwin, 2015 WL 4397641, at *5 (sexual orientation); Lusardi v. Dep’t of the Army, Appeal No. 0120133395, 2015 WL 1607756, at *7 (E.E.O.C. Apr. 1, 2015) (transgender status); Macy, 2012 WL 1435995, at *12 (transgender status); the Department of Health and Human Services, see 45 C.F.R. § 92.4 (“On the basis of sex includes, but is not limited to, discrimination on the basis of . . . sex stereotyping, and gender identity.”); the Department of Labor, see, e.g., 41 C.F.R. § 60-20.2 (“The term sex includes, but is not limited to, . . . gender identity; transgender status; and sex stereotyping.”); the Department of Education, see 34 C.F.R. § 270.7 (“Sex desegregation means the assignment of students to public schools and within those schools without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; and pregnancy and related conditions), including providing students with a full opportunity for participation in all educational programs regardless of their sex.”); the Department of Housing and Urban Development, see Memo. from John Trasviña to FHEO Reg’l Dir., *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010); and the Office of Personnel Management, see 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105.

informing individuals of their rights under the law; and (4) guiding the internal processing of complaints filed with the Commission.

Accordingly, the Commission should follow the path charted by the New York State Division of Human Rights, as well as numerous federal agencies, and promulgate and implement rules and regulations that *explicitly* define the term “sex,” as used in the PHRA and the PFEOA, to include sexual orientation, gender identity, gender expression, transgender status, and failure to comply with sex stereotypes.

a. Recommendation

Based on the Commission’s broad powers, Lambda Legal urges the Commission to promulgate and implement rules and regulations as follows:

Discrimination on the basis of sex against lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) persons.

(a) *Statutory Authority. Pursuant to the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 957(d), and the Pennsylvania Fair Educational Opportunities Act, 24 Pa. Stat. Ann. § 5006(6), it is a power and a duty of the Division to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of said Acts. Pursuant to the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. § 957(e), and the Pennsylvania Fair Educational Opportunities Act, 24 Pa. Stat. Ann. § 5006(5), it is also a power and duty of the Commission to formulate policies to effectuate the purposes of these Acts.*

(b) *Purpose. In recognition that the prohibition on sex discrimination, contained within the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act, covers discrimination on the basis of actual or perceived sexual orientation, gender identity, gender expression, transgender status, and sex stereotypes, and in order to meet its obligation to combat discrimination, as set forth in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act, the Commission adopts this chapter for the following purposes:*

- 1) To assist employers, educational institutions, housing providers, businesses, organizations, service providers (including government), and other entities in understanding their responsibilities under the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act;*

- 2) *To educate the public about the prohibition of sex discrimination, particularly as it protects lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) people;*
- 3) *To inform individuals of their rights under the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act; and*
- 4) *To guide the internal processing of complaints filed with the Commission on Human Relations.*

(c) Definitions.

- 1) *Gender identity means an individual's internal core sense of their gender, which may be male, female, neither, both, or a combination of male and female, and which may be different from that individual's sex assigned at birth. The way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender.*
- 2) *A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.*
- 3) *Sexual orientation means homosexuality, heterosexuality, or bisexuality.*
- 4) *Sex stereotypes refers to stereotypical notions of gender, including expectations of how an individual represents or communicates gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that gender can only be constructed within two distinct opposite and disconnected forms (masculinity and femininity), and that gender cannot be constructed outside of this gender construct (individuals who identify as neither, both, or a combination of male and female genders) that individuals consistently identify with one and only one of two genders (male or female), and that they act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered expectations related to the appropriate roles or behavior of men and women, such as the expectation that women are primary caregivers, and aspects of an individual's sexual orientation, such as the sex of an individual's sexual or romantic partners.*

(d) Discrimination on the basis of sex defined.

- 1) Discrimination on the basis of sex, as the term “sex” is used in the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act, includes, but is not limited to, discrimination on the basis of actual or perceived sexual orientation, gender identity, gender expression, transgender status, and failure to conform to sex stereotypes.*
- 2) The prohibitions contained in Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected category, also prohibit discrimination on the basis of actual or perceived sexual orientation, gender identity, gender expression, transgender status, and failure to conform to sex stereotypes.*
- 3) Harassment on the basis of a person’s actual or perceived sexual orientation, gender identity, gender expression, transgender status, and failure to comply with sex stereotypes is sexual harassment.*
- 4) To the extent the establishment of single-sex facilities is permitted by law, individuals shall be admitted to single-sex facilities, including but not limited to restrooms, locker rooms, and housing, based on their gender identity.*

IV. CONCLUSION

We greatly appreciate the Commission’s efforts to clarify how it processes complaints of discrimination by LGBTQ persons, under the PHRA and the PFEPA, through the Proposed Guidance. We strongly support the issuance of the Proposed Guidance in order to make clear that discrimination on the basis of sexual orientation, gender identity, gender expression, transgender status, or failure to conform to sex stereotypes constitutes discrimination on the basis of sex. Nonetheless, for the reasons set forth above, we respectfully urge the Commission to address the following points of critical importance to LGBTQ and gender-nonconforming people in Pennsylvania:

1. The Proposed Guidance should be expanded to incorporate all of the rationales for why discrimination on the basis of sexual orientation or gender identity are forms of sex discrimination;
2. In order to provide clarity, the language of the Proposed Guidance should be modified to explicitly state that the Commission will take and investigate sexual

orientation, gender identity, gender expression, transgender status, and sex stereotyping claims filed by LGBTQ individuals as sex discrimination claims; and

3. In order to provide certainty for LGBTQ Pennsylvanians as well as to all who must abide by the PHRA and the PFEOA, the Commission should promulgate and implement rules and regulations that *explicitly* define discrimination on the basis of sex, as the term “sex” is used in those Acts, to include actual or perceived sexual orientation, gender identity, gender expression, transgender status, and failure to comply with sex stereotypes.

We thank you for considering these comments and for your work to implement the crucial civil rights protections of the PHRA and the PFEOA so that LGBTQ people and gender-nonconforming people are afforded an equal opportunity to enjoy a full and productive life in the Commonwealth of Pennsylvania.

Most respectfully submitted,

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