

2013 SENATE JUDICIARY

SB 2252

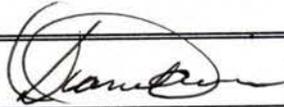
2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2252
2/6/2013
Job #18390

Conference Committee

Committee Clerk Signature



Minutes:

Attached testimony

Relating to discrimination on the basis of sexual orientation

Senator David Hogue - Chairman

Senator John Warner - Introduces the bill - See written testimony and proposed amendment (1)

Murray Sagsveen - See written testimony (2)

Senator Sitte - Asks what legislative action would do in a court case such as California.

Sagsveen - Responds gays are not a protected class and this bill wouldn't make them one it would have them treated fairly.

Rep. Kylie Oversen - District 42 Grand Forks - See written testimony (3)

Rep Oversen - Replies it does not treat them as a protected class

Rep. Joshua Bosschee - District 44 - See written testimony (4)

Senator Hogue - Asks how this legislation is different than previous legislation

Rep Bosschee - Replies it was religious positions

Claus Lembke - See written testimony (5)

Peg Haug - See written testimony (6)

Rep. Kathy Hawken - Fargo - This is an issue of what is right. It is time.

Suzanna Magstadt - See written testimony (7)

Wayne Kutzer - See written testimony (8)

Shane Gerbert - See written testimony (9)

Tom Fiebiger - See written testimony (10)

Senator Hogue - Asks if in his practice he has received calls about housing discrimination

Fiebiger - Replies he has

Senator Hogue -Asks if it was because they were gay or lesbian

Fiebiger - Replies yes and he had a case where someone was evicted because he was gay and he wasn't.

Crystal Kemmis - In support - Speaks of being bi-racial and opportunities she has had since Congress passed an anti-discrimination act. She speaks of the discrimination gay people withstand. (11)

Tami Adams - See written testimony - (12)

Jean King - See written testimony - (13)

Robert Loft - NDSU - Gives a handout (14)

Kevin Tengesdal - See written testimony - (15)

Andy Peterson - Greater North Dakota Chamber - See written testimony (16)

Jody Farris - ND University Association - See written testimony (17)

Riah Roe - See written testimony - (18)

Evie Myers - Vice-President of Equity Diversity and Global Outreach at NDSU - See written testimony - (19)

Pete Haga - Representing the City of Grand Forks - States that GF is in support of this bill and show a resolution adopted by the city. See hand out (20)

Armand Tiberio - ND Public Education - In support

Stewart Savelkoul - ND Public Employee Association - In support

Tom Riccar - President of the ND FICO - In support - There is no place in the workplace for discrimination.

Opposition

Tom Frier - ND Family Alliance - See written testimony (21)

Kelly Fedorchak - Alliance for Defending Freedom - See written testimony (22)

Yanne Myrdal - Concerned Women for America of ND - See written testimony (23)

Christopher Dodson - Executive Director ND Catholic Conference (24)

Pastor John Boustad - See written testimony (25)

Clint Fleckenstein - See written testimony (26)

Pastor Jay Reinke - See written testimony (27)

Rocky Gordon - ND Apartment Association - Their opposition has nothing to do with gay or lesbian, they do not stand for discrimination of any kind. Their opposition is for the expansion of protected classes.

John Langenfelner - Citizen - Concerned about his business being put in a bad situation. He said he feels he would always feel he was under a threat.

Bill Schue - Citizen - Says we need to be aware of the structure of the law and must be concerned with the power of the bill. In the hands of an aggressive group it can drive people to bankruptcy.

Neutral

Tony Weiler - Commissioner of Labor - See written testimony (28)
Will share a print out of states that have a protected category

Close the hearing on SB2252

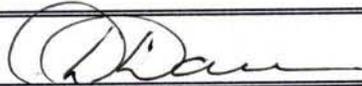
2013 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

SB2252
2/13/2013
Job #18823

Conference Committee

Committee Clerk Signature



Minutes:

Vote

Senator David Hogue - Chairman

Committee work

Senator Hogue explains the bill and proposes a Hog House amendment. He explains that this amendment does two things; Section One declares the policy of the State of ND to say that the State of ND does not condone discrimination on the basis of sexual orientation. This policy does not go into the Human Rights Act so that does not create a cause of action for individuals who allege they have been discriminated against on the basis of sexual orientation. This does not create a class, does not provide any right to bring a lawsuit. In the Third Sub-section, it says it is a policy of the State but that they are not amending State Personnel Policy to recognize Gay and Lesbians and this does not amend contracting policies. In Section Two - this will change the age to bring an age discrimination lawsuit. The Section Three amendment relates to the relief that people are entitled to for back pay.

Discussion

Committee discusses if sexual orientation is defined in State Law currently. Senator Nelson says the proposed amendment does not address lodging and that is what she is hearing about. Senator Hogue said it would be under the Public Accommodations Section of the Act. He gives examples of people being turned away from restaurants or bars and says we do not condone or support that at all. The difference between the bill and the amendment is whether you have a right to initiate a lawsuit.

Senator Berry moves amendment 13.0758.01002
Senator Armstrong seconded

Vote - 4 yes, 3 no
Motion passes

Senator Sitte moves the Sitte amendment defining sexual orientation
Senator Hogue seconded

Discussion

Committee discusses defining sexual orientation and trans-gender.

Vote - 5 yes, 2 no

Motion passes

Senator Berry moves a do pass as amended on the bill
Senator Armstrong

Discussion

Committee discusses that the bill is gone and with the amendment it has been Hog Housed. They discuss liking the bill as amended because they do not support discrimination. They also do not like to lose talented people moving out of state.

Vote - 6 yes, 1 no

Motion passes

Senator Hogue will carry

February 12, 2013

JC
2-12-13
1 of 2

PROPOSED AMENDMENTS TO SENATE BILL NO. 2252

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 1-08 of the North Dakota Century Code, relating to a state policy on discrimination on the basis of sexual orientation; and to amend and reenact subsection 1 of section 14-02.4-02 and section 14-02.4-20 of the North Dakota Century Code, relating to the definition of age and to the relief for discriminatory practices.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 1-08 of the North Dakota Century Code is created and enacted as follows:

State policy - Discrimination based on sexual orientation.

It is the policy of the state of North Dakota that this state does not condone discrimination on the basis of sexual orientation. Sexual orientation means actual heterosexuality, bisexuality, or homosexuality. This section does not:

1. Create a right to a cause of action for damages for a claim of discrimination on the basis of sexual orientation;
2. Create any rights or protections with respect to discrimination on the basis of sexual orientation; or
3. Amend or change state personnel policies, contracting policies, or other law or policy related to state action.

SECTION 2. AMENDMENT. Subsection 1 of section 14-02.4-02 of the North Dakota Century Code is amended and reenacted as follows:

1. "Age" insofar as it refers to any prohibited unfair employment or other practice means at least ~~forty~~fifty-five years of age.

SECTION 3. AMENDMENT. Section 14-02.4-20 of the North Dakota Century Code is amended and reenacted as follows:

14-02.4-20. Relief.

If the department, as the result of an administrative hearing, or the court determines that the respondent has engaged in or is engaging in a discriminatory practice, the department or the court may enjoin the respondent from engaging in the unlawful practice and order temporary or permanent injunctions, equitable relief, and backpay limited to no more than ~~two years~~one year from the date a minimally sufficient complaint was filed with the department or the court. Neither the department nor an administrative hearing officer may order compensatory or punitive damages under this chapter. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against reduce the backpay otherwise allowable. In any action or

proceeding under this chapter, the court may grant the prevailing party a reasonable attorney's fee as part of the costs. If the court finds that the complainant's allegation of a discriminatory practice is false and not made in good faith, the court shall order the complainant to pay court costs and reasonable attorney's fees incurred by the respondent in responding to the allegation."

2 of 2

Renumber accordingly

Date: 2/12/13
 Roll Call Vote #: 2

**2013 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2252**

Senate JUDICIARY Committee

Check here for Conference Committee - Define Sexual Orientation -

Legislative Council Amendment Number Sitte amendment

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By S Sitte Seconded By J Hoque

Senators	Yes	No	Senator	Yes	No
Chairman David Hogue	X		Senator Carolyn Nelson		X
Vice Chairman Margaret Sitte	X		Senator John Grabinger		X
Senator Stanley Lyson	X				
Senator Spencer Berry	X				
Senator Kelly Armstrong	X				

Total (Yes) 5 No 2

Absent _____

Floor Assignment Pass

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2252: Judiciary Committee (Sen. Hogue, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2252 was placed on the Sixth order on the calendar.

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Renumber accordingly

2013 TESTIMONY

SB 2252

Senate Bill 2252
Senator John Warner
6 February 2013

Mr. Chairman, Members of the Committee,

Senate Bill 2252 extends the protections under the law against discrimination to include sexual orientation. Mr. Chairman, you have allotted a generous amount of time to this important discussion and you will hear some compelling testimony so I'm going to limit my remarks to some of the mechanics of the bill, a little bit of orientation into what seems a lot of repetition and maybe address some stumbling blocks that make more sense when placed in context.

- Sections 1-12 deal with Century Code 14-02.4- Human Rights
- Sections 13-19 deal with Century Code 14.02.5-Housing discrimination
- Sections 20-24 deal with Century Code 26-Insurance
- Section 25 deals with Century Code 27-The Judicial Branch

Let us begin with the Human Rights Sections:

Section 1 adds sexual orientation to a long list of prohibited discriminations which include the more familiar race, color, religion, sex, national origin, age, mental or physical disability, marital status or public assistance.

Section 2 adds a definition of 'gender identity' (page 3, line 20) which cycles back into the definitions as part of the definition of 'sexual orientation' (page 4, line 27) but does not appear elsewhere in the body of the bill.

Section 3 contains a drafting error near the top of the page; somewhere around page 5, line 11 the words sexual orientation should have been added to this draft. Mr. Chairman, I have had an amendment drafted and I hope that the committee will consider its inclusion.

This section also adds new language protecting religious organizations from the need to comply with this law. I consider this to be a "belt AND suspenders" provision. In my opinion religious organizations have abundant protection in the Constitution that supersedes the provisions of this law and that it is not necessary.

My only concern with offering this redundant assurance is that if this legislature thinks that it can, by majority vote, exempt churches from the provisions that some future legislature, by majority vote, will think that it can compel churches to follow the nondiscrimination law. I want it to be very clear that churches and religious organizations have constitutional protections above and beyond this clause and that the three subsections under paragraph 4 are merely restating the obvious.

The remaining sections through Section 12 plug the new language into code dealing with employment agencies, labor unions, employment advertising, public accommodation, public services and credit.

Sections 13-19 deal with housing discrimination. I don't want to go through them section by section except to point out a notable section, an exception that isn't in the bill. Because there is no new language in 14-02.5-09, 'Sales and rentals exempted' it is not written into the bill but it contains some important exemptions.

1. Sections 14-02.5-02 through 14-02.5-08 **do not apply to the sale or rental of a single-family house sold or rented by the owner if the owner does not own more than three single-family houses at any one time** or own any interest in, nor is there owned or reserved on the person's behalf, under any express or voluntary agreement, title to or any right to any part of the proceeds from the sale or rental of more than three single-family houses at any one time. In addition, **the house must be sold or rented without the use of the sales or rental facilities or services of a licensed real estate broker, agent, or realtor, or of a person in the business of selling or renting dwellings, or of an employee or agent of any such broker, agent, realtor, or person; or the publication, posting, or mailing of a notice, statement, or advertisement prohibited by section 14-02.5-03.** The exemption provided in this subsection applies only to one sale or rental in a twenty-four-month period, if the owner was not the most recent resident of the house at the time of the sale or rental. For the purposes of this subsection, a person is in the business of selling or renting dwellings if the person:

- a. Within the preceding twelve months, has participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest in a dwelling;
- b. Within the preceding twelve months, has participated as agent, other than in the sale of the person's own personal residence, in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest in a dwelling; or
- c. Is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families.

2. Section 14-02.5-02 and sections 14-02.5-04 through 14-02.5-08 **do not apply to the sale or rental of the rooms or units in a dwelling containing living quarters occupied by or intended to be occupied by not more than four families living independently of each other, if the owner maintains and occupies one of the living quarters as the owner's residence.**

Sections 20-24 of the bill prohibit discrimination in insurance products

Section 25 of the bill prohibits discrimination in the call to jury duty.

Mr. Chairman, I will be happy to attempt to answer any questions but I would prefer to allow all possible time for those who have traveled so far to testify.

13.0758.01001
Title.

Prepared by the Legislative Council staff for
Senator Warner

February 5, 2013

2252 (11)

PROPOSED AMENDMENTS TO SENATE BILL NO. 2252

Page 5, line 11, after the first comma insert "sexual orientation."

Renumber accordingly

**Testimony to the Senate Judiciary Committee
by Murray G. Sagsveen**
on
Senate Bill 2252
February 6, 2013

I am Murray Sagsveen, personally testifying in support of Senate Bill 2252.

Currently, state law prohibits discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer. This bill would also prohibit discrimination on the basis of sexual orientation in employment relations, public accommodations, housing, state and local government services, and credit transactions.

We should now clearly affirm in state law that our family members, our friends, our colleagues, and others should not be the subject of discrimination on the basis of sexual orientation.

During the past dozen years, many of my close friends and colleagues have explained numerous traumatic events in their lives solely because of their sexual orientation. Parents no longer considered them part of the family. They were shunned in church and in the workplace. When applying for employment, they limited their job search to known "gay friendly" employers, they were careful to not mention the word "partner," and they dressed differently so that the interviewer would not suspect they were gay. If hired, they were careful about the photos on their desk, introducing their partner to colleagues, or even hinting to colleagues they had a partner. When socializing, they only patronized the "gay friendly" bars and clubs in order to avoid unpleasant or even dangerous situations.

You may be interested in several specific examples...

Previously, I was the general counsel of an international specialty medical association in St. Paul, MN. We had a very strict nondiscrimination policy, and we were considered a very gay friendly employer. As a result of that reputation, I believe we attracted the best and brightest who may have been reluctant to seek employment elsewhere.

Also, when at the medical association, a close friend and physician explained that he hid his relationship with his partner for many years. When considered safe at his employment, he “came out” to his co-workers. No more hiding their relationship, no more avoiding social events with co-workers, and no more fear. He said, almost with tears in his eyes, that coming out was like taking a huge burden off his shoulders.

An acquaintance also recently told me about a surprise eviction. Two women living in an apartment asked the landlord to repair the plumbing. When the landlord entered the apartment and realized the two women were sharing the same bedroom, the landlord evicted them.

As a former judge advocate officer, I know of gay officers and enlisted personnel who lived in constant fear of disclosure. They were forced to “live in the closet” because it would take only one inadvertent comment (that could be relayed to a commanding officer) or (when with a partner) one accidental encounter with a commanding or noncommissioned officer to ruin a career. The so-called “don’t ask, don’t tell” policy relieved some of the tension, but disclosure could still lead to an involuntary discharge. Fortunately, in September 2011, gays could openly serve in the military without (much) fear.

Even though gays may now serve openly in the military, they may still be fearful, if assigned to or serving in North Dakota, that they be denied public accommodations, housing, governmental services, or financial credit on the basis of their sexual orientation. They may now serve their country, but may not be able to find a room at the inn.

When preparing this testimony, I realized my friends, colleagues (in the civilian workplace and in the military), and others were all fearful – afraid of exposure, afraid of eviction, afraid they would be fired or discharged, afraid they would be ridiculed or injured in an unfriendly social setting...always afraid. Perhaps this fear is best explained in a recently published book, *Prairie Silence: a Rural Expatriate’s Journey to Reconcile Home, Love, and Faith*, by Melanie Hoffert, a close friend and former colleague who grew up in Wyndmere, ND.

I could tell you many more disappointing stories – and you may hear many such stories today.

To summarize, this bill should be enacted for three basic reasons:

- The Fourteenth Amendment to the United States Constitution clearly requires that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws."
- It is the right thing to do. We should not tolerate anyone denying employment, public accommodations, housing, governmental services, or credit transactions to our family members, colleagues, members of the armed forces, friends, and others solely because of their sexual orientation.
- Enacting this bill would prove that the first sentence of the Human Rights law, NDCC §14-02.4-01, is the State's policy: "It is the policy of this state to prohibit discrimination..."

Finally, I understand the political reasons for the proposed language (page 5, line 29, through page 6, line 2) to essentially allow religious organizations to discriminate on the basis of sexual orientation regarding employees and volunteers for *nonreligious* positions. Hopefully, during my lifetime, religious organizations will testify in this Legislative Assembly that they also will not condone discrimination on the basis of sexual orientation.

Therefore, I urge you to vote "do pass" on this very important human rights bill.

Murray G. Sagsveen
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Bismarck, ND 58503-1701
mgsagsveen@gmail.com
701-426-1905

Testimony- SB 2252
Senate Judiciary Committee

Good morning, Mr. Chairmen and members of the Senate Judiciary Committee. My name is Kylie Oversen. I represent District 42 in Grand Forks. I am here today to speak in support of SB 2252 and explain why this particular piece of legislation is so important to me and many constituents in my district.

When I arrived in Bismarck for this legislative session, my colleagues and I made a commitment to work for the betterment of our great state and to always put North Dakota families first. As you have heard, SB 2252 will extend basic protections in the home and workplace to members of the LGBT community in North Dakota. Passage of this bill will ensure that we are looking out for all families in our state guaranteeing that they are comfortable enough in their living spaces and their workspaces to be who they truly are and in turn, being the most productive and engaged citizens they can be.

Our state has much to be proud of: We are one of the only states in the US with a budget surplus. We are leading the way in the energy and agriculture sectors. We have been building our education systems to produce intelligent and productive students. However, North Dakota still has a long ways to go when it comes to social issues. We have an opportunity before us to change that. This is the first step to creating inclusive and supportive communities for all of North Dakota's families and to encourage diversity and acceptance among our communities.

Young people across the state want to attend our public universities and colleges and many hope to start their careers and families here. However, not all of them feel welcome or protected when they must constantly fear discrimination by their employer or their landlord. We want to encourage our young people to stay in the state and many of them desire inclusive and diverse communities. Further, we want the ability to attract the best and brightest from across the nation to our schools and our businesses. This bill is a big step in allowing us to do just that.

When we have the conversation about discrimination, particularly against the LGBT community as it relates to this bill, many people question whether or not this actually happens in our state. I wonder what part they are questioning. Whether or not we have North Dakota residents that identify as gay, lesbian, or otherwise? Or are they are questioning if those individuals are actually discriminated against? My answer to both of those questions, Mr. Chairmen and members of the committee, of course, is yes. Now, we have an opportunity to change just one of those answers.

I have many personal experiences with this issue. In fact, both of my current roommates in Grand Forks identify as gay. At any point on any given day, either of them could be evicted from our shared apartment, for no reason other than the presumption that they are gay, and according to our law right now, they would have no recourse. That absolutely breaks my heart. My roommates are both civically engaged, well-respected, wonderful individuals and neither of them deserve the opportunity for that type of blatant discrimination to occur.

Along with my roommates, I have many other colleagues, family members, and friends who are a part of the LGBT community, as I imagine many of you do as well, and it is time that we, as a state, acknowledge those individuals as truly equal members of our communities.

This is not a partisan issue; it is not an issue of individual religious convictions or beliefs. Mr. Chairmen and members of the committee, this legislation is a business and economic issue and more importantly a family issue. It is about creating inclusive, supportive, and diverse communities that welcome and accept all members as our state continues to expand and progress.

With that, Mr. Chairmen and members of the committee, I thank you for allowing to speak to you today and will gladly answer any questions that you may have.

SB 2252 Testimony
Representative Joshua A. Boschee, District 44
Senate Judiciary Committee

Chairman Hogue and Committee Members,

I am truly honored and humbled to stand in front of you all today to ask for your support for SB 2252 as a fellow legislator. You see, it was four short years ago when I testified in front of this committee as a citizen to ask for support of SB 2278, an almost identical bill during the 2009 legislative session. I think we can all agree that our great state has changed a great deal since that time.

Four years ago, the Senate Judiciary committee supported similar legislation to improve the quality of life for North Dakota's lesbian, gay, bisexual and transgender citizens and their families. Followed by a healthy majority of Senators voting to put an end to discrimination based on sexual orientation or gender identity. For some it took courage, but they knew it was the right thing to do. I'm asking you to do the same.

As Senator Warner indicated, this is a fairly simple piece of legislation. It is a statement from our elected leaders that we value all North Dakotans and their contributions to our communities, regardless of who they love or consider their family. It is rare that today any of us do not have a family member, friend, co-worker, neighbor or someone we worship with that is gay or lesbian. As we see greater representation of lesbian and gay people in the media, our communities, business and industry, government and throughout various faiths, people in our state have become more comfortable with who they are and feel the ability to be honest with their family, friends, co-workers and neighbors. While some feel this comfort, I can assure you that there are many more that fear their job, home and safety will be compromised if others knew of they were gay or lesbian.

As an educator, I have spent the last seven years facilitating training for students, educators, employers, people of faith and community leaders to gain a better understanding of the experiences of LGBT people and their families. These discussions have occurred throughout the state in small and large groups, churches, schools, businesses and institutions of higher education. Ninety percent of the time, a participant shares a story about them or someone they know experiencing employment or housing discrimination because they were perceived or discovered to be LGBT. Very few are willing to report their experience to the Department of Labor for one of two reasons. First of all, the Department of Labor cannot do anything for them and secondly, they fear continued discrimination or rejection if they were to report something.

These experiences negatively impact our communities and our state. When an individual lives in fear of losing their job or home, they are continually trying to find ways to keep their personal life separate. This impacts productivity and the individual's ability to feel safe in their workplace or home. Passing SB 2252 will allow LGBT North Dakotans to be afforded basic protections in housing and employment, which in turn will improve productivity and one's

ability to more fully participate in society. Currently, regardless of being an average or above average employee or whether you pay your rent on time or early each month, you can still be fired or evicted because a small part of whom you are. One's ability to work or rent should not be dictated by who one loves or calls family.

My sexual orientation is a small part of who I am. It is no greater or less than the fact that I am white, a man, able bodied, spiritual, a son, a brother, educated, middle-class, an engaged citizen or a teacher. All of these identities combined, make me who I am.

As I stated before, our state has changed dramatically since 2009. Agriculture commodity prices, energy development, increased technology development and manufacturing, complemented by a highly-skilled and educated work force has made our economy the envy of the nation. Each day, the local and national media produces articles about our growing economy, community values and work ethic. The nation is paying attention to who we are and where we are heading. This is an opportunity for us to tell the nation that we value the contributions of all our family members, friends, co-workers, neighbors and those we worship with.

SB 2252 will help enhance our business friendly environment that enhances creativity, entrepreneurship and innovation by ensuring that some of our most talented individuals are able to contribute to the economic success of our state without the undue and unnecessary pressure of discrimination over their heads. It also falls in line with the Department of Commerce's North Dakota Economic Development Strategic Plan by:

- Increasing the state's ability to attract, retain and expand talent
- Creating a culture that drives individual and organizational improvement
- Improving the productivity of the overall organization.

Additionally, it complements the North Dakota 2020 and Beyond recommendations by:

- Growing and nurturing creativity in North Dakota;
- Fostering an image that ND is a vibrant, progressive state with a great family and business environment

This legislation is good for business, 88% of Fortune 500 companies have non-discrimination policies that include sexual orientation and 57% include gender identity. When we limit the opportunity for discrimination, we create an environment of increased productivity. This morning you will hear from employers and statewide association about why not discriminating against LGBT persons is good for their bottom line. While they have protections for their employees and members, those protections do not follow the individuals in their communities and throughout the state. Passing SB 2252 supports the business culture of the employers that are an integral part of our state's economic vitality.

It is sometimes stated that enhancing nondiscrimination policies provides special rights to one group of people over another. I disagree with this sentiment. Enhancing nondiscrimination policies recognizes that in our society, certain people become targets and are more likely to be

treated unfairly than others. The opportunity for this type of treatment is detrimental for our families, our communities and our state. Our state and nation has a history of overcoming these forms of discrimination. At one point in our nation's short history, discrimination occurred based on sex, race and religion. At times, it took courage for elected leaders to say "No More" to protect groups that have historically been discriminated against. Now is North Dakota's turn to ensure that your family members, friends, co-workers and neighbors are judged by the content of their character, not who they love or call family.

Finally, as elected leaders, we cannot bury our heads in the sand and continue to be naïve that discrimination against lesbian, gay, bisexual and transgender North Dakotans does not occur. I believe that the majority of businesses and landlords do not discriminate; in fact they appreciate the contributions all of their employees and tenants make to our community. SB 2252 tells the other employers and landlords that North Dakota is home to a variety of people and as long as they are doing their job and paying their rent on time, discrimination based on sexual orientation and gender identity is inappropriate and illegal. It is a statement to LGBT North Dakotans, their families and those North Dakotans that oppose discrimination in any form, that we value our family, friends, neighbors, co-workers and those we worship and all that they contribute to our great state.

There were many North Dakotans that wanted to be here this morning, but were unable to attend. They have submitted written testimony and I ask you to take some time to review what they have to say. You will find that there are stories of direct discrimination, stories of young people leaving the state to attend college or find employment because they feared they could be discriminated against and of course family and friends of LGBT North Dakotans who want their children, siblings, parents and friends to be protected and to be full members of our community.

Chairman Hogue and committee members I ask for a DO PASS recommendation on SB 2252 so that your LGBT family members, friends and constituents can live free from the fear of discrimination in North Dakota.

Dear Chairmen and Committee Members:

My father's great grandfather Matt Petrick emigrated from Czechoslovakia to the United States and met his wife Mary Martinek. In 1881 Matt and Mary were among the first to homestead Prairie Center Township, in what is now Walsh County, North Dakota

My mother's great grandfather Ole Elvebakken emigrated from Norway to the port of Boston Massachusetts and at twenty-one years old he worked his way to North Dakota for the opportunity at a new life. Ole met his wife Lillian Nord and opened his shoe and harness repair business in St. Thomas North Dakota.

My parents are the fourth generation to raise a family while calling North Dakota home and I am as proud of them as they are of me. Being Born in North Dakota alone doesn't make you North Dakotan. It was my parents that instilled the values, the respect of others, pride in self, and the determination to always strive to be better.

As a child I attended Belmont Elementary school in Grand Forks and ran both cross country and track at Central High School. I joined Boy Scouts, Troop Sixteen in the fifth grade and become an Eagle Scout, along with three of my best friends. I have worked at the same independent automotive repair service station since I graduated High School in 2006 and am attending Northland Community and Technical College pursuing a degree in Architectural Drafting

I was born in North Dakota and I grew up in North Dakota, it shaped the person I have become and I take pride in my heritage and what it means to be a fifth generation North Dakotan.

In April 2009 I wrote an editorial expressing my disappointment in the defeat of S.B. 2278, which would have granted equal protections in housing and employment to all North Dakota residents. I ended the editorial acknowledging that this bills defeat would directly impact me. Shortly after the editorial was published my employer started holding closed door meetings to discuss whether or not I could retain my position. After two years of employment I came home to a letter informing me that I had 30 days to vacate the premises and my employment had been terminated. Over those thirty days I would be harassed and threatened by my employer.

Currently those elected to represent the people of North Dakota are debating a bill that will decide how much of a North Dakotan I am. Whether I can be afforded the rights and dignity bestowed on four generations of Petrick's before me. Whether I can be judged alone on my actions and the content of my character. It is wrong for any resident of our state to live in constant fear of losing their home or their jobs because of who they are. I urge a yes vote on S.B. 2252 because it is the North Dakotan thing to do.

Zack Petrick

Grand Forks, N.D.

Testimony of Celeste L. Carlson (50 S Terrace N, Fargo-ND) before the Senate Judiciary Committee

Hello Chairman Hougue and members of the Judiciary Committee. Today, I am submitting testimony in support of SB 2252, which would amend the ND Human Rights Act and the ND Fair Housing Act to include sexual orientation and gender identity in housing, employment, public accommodations and public transactions.

I was born and have lived in North Dakota most of my life. I pay my taxes. I am a productive, contributing member of my community. I have a long history of working in public service, including child protection and with homeless veterans. I volunteer and am in a leadership role in my church. I have also been involved in neighborhood and community beautification projects. I care about the well-being of my community and the people in it.

I have been partnered with my significant other, Amber for almost 6 years. We have 2 children under the age of 5.

While there are many things I love about being a North Dakotan, I frequently contemplate moving to another state. The fact my family and I are not afforded very basic protections in both employment and the community has made me question if I want to raise my family in North Dakota.

As a contributing member of my community, I should not be faced with worries about losing my job because of a perceived perception of my sexual orientation or experiencing legalized discrimination under public auspices.

My circumstances are not unique. I personally know several people and families who are Lesbian, Gay, Bisexual or Transgendered who contribute to our state economically and through their occupations or talents. I also know many people of the same population who have moved to other states where they are protected and valued.

I am depending on you all today to make the right choice for all people in North Dakota. An opportunity exists today for North Dakota to be recognized as a progressive state and join many other cities, states and private enterprises in declaring that members of the Lesbian, Gay, Bisexual and Transgendered communities are not second class citizens. If SB 2252 fails to pass, other individuals and families like mine will continue to be at risk. I would like the support of North Dakota in valuing me and offering me the same protections other citizens in North Dakota have. Thank you for your consideration and for hearing my testimony today.

My name is Andrew Hirst, and the bill SB 2252 that would ban discrimination based on sexual orientation in the job and housing market personally affects me. Hailing from Minot, ND, I have watched television ads that would tell me how I could sue if I was being discriminated against based on my gender, religion, and marital status. In that long list I never saw sexual orientation. Growing up in North Dakota, I knew I was different. I knew that I was attracted to men, but in Minot, that was something that one just didn't talk about. If one was gay, one either didn't come out of the closet or only told a limited number of people. In my graduating class there were only a few people who were open about their homosexuality. There was a fear of the unknown. Thus in my senior year of high school, I knew that I wanted to get away, to find someplace where I wouldn't have to hide.

Luckily I found my way to a school that was more accepting and open about sexuality and was fortunate enough to receive the top academic scholarship at St. Olaf College, where I have learned to become comfortable with myself as a gay man. While studying here I have been able to participate in such extracurricular activities as the St. Olaf Choir, leading Habitat for Humanity trips over Spring Break, and studying French language and culture in Paris. In May 2014, I will be graduating with a double major in music and mathematics with a concentration in statistics and hope to go on to graduate school in biostatistics.

My parents still live in Minot where my father works alongside my sister in their dental office. I would love to return to North Dakota. It is where I grew up, where my family lives, and where I have spent the last three summers working. Growing up, North Dakota provided me with a safe environment, a good education and many musical opportunities. Even though we hear about the changes taking place in ND, I still believe North Dakota is one of the best places to raise a family. Unfortunately, there still persists a reluctance to return home out of fear. Although I feel like I will be quite qualified for a job in applied mathematics, I could still be discriminated against based on whom I love.

During the summers I have worked as a counselor at Camp Metigoshe and have been lucky enough to be able to confide in the director of the camp about my sexuality. In the camp setting you need to completely trust and be able to count on each other. That cooperation requires one to be comfortable with others. At that camp I did and still do feel completely safe, but as of now, that safety is not guaranteed in other work settings. I have homosexual friends in Minot who must keep a low profile about their personal life out of fear that they could be fired. I am still reluctant to return to a place that I love. This tolerance of discrimination based on sexual orientation sends the message to homosexual men and women that North Dakota is not somewhere that they can be openly loved and accepted.

Thus I urge you to vote Yes. Vote Yes so that I, along with others, don't have to live in fear. Vote Yes so that many men and women will be able to hold their heads up confident and proud of themselves and not kneeling in shame or fear. Vote Yes so that all women and men whatever their sexual orientation will be treated equally under the law.

Andrew Hirst
Minot, North Dakota

My name is Jace Riggin. I am proud to call myself a North Dakotan. The values instilled within me from this great state have truly helped me to become the person I am today. I grew up about 20 miles south of Devils Lake, ND and attended High School in Devils Lake. However, the truth is that I no longer live in North Dakota and question if I will move back. I now attend college at a small private liberal arts institution where I am studying Political Science and Communications. I go to Gustavus Adolphus College in St. Peter, MN.

You may be wondering why, if I love North Dakota so much, I would choose to leave. I left North Dakota because I wanted to be protected and valued. I left North Dakota because I wanted to attend college without fear. I left North Dakota because under the law in my Home State I am not equal. If someone chooses to fire me because of the person I love, they can in my Home State. Why, because I am gay. In this state that I love, I can be legally discriminated against because of my sexual orientation.

Senate Bill 2252 would prevent that discrimination from legally happening. At Gustavus Adolphus College a portion of our Mission statement reads:

"The College aspires to be a community of persons from diverse backgrounds who respect and affirm the dignity of all people. The purpose of a Gustavus education is to help its students attain their full potential as persons, to develop in them a capacity and passion for lifelong learning, and to prepare them for fulfilling lives of leadership and service in society."

I am asking you to affirm Senate Bill 2252. I am asking you to affirm my dignity as a human being. By passing this bill you will be allowing all North Dakotans to feel welcome at home. You will be allowing all North Dakotans to learn, grow, and reach their full potential as human beings in a place that they love.

Respectfully,

Jace Riggin '16
Political Science & Communication Studies Major
Gustavus Adolphus College
Diversity Center Staff
Cell: 701-351-5366
Email: jriggin@gustavus.edu

February 1, 2013

Dear Committee Members:

My name is Samantha June Larson. I was born and raised on a farm near Carrington, ND. I have always been an active and contributing member of society. I was in almost every high school extracurricular activity, and I graduated as a valedictorian. I earned a B.A. from UND with honors. While studying abroad in Norway during my final undergraduate semester, I had dreams of moving outside the state for better economic and cultural opportunities. Yet, I opted to return to Fargo and devoted my career to local community development. I promoted youth initiatives at Trollwood Performing Arts School and later earned my Master's from NDSU. There, I taught courses, expanded my civic involvement, and organized fundraisers for state agencies like the North Dakota Council on Abused Women's Services.

While earning my degree in my home state, I also fell in love with a fellow graduate student in the spring of 2009. Her name is Bobbi Jo Merten. She moved to North Dakota in 2006 to earn her Ph.D. in Coatings and Polymeric Materials at NDSU. Bobbi grew up on a dairy farm in northern Wisconsin. She was also a dedicated community volunteer throughout her life, and continued to donate her time through service with Habitat for Humanity, the Dorothy Day Food Pantry, and the Fargo-Moorhead Derby Girls. Bobbi has been very active in athletics throughout her life. She represented North Dakota as a member of the Women's Class C Slow Pitch Northern National Championship Team in 2010.

As a committed, same-sex couple, Bobbi Jo and I are writing to you today to express our support of SB 2252. We highly encourage you to do the same and end discrimination against LGBT residents across the state of North Dakota. Not only will this legislation provide members of our community with the same equal rights of other groups. It will also symbolize a cultural shift that will advance the state as a whole.

When similar legislation was introduced in 2009, I was a student at NDSU and attended some of the committee hearings. At that time, young, college-educated people were leaving the state at one of the highest rates in the nation. I believed this was one of the greatest reasons to pass such a measure – so valuable minds would stay in a place that was diverse and welcoming of all. With the economic boom, such a trend has made a drastic turn, and North Dakota has experienced one of the greatest population bursts in its history. Many smart, young people are now finding great employment opportunities across the state. However, it is continuing to lose many smart, young people who are strong community leaders because of the lack of support of LGBT. Bobbi Jo and I fit into this category.

Although it was my dream to move back to my hometown of Carrington with my partner, the hostile culture and unequal treatment of LGBT people motivated us to go elsewhere after graduation. Bobbi accepted a position with the Bureau of Reclamation in Lakewood, CO last January. I accepted a position working to strengthen rural communities across Colorado by increasing funding to local programs. We are reaching all of the milestones that any a young couple does. We bought a house, a new car, and we are looking at starting a family in the next few years. If we had equal protection and access under North Dakota law, we would have been much more willing to pay taxes, contribute to the state economy, advance the workforce, and volunteer to strengthen our communities. We would also be much more willing to raise our children in a state that stands up to hate and other critical issues of our time, like LGBT equality.

Again, we highly recommend that you support SB 2252 to promote equal treatment of LGBT persons in North Dakota. It is still my dream to return to my home state and contribute to making it a better place to work, live, and play *for all*.

In closing, thank you for considering our testimony and all the others that are supporting this bill.

Kind Regards,

Samantha J. Larson and Bobbi Jo Merten
14380 W Yale Pl.
Lakewood, CO 80228

Dear Members of the Senate Judiciary Committee:

I am submitting this e-mail in support of Senate Bill 2252, regarding amendments to the North Dakota Human Rights Act to extend basic protection against discrimination in housing and employment to North Dakotans, regardless of their sexual orientation. I was born and raised in North Dakota and, for the past 16 years, have been a resident of District 46. I am fiercely proud of my heritage as a third generation North Dakotan and am proud to have chosen to return to North Dakota to raise my two children, now ages 23 and 26.

I am concerned, however, that my children and other people's children continue to live in a state that does not extend basic protections in employment and housing to individuals regardless of sexual orientation. When I discuss this issue with my children, they are dismayed that the state they love would allow one of the last vestiges of bigotry against their friends, family and fellow citizens.

I also am an employment lawyer and have practiced in North Dakota since 1997. In my practice, I have seen outstanding North Dakotans whom I believed were subjected to unfair treatment in their employment because of the gender of the person they chose to love. And, for every case I see of overt discrimination against gay North Dakotans, I know there are other cases of more subtle discrimination. Sadly, there are many, many other citizens who are simply afraid and unwilling to be open about their relationships for fear that they will lose their homes and jobs if others know that they are gay.

Can you imagine going to work and not being able to share concerns about the death or illness of a partner for fear you would lose your job? Having to remain silent on the joys and sorrows of such a fundamental aspect of all of our lives takes a toll. It places gay North Dakotans in the position of having to choose between acknowledging and nurturing those relationships that our most central to our lives, or remaining silent in order not to risk the loss of job or home.

This is a wrong that must be remedied. It is not only right to pass this bill, it is good for North Dakota's booming economy. We need to attract and retain the best and the brightest in order to continue our state's strong economy. We can do this by clearly sending a message that North Dakota judges people based on talent, initiative, quality of character and not on preconceived stereotypes. This bill would also provide clarity to North Dakota employers, many of whom do not understand the current state of the law on discrimination based on sexual orientation. It would also level the playing field between North Dakota and Minnesota employers, where discrimination based on gender identity has been unlawful for years.

In conclusion, I strongly support SB 2252 and ask that each of you do all that you can to advance its passage.

Thank you,

Lisa Edison-Smith

I am writing in support of SB 2252, which would make it illegal to discriminate against an individual in their workplace or housing on the basis of their sexual orientation. When I learned in 2009 that a person could be discriminated against in North Dakota because they were gay, lesbian, bisexual or transgender, I was very surprised and then very disappointed when SB2278 did not pass in the house. The reasons that legislators gave for voting against this human rights bill included: one group of people should not be given 'special' rights, people who 'choose' this lifestyle should not be rewarded for their choices, and they aren't being denied equal rights so there is not reason for this bill.

I would like to address these comments and concerns. First this bill does not provide any special rights to any group of people, but instead will make sure that people are not discriminated against on the basis of whom they are, whether homosexual or heterosexual. Sexual orientation, just like race, religion, marital status, and disability, should not be the basis for any type of discriminatory action.

Second, I do not believe that people 'choose' their sexual orientation. I have personally watched young men and women struggle with their sexuality and try to be someone they are not. I would ask why anyone would 'choose' to be discriminated against, bullied, and denied equal rights under the law. Even if people think it is a choice, that does not negate the need for this bill. Religion and marital status, which are protected under the anti-discrimination law, are choices we all make.

Third, I don't personally know of anyone who has been discriminated against in our state on the basis of his or her sexual orientation, but that shouldn't be the reason to vote against this bill. If we allow a group of people to be discriminated against in North Dakota, it sends an unwelcoming message to individuals who are Gay, Lesbian, Bisexual or Transgender. I always hear that we want to make sure young people stay in our state or return to it. Why would a bright, talented young man or woman want to return to a state that allows him/her to be treated as a lesser citizen? We are also sending a message to children and adults that people who are homosexual are different and don't deserve equal rights under the law. If adults can discriminate against a group of people, we are teaching our children that they can also treat them as inferior, which we see result in bullying.

I hope that you will consider the message that we are sending by passing this bill. We are saying that all individuals are entitled to the same treatment in the workplace and housing under the law. We are sending a message that we value everyone in this state, even if they are different from us. We should not be allowed to discriminate for any reason in North Dakota. I grew up in ND and returned here 30 years ago. I want to be proud of this state and I want my son to be able to return here and be treated equally under the law.

Jane Hirst
2001 18th Ave NW
Minot, ND 58703
701 839-4338

I consider myself a Republican and I deeply support SB 2252 which would protect members of the LGBT community against discrimination in employment and housing. I support this bill because of my republicanism. I believe in one's right and control of property. I feel that it would be unjust for a landlord to kick out a tenant because they were gay. All tenants should have what Supreme Court Justice Joseph Story termed as a "free enjoyment of their property." Consider a cognitive exercise: Should landlords be able to kick out their tenants for any legal behavior that occurs inside their home? What about a landlord that disagrees with their tenant in regards to gun control? Would that be ok?

For the sake of this argument let's just assume that homosexuality is entirely a choice. Even if this assumption were true then my belief in the free exercise of conscience and thought prevails. One has a right to do or think as they please in their home as long as it is legal. Homosexuality is not illegal. It is also unjust for someone to be fired from a job due to their outside-of-work legal activity. This bill does protect churches and other religious organizations to be free to hire those that share their religious beliefs.

I am a member of the Church of Jesus Christ of Latter Day Saints (often referred to as 'Mormons') and I remain unequivocally committed to defending the bedrock foundation of marriage between a man and a woman. SB 2252 has nothing to do with marriage. Per the North Dakota Constitution, marriage "consists only of the legal union between a man and a woman" (N.D. Const. Art. XI, § 28) and that will only be changed by a voter referendum or the US Supreme Court.

I support this bill because it is fair and reasonable. I urge North Dakota House and Senate Republicans to overcome their initial disapproval to this bill and think about what the right of property really means to them.

Tim Heise

Law Student

University of North Dakota

Distinguished members of the committee, my name is Christopher Braddock. I was born in Bismarck, and lived in North Dakota for most of my youth until I graduated high school. After high school, from 1998 to 2003, I lived in the Dallas, Texas, area. I moved to Fargo in 2003 to attend Minnesota State University Moorhead, and have been in the area since. I am writing to you because I feel the matter before you now, SB 2252, is perhaps one of the most important issues this legislature can address. I believe it speaks to a travesty of the law that must be corrected immediately.

Born in the late seventies, I remember 'gay' being a common pejorative term growing up in North Dakota. It was tossed about with the kind of reckless disregard that suggests not just ignorance, but an unwillingness of people to accept anyone unlike themselves. In elementary school, I remember thinking it odd that our nation had passed the Civil Rights Act, but did not protect members of the LGBTQ community. It took time for me to realize that when adults used the term 'minority,' they didn't mean all minorities. I couldn't understand why individuals of color had the protection of law, but gay individuals did not.

I'm older now. I have a wife and a son who I hope will grow up with an understanding of right and wrong. I hope his children know that in a progressive society *all* citizens have the same basic rights and that we can measure the quality of our society by the way we treat our neighbors; that we cannot (and should not) stand idly by while others are held to a disadvantage simply because of who they are. I want my son to see the good in people, until they prove him wrong. I want my son's first instinct to be to help, rather than to judge or assume.

I know the difference between right and wrong, the difference between good and bad. I know that how I treat those around me is my impression on the world. If I treat my neighbor with compassion, that will be my legacy. When I look at another person, I first look for the good. Some might consider this to be naïve, or overly optimistic. I'm not rich, I'm not a man of influence, and my words do not move mountains. I hope to be a better person than I was yesterday, and to set a good example for my little boy. I hope, in other people, he sees the similarities to himself before the differences.

For any of that to happen, my state needs to provide an equitable security to all its citizens. This is a multi-faceted and highly polarizing debate: should SB 2252 pass, gay citizens of North Dakota still won't enjoy equal protection under the law, equal protection that the 14th Amendment of the United States Constitution guarantees, but that North Dakota as a state – and we, as a nation – have failed to enforce. This is an equality that any clear conscience demands to be at peace. This equality is protection that lets my neighbor be my neighbor without fear of discrimination or hostility.

We are too good a people to allow any of our brothers or sisters to be excluded, harassed, discriminated against, or punished for being who they are. I want to leave my son a better North Dakota than the one in which I grew up. I urge the committee to support SB 2252, and take the appropriate steps to protect all of our citizens.

Respectfully,

Christopher Braddock
Fargo, ND

Dear Senators:

My name is Krystyl Kimmes and I live in Jamestown ND. I am a biracial person – my mother is Caucasian and my biological father was African American. At one point in history, my very existence would have been a crime that could be punished by death. Forty five years ago, it would have legal to deny my mother housing because I was biracial. It would have been legal to fire my biological father from a job because of the color of his skin. It would have been legal to deny me a job, a house, and a decent wage because of the color of my skin.

Yet in 1964 and again in 1968, the brave members of the Congress of the United States took action. No longer was the status quo good enough. No longer would they stand for discrimination because of a person's race, or gender, or ethnic group, or minority religion. No longer could someone deny me a house because my skin is darker than theirs. No longer could someone fire me from a job or not hire me at all because of my skin color. Standing in the face of what must have been overwhelming opposition from a vocal minority wasn't easy, but they did it.

Because of the brave action of those members of Congress, I have been given so many opportunities to prosper. I attended public school in integrated districts. I was able to attend Jamestown College and graduated in 2010 summa cum laude. I have a position I love working in a group home for people with mental illness. I purchased a house in Jamestown, North Dakota, because I believe in this community and this state. My very existence is becoming less and less of a novel thing. I was free to marry the man of whatever color I chose.

As wonderful as all of this is for me, there are those in our state that don't have the same protections. Our lesbian, gay, bisexual, transgender, and questioning citizens do not have those same protections. These are people who live in our state, work in our state, pay taxes in our state, and even sign up to die for our state. Yet when they look for a house or a job, they can be denied because someone doesn't agree with who they love.

I love my brother more than I can possibly explain in this letter to you today. My brother is a gay man. He is also one of the most caring and loving people I know. He is incredibly competent at his job. But my brother doesn't have the same protections under the law that I have. An employer can fire him because they disagree with who he loves. Anyone who owns property in ND can refuse to rent or sell to him because of who he loves. Can you imagine allowing this to happen to an African American, Latino, German, Russian, or Mormon today? Why are we not bothered by this? Why is this still legal?

I urge each one of you to pass SB2252. I know that there will be a vocal minority – one that will feel like a majority at times – that urges you to vote down the bill. But I want to remind you that there was an overwhelming minority that once thought that African Americans, women, and religious minorities were not equal under the law. This minority thought that it should be ok to deny me an education, housing, and a job because of the color of my skin. I ask you to follow in the courageous footsteps of the Congresses before you who have said ENOUGH to discrimination; ENOUGH to hate; ENOUGH to the degradation of citizens of North Dakota and the United States of America. Say YES to what is right. Vote "yes" on SB2252.

Respectfully Yours,
Krystyl Kimmes
109 6th St NW
Jamestown, ND 58401
klkimmes@yahoo.com

February 6, 2013, 0900

Fort Lincoln Room, North Dakota State Capitol, Bismarck, ND

To: Senate Judiciary Committee
Senator Hogue, Chair
Senator Sitte, Vice Chair

From: Emily Tintes Schiwal and Brandon Schiwal
1408 East Avenue B
Bismarck, ND 58501

Re: Support for SB 2252: Relating to Discrimination on the Basis of Sexual Orientation

Chairs and Committee Members:

Today we are proud to add our names to the long list of North Dakota residents in support of SB 2252. As life-long residents of our great state, we believe being fair-minded and showing respect to our neighbors is woven into our value driven culture. Having the civil liberties of being able to be who we are and choosing how to live our lives is central to being an American and being a North Dakotan. Unfortunately, North Dakota residents still suffer the antiquated fear of becoming homeless or losing their job due to merely existing as who they are meant to be.

North Dakota used to be afraid of losing young people due to lack of employment within the state. As young people who have been educated here, have found our careers, and have purchased a home here, it is clear to us that North Dakota faces a new hurdle to keeping its younger residents. The archaic ideologies which allow discrimination need to change. We struggle daily with wondering if North Dakota is a place we can raise a family or if we need to relocate to a place where all people are valued. Part of us wants to flee, yet part of us also wants to stay here and make heard the voices of a new generation of North Dakotans. We are standing in support of Senate Bill 2252 and if you also believe all people are truly created equal, you will have no hesitation to vote in support of this bill.

Thank you for the opportunity to submit our testimony.

Respectfully,

Emily Tintes Schiwal and Brandon Schiwal
1408 East Ave B
Bismarck, ND 58501

Angela Marie Mathers
5601 20th Street Cir. S
Fargo, ND 58104

February 6, 2013

Dear Senate Judiciary Committee Member,

I contact you today in regard to Senate Bill 2252 that seeks to provide protection to individuals based on sexual orientation in regard to housing and employment. This issue is incredibly important to me on a very personal level; as an ally of the LGBT community, I have gotten to know the people that are impacted by this debate. I've gotten to know them for more than their sexual orientation or gender identity. I've gotten to know them as students, colleagues, and more importantly, as friends. In getting to know them, I have learned how realistic the fear of losing a home or being fired from a job really is.

This issue is important to me because I care deeply about people in this state that are currently not able to live up to their potential because they live in fear. Having grown up, and lived in North Dakota for nearly thirty years, I know that we are not people who encourage hardship for others. In fact, we are quite the opposite. I know that I've frequently had unfamiliar North Dakotans go out of their way to help me, a perfect stranger. Codifying fear of maintaining a home or fear of job just isn't something I can fathom one North Dakotan doing to another.

This issue is important to me because I have worked with and been involved with LGBT (lesbian, gay, bisexual, and transgender) issues since I had the great fortune of attending North Dakota State University. I have talked with students about experiences they have had at work places and in apartments. I've had serious discussions with them in regard to North Dakota's viability as a place to call home. To be honest, it can be quite difficult for me to encourage students to live on the Fargo side of the river when the Minnesota side has so much more to offer them in terms of legal protection. We are losing out on the opportunities and potential of people who happen to love someone of the same gender. We need them. We need the skills and abilities that they offer.

I love North Dakota. I always have and always will. I'll call it "home" no matter where I live. I want others to experience the North Dakota that I have grown to love dearly. I want everyone to have the opportunity to experience the state that I did. In order to do that, I ask you, my lawmaker, to make the decision to support justice, equality, and the North Dakotan way, and to vote "yes" on SB 2252.

Respectfully Submitted,



Angela Marie Mathers

Testimony of Kristen E. Benson, Ph.D., before the Senate Judiciary Committee
Wednesday, February 6, 2013

Good morning Chairman Hogue and members of the Judiciary Committee. Today I am submitting testimony in support of SB 2252, which would amend the ND Human Rights Act and the ND Fair Housing Act to include sexual orientation and gender identity in housing, employment, public accommodations and public transactions.

I moved to North Dakota in August of 2007, after careful consideration. I was worried about purchasing a home and creating roots in a state where it was and remains legal to fire me based on the perception of my sexual orientation. Fortunately, I was offered a position with an institution that prohibits discrimination on the basis of sexual orientation or gender identity. Unfortunately, I know several people who do not experience those same protections. After I arrived and settled into life in North Dakota, the work ethic and values of North Dakotans became evident to me. I have been surprised and dishearted to know that a person's livelihood could be diminished based on reasons other than their merit.

I work with many gay, lesbian, bisexual, and transgender people in the community through volunteering and professional outreach. More specifically, I am a research faculty who studies gender identity and have had the opportunity to meet transgender North Dakotans. I am acutely aware of the types of discrimination transgender people face, particularly in housing and employment. While inaccurate portrayals of transgender people tend to be voiced during legislative efforts such as this one, I can attest that they are grounded in false assumptions. I have heard the misguided statements that reflect a view transgender and gender non-conforming people as predatory, which is statistically wrong; rather, transgender people are more likely to be the victims of violent crimes and other forms of discrimination. Many remain silent about their identities out of concern for physical safety and discrimination, yet there are transgender identified people who are model citizens in our communities. They have served in our military. They work with the homeless. They are farmers. They are educators. They are students in our universities. They are members of our faith communities. They are our relatives and friends. Yet they are *legally* discriminated against because of who they are.

A recent national study found that 47% of transgender people had been denied employment, denied a promotion, or fired for being transgender or gender non-conforming (Grant, Mottet, Tanis, Harrison, Herman, & Keisling, 2011). These employment disparities led to a significant decrease in the likelihood that they would own a home (32% compared to 67% of the general population), forcing them to rent. Yet 19% have been refused rental homes and 11% have been evicted based on their gender expression, resulting in increased rates of homelessness (Grant, et al., 2011). This study is particularly important because discrimination based on gender identity is rarely reported due to the need to disclose gender identity to law enforcement or other agencies and the associated risks involved. We have no accurate way of identifying these disparities because the North Dakota Department of Labor does not keep track of sexual orientation or gender identity information when a complainant is reported, and only considers complaints related to housing, public accommodations, or wage and hour related employment issues. Additionally, transgender people do not report these experiences of discrimination in North Dakota because there is currently no legal recourse. However, I have heard the personal stories of North Dakota citizens who have been subject to unfair treatment.

Allowing for legal discrimination of any people in employment, housing, public accommodations or public transactions does not reflect North Dakota values. I urge you to support SB 2252.

Thank you for your consideration.

Kristen Benson, 1213 7th St. N, Fargo

Reference

Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L., & Keisling, M. (2011). *Injustice at every turn: A report of the National Transgender Discrimination Survey*. Washington DC: National Center for Transgender Equality and National Gay and Lesbian Task Force.

Chairman Hogue, members of the Senate Judiciary Committee.

As chair of the North Dakota Human Rights Coalition, I submit written testimony in support of SB2252.

North Dakota Human Rights Coalition is a broad-based coalition of individuals and organizations with an interest in the furtherance of human rights in North Dakota. We work toward the enhancement of human rights in North Dakota through information, education, and legislative action. We represent individuals and organizations from Williston, to Bowman, to Grafton to Wahpeton and points in between.

As the status quo now exists in North Dakota, individuals, North Dakota residents, who are gay, bisexual and transgendered can legally be fired or evicted from their homes. This is wrong and must be corrected. SB2252 would do that.

As important as this protection is to our lgbt residents, is the message that we must send to every resident of our state. We do not allow discrimination of ANY North Dakotan regardless of race, nationality, gender, marital status AND certainly because of sexual orientation.

This is a family protection act. We want our sons, daughters, our mothers and fathers, all North Dakotans know that they are considered a vital, dignified and valuable part of our North Dakota way.

This is NOT offering "special" rights. How special can a right to home and employment be? North Dakota needs to be a place of human dignity, of a respect of all our residents.

North Dakota is not that place yet. SB2252 would change that. Please vote yes on SB2252.

Barry Nelson, Chair
North Dakota Human Rights Coalition
(701)235-8790

www.ndhrc.org

Boschee, Joshua A.

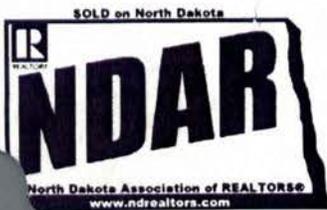
From: Eric Momsen <eric.momsen@gmail.com>
Sent: Wednesday, February 06, 2013 7:53 AM
To: Boschee, Joshua A.
Subject: Support for SB 2252 (NonDiscrimination Bill)

Good morning,

I hope I'm not too late to provide written testimony in support of SB 2252 (NonDiscrimination Bill). When I moved to North Dakota, one of the things I looked forward to was the reputation of a strong independence streak. I expect our government to reflect that, and show that we can protect the independence of all individuals against discrimination.

Best regards,
Eric Momsen

1220 4th St N
Fargo, ND



North Dakota Association of REALTORS®

318 West Apollo Avenue – Bismarck, ND 58503-1404
Phone: 701-355-1010 or 800-279-2361 – Fax: 866-665-1011
www.ndrealtors.com info@ndrealtors.com

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Testimony for Senate Bill 2252
Senate Judiciary Committee
February 6, 2013

Mr. Chairman, Members of the House IBL committee:

Mr. Chairman and Members of the Senate Judiciary Committee my name is Claus Lembke. I am the Political Affairs Director for the ND Association of REALTORS®. We consist of 8 local Board of REALTORS® with a total of 1,500 individual REALTOR® members.

We fully support the intent of SB 2252. Section 17 and 18 on page 11 specifically address real estate transactions and Brokerage services and we support the amendments therein.

Our REALTORS® Code of Ethics has 17 specific articles that hold every REALTOR® member at a higher standard in comparison to real estate license laws. This code was first enacted in 1913 and we are celebrating its 100 year anniversary this year.

Article 10 states:

"REALTORS® shall not deny professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, or sexual orientation. REALTORS® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, or sexual orientation"

The same standards apply to REALTORS® employment, advertisement and rental practices.

Every one of our local boards as well as our State Association have formal procedures in place if any REALTOR® would violate this or any other section of our Code of Ethics. Fines range from monetary fines and reprimands to temporary or permanent suspension of membership.

Mr. Chairman and member of the Senate Judiciary committee we ask for a do pass on SB 2252.



Good Morning Chairman Hogue,
 Vice-Chair Sitte,
 Sen. Armstrong,
 Sen. Berry,
 Sen. Grabinger,
 Sen. Lyson,
 Sen. Nelson, and all other hearing attendees.

My name is Peg Haug and I am here today as a parent and as a concerned citizen of North Dakota to express my support of Senate Bill 2252.

Currently, in the state of North Dakota, an individual cannot be discriminated against based on sex, race, color, national origin, religion, age, disability, familial status, marital status, public assistance or participation in lawful activity. This bill would expand that list to include sexual orientation which includes actual or perceived heterosexuality, bisexuality, homosexuality and gender identity.

I know that every member of the committee is a parent and, like me, some of you are grandparents. I am speaking to you today from the heart of a Mother. I have 2 children: my son is 31 and my daughter is 30. I love my children equally and unconditionally. My hope for both of them is the same - that they find a job that they love; a place where they can create a safe and loving home; a long and healthy life; and a partner to share in that life.

My daughter is heterosexual and people just accept her sexual orientation. Theoretically, she could be discriminated against because of her sexual orientation, but I think we all know that is not likely to happen. She can live openly with and love the man who shares her life. My son on the other hand cannot live openly with and love the man he chooses to share his life. My son is gay and people don't just accept his sexual orientation. Many people define him only as gay. He may be gay, but he is so much more. He is a son, a brother, an uncle, a nephew, a grandson, a godfather to his nieces and nephew, a student, a friend, an employee, a ND citizen born and raised, a taxpayer and a soldier. As a



soldier, he was recognized as the Distinguished Graduate of his advance training class. He is no different than you; than your children; or grandchildren. He is a person; he is a human being.

An employer should not be allowed to refuse to hire him just because he is gay. He shouldn't be refused a public service or a public accommodation just because he is gay. A landlord should not be allowed to refuse to rent to him just because he is gay. He shouldn't be refused credit just because he is gay.



Many people will ask, "How serious is this problem?" I wish I could tell you. I wish I had numbers to show how often discrimination based on sexual orientation happens, but because of the stigma still attached to someone being gay or lesbian, individuals may not come forward. Not every gay or lesbian individual feels safe enough to admit their sexual orientation. Many of these individuals haven't even told their families. I know of one middle-aged gentleman who said he hasn't told his Mother who is in her 80's. He isn't going to tell her because he wants her to die without knowing. He thinks telling her would upset her. How sad that he can't be who he really is even with his own family and how sad that his story is not unique.

No one should be discriminated against because of their sexual orientation; not my children, not your children, not my grandchildren, not your grandchildren. Everyone deserves equal protection under the law. Please provide that protection by voting "Do Pass" on this bill.

Peg Haug
4720 Green Spruce Ln
Bismarck, ND 58503
(701) 226 - 8926



(7)

Good morning Committee members, my name is Susanna Magstadt. I am here today to voice my support for senate bill 2252. My intention is to explain how this bill would impact me, my family, my friends, and so many others in our community.

I am a North Dakotan. That is not a statement I make lightly, so I will say it again. I am a North Dakotan. This state was built on the backs of many generations of my family. We have lived here, we have poured our sweat, blood and tears into this land, and we have been buried in these hills. We have been shaped and molded from the time we were born until the time we die with the ethics and values that all North Dakotans share. We have learned the value of good neighbors, the kindness of strangers who will stop on a freezing cold day to help with a flat tire, and the joy of paying it forward at the next opportunity.

My partner and I love this land and the people who live here without regard to what they look like, or who they call family. We have instilled these values in our children during dinners around the table every night. We have shown them through our own actions that every person is worthwhile and important. And we have taught them that people come first.

Over the years, I have watched as many talented, creative, and hard-working North Dakotans have left our state to find a place where they were protected from losing their jobs and homes. They have left this land they love to find protection their home would not offer them. What a loss, for our state. How sad it is to lose so many good, honest, and dedicated people.

My partner and I have struggled with discrimination ourselves. Six years ago I was fired from a job simply because the gender of the person I love is the same as mine. We had a choice, though. We could leave to find a new home where we could be certain that our orientation would not be held against us in the matters of employment and housing, or we could stay, and make this state better. We are still here. And it is getting better, but we still fear for our jobs and our home - the last things anyone should have to worry about losing simply for who they are.

Lesbian, Gay, Bisexual and Transgender people do not have a choice in their sexual orientation. We are as God made us. We are whole, vibrant, creative, dedicated, honest people. We love our families. We love our children. We love our state. We are your children, your friends, your family, your co-workers. We are your neighbors. We stop on freezing cold days to help with flat tires.

North Dakota has a choice, right now, through the actions of our elected officials, to stop the out-migration of so many talented young people. We have the choice to show our children that they will be protected from losing jobs and homes right here. We have the choice to keep the good people who have been raised with the ethics and values all North Dakotans share. We have a choice to make this state better.

The choice is a clear one.... people come first. Committee members, North Dakotans come first. And I am a North Dakotan.

protections. These are people who live in our state, work in our state, pay taxes in our state, go to college in our state, raise their children in our state, and even sign up to die for our state. Yet when they look for a house or a job, they can be denied because someone doesn't agree with who they love. They can be denied a job or fired from a job because they "talk too gay" or "dress too gay" or have a hair cut that is "too gay." This type of discrimination is legal in our state.

A member of my family who is very dear to me is a gay man. I love my brother more than I can possibly explain to any of you. He is also one of the most caring and loving people I know. He is incredibly competent at his job. But my brother doesn't have the same protections under the law that I have. An employer can fire him because they disagree with who he loves. Anyone who owns property in North Dakota can refuse to rent or sell a house or apartment to him because of who he loves. Can you imagine allowing this to happen to an African American, Latino, German, Russian, or Mormon today? Why are we not bothered by this? Why is this still legal?

I urge each one of you to pass SB2252. I know that there will be a vocal minority – one that will feel like a majority at times – that urges you to vote down the bill. But I want to remind you that there was an overwhelming minority that once thought that African Americans, women, and religious minorities were not equal under the law. This minority thought that it should be ok to deny me an education, housing, and a job because of the color of my skin. They thought it should be ok to incarcerate or kill my African American biological father for having a child with my Caucasian mother. I ask you to follow in the courageous footsteps of the Congresses before you who have said ENOUGH to discrimination; ENOUGH to hate; ENOUGH to the degradation of citizens of North Dakota and the United States of America. Say YES to what is right. Vote "yes" on SB2252.

Thank you!

Senate Judiciary Committee
Testimony on SB2252
February 6, 2013

Mr. Chairman, members of the committee, my name is Wayne Kutzer, I reside in Bismarck. I wholeheartedly support SB2252, which is all about fairness ...equal treatment ...civil rights. It's unfortunate that we need legislation that protects individuals just for who they are, but I am also a realist and know that this piece of legislation is not only needed, it is the right thing to do. This is basic civil rights.

Adding sexual orientation to the language in each of these sections of anti discrimination law also sends a statement that we value people, just as when we say you can't discriminate on the basis of race, ethnicity, religion, sex, and all the others that are listed in law. Discriminatory practices of any kind are rooted in fear and ignorance, discrimination based on sexual orientation is no exception.

I am sure you will hear of statistics that nearly one half of the states and many individual cities, as well as the federal government, already have similar laws protecting those whose sexual orientation is different, but this law is about North Dakota – how we, as a state, value individuals, it will help to create that "quality of place" in our state, that is open to diversity, and one that is serious about protecting the rights of everyone.

Mr. Chairman, members of the committee this bill is the right thing to do. Equal rights and equal protection is something that we must stand for. As the father of a young professional who happens to be gay, and who feels his opportunities are limited in our state, this can be a signal that North Dakota can send, which tells all sons and daughters that we value them and want them to look at the opportunities here. We all want and need people to work, live and stay

in ND. We talk about a talent strategy that will attract, retain and expand talent but we don't provide this basic protection ...this affirmation that all are welcome. ... This is one of those strategies, one of those opportunities. What a message North Dakota could send with the passage of this bill. I want North Dakota to be viewed as a progressive state ...better yet an inclusive state, and selfishly I would love for our son to feel as welcome in this state as he is in our home. This is a perfect example where our actions speak louder than words.

I strongly recommend a do pass on SB 2252 and would be glad to answer any questions that you may have.

UND Student Senate

Senate Bill

To: The Student Senate of the University of North Dakota

Authors: Logan Fletcher- Student Body President, Shane Gerbert-Governmental Affairs Commissioner

Sponsors: Chantel Thompson-Off Campus Senator, Alan Oberg-EHD Senator, Joseph Kalka-Residence Hall Senator

CC: Logan Fletcher - Student Body President, Eric Watne - Student Body Vice President, Cassie Gerhart - Student Government Advisor, Andrew Frelich – Student Government Office Manager, Student Body Treasurer – Brandon Myhre;

Date: 2/3/13

Re: Support for Non-Discrimination Clause

2 Whereas, in 1996 the University Senate passed a Community Values Statement that is published in the UND *Code of Student Life*, and

4 Whereas, the Community Values Statement is intended to foster “an environment where all faculty, staff, and students deserve to be treated with dignity and respect”, and

6 Whereas, the mission of UND encourages students to be “intellectually curious and creative, to commit themselves to lifelong learning and the service of others, and to share responsibility both for their own communities and for the world”, and

8 Whereas, UND has students that live and work on and off campus, and

10 Whereas, current state law does not protect students from discrimination off of UND and NDUS properties on the basis of sexual orientation, and

Whereas, students need a safe place to live and work, and

12 Whereas, students need a North Dakota that attracts and maintains a talented workforce, and

Whereas, such a goal is aligned with the North Dakota 2020 and Beyond plan, and

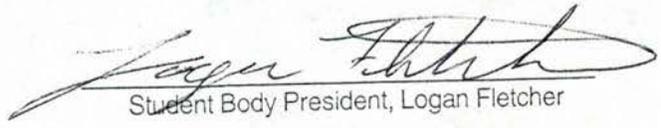
14 Whereas, the passage of SB 2252 supports a UND’s mission, as well as its community both on and off campus, and

16 Whereas, the passage of SB 2252 supports the growth of North Dakota.

18 Therefore, be it moved that UND Student Senate, acting on behalf of the approximately 15,250 students of UND, fully support SB 2252, and

20 Therefore, be it furthest moved that that UND Student Government requests the Legislative Assembly to pass SB 2252.

22


Student Body President, Logan Fletcher

February 5, 2013

the North Dakota Senate Judiciary Committee,

As the Student Body President at the University of North Dakota, it is my great pleasure to submit this written testimony in support of SB 2252. Included with this testimony is the UND Student Senate Resolution 1213-15 that was passed on February 3, 2013 at the UND Student Senate meeting.

Throughout the discussion on this bill, I am sure you will hear many different testimonies both in support and opposition. In any conversation dealing with sexual orientation or any form of discrimination, I believe we are all aware of the strong feelings, opinions, and beliefs surrounding the issue. It is my hope that our state legislature will allow honest and open discussion in which all residents can participate. You'll hear many supporters of this bill speak about how this will make North Dakota more attractive for a younger, more creative generation. They will speak about how it aligns with North Dakota's 2020 and Beyond recommendations and other goals set forth by the state, and while I agree with those points, from my position, I hope that you will hear the stories of residents, but students specifically, that have been affected by this obvious gap in our anti-discrimination policies.

In my position at the University of North Dakota, I have been able to meet and speak with students and professionals across the state, serving in many different disciplines. What I've realized is that my values and those of my peers at UND, which have led us to support this measure, are not so different from many other shared values in our state. We value loyalty, honesty and trust, commitment and dedication, and working hard to provide for ourselves and our families.

In my eyes, those three points are really what this bill comes down to. It is about allowing people to be honest about who they are to their friends, family and neighbors so that we can trust each other and truly know who we live with and near. It is about a commitment that our elected officials have to all of our residents - gay, straight, and otherwise identified. This commitment includes ensuring that North Dakotans, no matter who they love or call family, are able to build a home, family, and life for themselves. And while many of us desire to live in the great state of North Dakota, earn our own living, and provide for our loved ones, this gap in equal protections under the law threatens the ability for some of us to do so. For students at risk of penalty for their sexual orientation, it creates a looming fear of losing the already instable structure of a college student's life. It distracts from the ultimate goal of successfully receiving a degree because some students become more preoccupied with retaining their housing and income to even afford an education.

After graduation, this becomes an issue of allowing our most talented graduates, including our LGBT peers, to flourish in the state we call home. It is about retaining talent within our state and offering a community where young people feel they will be able to live honestly by their own efforts.

On behalf of the UND Student Government, student body, and allies in this effort, thank you for your thoughtful consideration and support of SB 2252.

Sincerely,


Logan Fletcher
Student Body President
University of North Dakota
651-999-9051

SB 2252 – Testimony of Tom Fiebiger

Chairman Hogue, members of the Senate Judiciary Committee, my name is Tom Fiebiger, and I appear today in support of SB 2252.

I come before you this morning wearing several different hats. I am a former legislator. I am an attorney who has represented North Dakota citizens in civil rights cases for over 20 years. I am a member of the ND Human Rights Commission and former member and chair of the Fargo Human Relations Commission. I am also the parent of a wonderful, bright and caring son, Erik – who happens to be gay.

What SB 2252 does is extend basic protections in the home and workplace to members of the LGBT community in North Dakota by including sexual orientation to the North Dakota Fair Housing Act and the North Dakota Human Rights Act. The people this legislation is designed to protect from losing their job or being evicted from their homes because they are gay, lesbian, bisexual or transgender are our sons, daughters, brothers and sisters. They are the folks we work with and the worshipers that we sit next to in the pews on Sunday. They are our friends and family. They are the people we love.

As a practicing attorney I have fielded calls over the years from North Dakota citizens asking me for legal assistance because they lost their job because they were gay. Sadly, there was nothing I could do to help them. I find it a sad state of affairs when in 2013 someone can be fired from their job or evicted from their home because of who they love if they happen to work on the North Dakota side of the Red River but are protected if they work on the Minnesota side of the river.

10

There is a reason almost 90% of the Fortune 500 companies include sexual orientation as a protected class in their company handbooks. They want their business to be successful - and that's accomplished by being invitational to the best and the brightest – no matter what their sexual orientation. Imagine having to worry that if you talk about your personal life at work or have a picture of your partner on your desk at work – something most of us take for granted, you can be fired. That's the current reality for our fellow North Dakotan LGBT citizens without this legislation. This legislation will serve to increase the state's ability to attract, retain and expand its pool of talented workers. We want to encourage our young people to stay in the state and many of them desire inclusive and diverse communities. This bill is a big step in the right direction.

This legislation should not be a partisan issue. We have support from both sides of the aisle. It is a family and business issue. It is about creating inclusive, supportive and diverse communities as our state continues to expand and progress. This country recently inaugurated President Obama, the first African American President - for the second time, and celebrated in that process Martin Luther King, Jr. It was Martin Luther King, Jr. who said the time is always right to do what's right. I urge you as members of the Senate Judiciary Committee to do what's right and give SB 2252 a DO PASS recommendation.

Thank you for your thoughtful consideration of this important legislation. I would be happy to answer any questions you may have.

Krystyl Kimmes
109 6th St NW
Jamestown, ND 58401
klkimmes@yahoo.com
701-269-9845

Mr. Chairman; members of the board, my name is Krystyl Kimmes and I live in Jamestown ND. I have to confess that I am not a North Dakota native. I moved from Newport, Rhode Island, with my family when I was 14 to the Almont- New Salem area. Over the past nine years my "O"s have become much longer, I've been known to say "Offdah" more than I should, and I've developed a health love of knephlea soup. But there is one thing that hasn't changed.

I am a biracial person – my mother is Caucasian and my biological father was African American. At one point in the history of this country, my very existence would have been evidence of a crime that could be punished by death. Only forty five years ago, it would have been legal to deny my mother housing because I was biracial. It would have been legal to fire my biological father from a job because of the color of his skin. It would have been legal to deny me a job, a house, and a decent wage because of the color of my skin. Worse, it would have been legal to do all of those things because of my gender as well.

Yet in 1964 and again in 1968, the brave members of the Congress of the United States took action. No longer was the status quo good enough. No longer would they stand for discrimination because of a person's race, or gender, or ethnic group, or minority religion. No longer could someone deny me a house because my skin is darker than theirs. No longer could someone fire me from a job or not hire me at all because of my skin color. Standing in the face of what must have been overwhelming opposition from a vocal minority wasn't easy, but they did it.

Because of the brave actions of those members of Congress, I have been given so many opportunities to prosper. I attended public school in integrated districts. I was able to attend Jamestown College and graduated in 2010 summa cum laude; with highest honor. I have a position I love working in a group home for people with mental illness. I purchased a house in Jamestown, North Dakota, because I believe in that community and this state. This is where I want to raise my children, if I am fortunate to have them. I was free to marry the man of whatever color I chose, and my very existence as a biracial person is becoming less and less of a novel thing.

As wonderful as all of this is for me, there are those in our state that don't have the same protections. Our lesbian, gay, bisexual, transgender, and questioning citizens do not have those same

Thank you, Mr. Chairman and members of the committee for your time today.

I am Tammy Adams and I live in Thompson, ~~ND~~. I have lived my entire life in the great state of North Dakota. I have been married 31 years to the same loving man and have been blessed with 2 wonderful children. My husband and I are members of St. Jude's Catholic Church in Thompson and have raised our children as Catholics. I am a hard working North Dakotan who has dedicated 31 years of service to my employer, and many years to the greater Grand Forks area through community service and volunteerism.

Now that you know a little bit about me, I would like to introduce you to our son, Andrew. **(show picture)** *who could not be with us here today.*

Andrew is 24. He graduated 3rd in his class from Thompson Public School. He graduated Summa Cum Laude from the University of Mary. Currently, Andrew is an accountant with a prominent accounting firm here in North Dakota. As a graduate of the University of Mary, Andrew is an active servant leader. He currently serves as president of Dakota Outright of Bismarck, a local nonprofit dedicated to ^{LGBT}~~GEBT~~ outreach. Andrew is what all of us consider to be an outstanding and contributing member of the Bismarck/Mandan community.

When Andrew was in high school he was very active in the Liberal Arts activities offered through the public school system. Andrew juggled 2 jobs, homework, and extracurricular activities. During his summers he worked 3 jobs and yet maintained a healthy work/life balance.

At the University of Mary, Andrew grew into his own person. He became an active participant in all that UMary offered, again maintaining a healthy work/life balance. His father and I have always been very proud of his many accomplishments, who he is, and who he has grown to be as a young adult.

I tell you all of this because Andrew achieved ~~all of~~ this while dealing with emotional and personal stress due to his sexual orientation. No person, let alone a child, should ever have to face harassment ^{or discrimination} in any form because of their sexual orientation while growing up, yet they do every day.

Andrew told me of his sexual orientation the summer after he graduated from high school. His announcement did not change my love for him. ^{As you all know, a mother's love is unconditional...no matter what.} *My son is my son.*

When Andrew shared his orientation with me, my first thought was for his safety...his personal safety. I believe we are all aware of past harmful acts that have occurred in our communities to our gay, lesbian, and bisexual brothers and sisters. I want to protect Andrew from any harm or discrimination, whether physical or emotional. I am sure you would all agree this is a natural desire for all parents. We have been given the gift of a child, to love, nurture, and protect. That role does not end when our children grow into adults.

Until ~~2011~~ ^{the last legislative assembly} I was unaware that sexual orientation could be used as a legal reason to fire an employee or evict a renter ^{or deny} in the state of North Dakota. I couldn't believe it! When the legislature failed to pass an amendment that would have corrected that unbelievable

form of discrimination, I committed to Andrew and his friends that I would do whatever it took to change this in the future.

So today I stand before you, ready to follow through on my commitment. I strongly encourage each and every one of you to vote "do pass" on Senate Bill 2252. Your vote will ensure that sexual orientation cannot be used as an excuse to allow discrimination ~~against this "category" of people~~. This is long overdue!

Let's not let this type of discrimination define our state. On Monday, February 4, the Grand Forks City Council declared a resolution in favor of supporting Senate Bill 2252. This is a good step in the right direction! We should be focusing on retaining the best and brightest people in our workforce, and not allowing sexual orientation to be a source of ^{distracton or} discrimination.

As a mother, relative, and friend of gays and lesbians, I ask that you look into your hearts as parents, friends, employers, and fellow North Dakotans and do the right thing. Let's ensure that everyone, especially our young people, continue to see North Dakota as a great place to live, work, and serve.

Again, thank you for your time.



Senate Bill 2252: adding sexual orientation/gender identity to the state policy against discrimination.

My name is Jean King and I have lived in Bismarck for more than 30 years. I am here to testify in favor of House Bill 2252.

I have a great uncle James whose visits I always looked forward to as a child. When he came, the house was full of the sounds of he and my mother laughing and gossiping about all the relatives back home. He was a railroad engineer, he had an acute and clever sense of humor, he loved to cook and garden, and he was generous to our family. He seemed to have a lot of money: he often gave my parents things from his home as he replaced them: an oak dining room table and chairs, a set of dishes, some carpeting, an antique bookcase full of classic books -- I still have some of those things today. Sometimes he brought a friend with him, a man named Dave, who worked in the recording industry.

Later, when they were both retired, Dave was diagnosed with lung cancer and emphysema, and my great uncle took Dave to his doctor and hospital appointments and cared for him at home for several years. When medical treatment was no longer of use, they sold the house in LA and moved back to Kansas where my great uncle took care of Dave until the day he died. He still lives there with his dogs, and his garden. He always brings beef brisket and that contagious laugh to the family reunions every year.

I never knew to think of him as a homosexual when I was young. At some point in my life, it finally occurred to me that that's what he must have been all along. But it was completely irrelevant to our relationship. He was and is a good, decent, funny man, who brings a zest for life and a commitment to excellence to everything he does. He has always been a force for good in our family, and in his community. He worked all of his adult life, he encouraged me to listen to my parents, work hard in school, and respect others, and he's the kind of man who can be counted on when the chips are down.

Once, as I sat next to my then husband on a plane and held his hand for comfort and companionship during take-off, it occurred to me that the simple comfort of holding the hand of the person you loved when you were nervous was not something my great uncle could have looked for in a public setting, and I wondered how many other things that I take for granted in my life were difficult and dangerous for him because of who he loved.

So I hope you can see why I find it hard to believe that we would want it to be legal for someone to refuse him housing, or a job, or deny him service in a store, because the person he fell in love with was a man.

Since that time, I've met many decent, caring, honorable, and responsible people who've dedicated their lives to doing good in the world who also happen to be gay. To me, it's one of the least important things about them, though to them, I'm sure it's more significant since many of them feel they have to hide that part of who they are or risk losing employment, a place to live, the respect of their neighbors, the ability to function in our society.

When we talk about America, two of the first words that come to mind for me are freedom and liberty. We talk about them all the time - they are what we are fighting for in conflicts around the world. I am proud of my country, and believe in the promises it makes to offer liberty and justice for all. I ask the members of this committee, representing all the citizens of this great state, which is a part of this great nation, to thoughtfully consider upholding the liberties of this group of people in what is essentially a private matter, the matter of who we love, in the same way that we uphold our right to disagree with each other peaceably and respectfully over so many other issues.

I am a member of the Bismarck Mandan Unitarian Universalist Congregation where the Board of Trustees has endorsed this bill. SB 2252 is fully in alignment with the principles of the Unitarian Universalist Association, and their Standing on the Side of Love campaign.

Thank you,

Jean King
1221 Prairie Drive
Bismarck, ND

SR-__-__

A Senate Resolution to Supporting the Amendment North Dakota Senate Bill 2252

WHEREAS, NDSU Student Government supports the amendments made to ND Senate Bill 2252, and

WHEREAS, The amendment to Senate Bill 2252 adds line item sexual orientation to state policy against discrimination, and

WHEREAS, As stated in this bill the language reads, "It is the policy of this stat to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer; to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services, and credit transactions; and to deter those who aid, abet, or induce discrimination or coerce others to discriminate." ;therefore, be it

ENACTED, That North Dakota Student Government supports these amendments made in the North Dakota Senate Bill 2252.

Respectfully submitted,

Robert Lauf

Commissioner | Governmental Relations and Intercollegiate Affairs

Kevin Walsh

Senator | Agriculture

Jessie Berg

Senator | Engineering and Architecture



Bryce Heustis

Senator | Off-Campus

Mitch Calkins

Commission Member | Governmental Relations and Intercollegiate Affairs

Robert Vallie

Commission Member | Governmental Relations and Intercollegiate Affairs



Nathan Todd

Commission Member | Governmental Relations and Intercollegiate Affairs

Matt Prochniak

Commission Member | Governmental Relations and Intercollegiate Affairs



SENATE JUDICIARY COMMITTEE
WEDNESDAY, FEBRUARY 5, 2013
SENATE BILL 2252: Relating to discrimination on the basis of sexual orientation

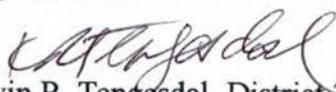
Committee members and fellow citizens of North Dakota, Greetings. My name is Kevin R. Tengesdal, a native of North Dakota now living in Bismarck. I have been working in good standing with a company for the past nine years as a graphic designer. I am a veteran of the United States Navy. I am also a graduate from an evangelical Bible College with Bachelor degrees in Biblical Studies and in Biblical Languages. My thriving faith is based upon following the precepts of Jesus. And, yes, I am gay.

I stand here to entreat your complete support of SB2252 so as to ensure that discrimination against LGBT persons and their families will not occur within our communities. Personally I have experienced having one's life dreams cut short because of my sexual orientation. In 1988, after 15 months of service, the Navy delivered me a DD214 discharge – an honorable discharge via administrative separation due to personality disorder for the convenience of the government with no chance of re-enlistment – because I am gay. I was crushed as I had anticipated a life of serving our great country. A DD214 follows you, and if a potential employer wants full disclosure of your background, this can alert them of ones sexual orientation. In the summer of 1996 before my senior year at Bible College, Wycliffe Bible Translators terminated my application for service with them due to the DD214 background check. Devastated, I started my final year of college with no clue for a future career path.

With these two jarring life lessons, I learned the necessity for purposing to keep my identity best hidden with new employments. Thankfully, my work experiences have not been traumatic, as none have proven discriminatory. Unfortunately, I am unable to claim this acceptance as the definitive norm for all LGBT citizens within our communities, whether it be in the labor force or in housing situations.

In 2009 similar legislation was proposed and some arguments against SB2278 were amazing. "Do we want this in North Dakota?" "A chosen lifestyle has nothing to do with civil rights and everything to do with conduct." "We are not telling them how to live their lives, just not in the places we hold most sacred." As a Christian, I ask, how can we decide that a person should be a second-class citizen undeserving of the same respect and dignity that which Christ Himself gives freely? Citizens of North Dakota, should religious sovereignty or dogma rule human fairness and dignity?

We are a state that prides itself on a strong work ethic and supporting our families, youth and community. We must pass this legislation unconditionally now. Representatives and fellow citizens of North Dakota let me close by simply stating that we, your LGBT family and friends, are seeking fair treatment and not fear treatment. Thank you for your time.


Kevin R. Tengesdal, District 35
2025 North 16th Street, Apt 4; Bismarck, ND 58501
krten1966@bis.midco.net; 701/527-0737



Testimony
Senate Bill 1258
Senate Judiciary Committee
Honorable Senator David Hogue - Chair

The Greater North Dakota Chamber, Champions for Business in North Dakota, is committed to building the best business climate in the nation. We work in collaboration with more than 1,100 businesses and a coalition of local chambers in our state. The Greater North Dakota Chamber also represents the National Association of Manufacturers and works closely with the U.S. Chamber of Commerce.

The GNDC supports the passage of HB 2252 for the following reasons:

First, businesses in North Dakota are pragmatic. We are concerned with attracting and retaining the best employees. This includes employees who work in manufacturing, agriculture, technology, financial services, oil industry workers, and in any number of other industry sectors. We are not concerned with their religion, political beliefs, or sexual orientation. We are concerned that employees have the skill sets that apply to the jobs they are hired to perform. Moreover, we think that every employee be able, at a minimum, to use applied mathematics, be able to read, and be able to locate and effectively use information.

Secondly, businesses are looking towards the future. Fortunately, North Dakota has more job openings that we can fill, and people are coming to fill these jobs at an astonishing rate. However, if the nation's economy improves and workers find jobs plentiful in their home states we'll have more competition for workers. As a result of this dynamic, North Dakota will need to pragmatically attract good workers without regard to their religion, political beliefs, or sexual orientation.

Lastly, the best employees are those with good skills and this includes employees who are engaged and invested in what they are doing, and who can get along with others around them. At our office the last step in the hiring process involves a group interview. This includes a pre-interview discussion amongst current staff that disallows questions, amongst other things, regarding marital status, children, religion and/or sexual orientation. Our goal in this pre-interview discussion is to remind current employees what we are looking for in a particular job position – does the prospective employee have the skills needed to do the job for which we are hiring? And, if so, does he or she have the interpersonal skills to “get along” with us once they are hired.

Again, business is pragmatic. The coming war for workers is real. If we do not win this war we risk shrinking our economy in North Dakota. If HB 2252 helps us to attract and retain skilled workers then it is the right thing to do.





Chairman Hogue and members of the Senate Judiciary Committee:

My name is Jody Ferris, and I am the legislative lobbyist for the North Dakota Student Association and a student at Dickinson State University. On behalf of the 48,203 students of the North Dakota University System, I am honored to testify before you today in support of S.B. 2252.

Under State Board of Higher Education policy, university students are protected from discrimination based on sexual orientation when they are on campus or participating in any activity connected with their institution. However, some of our students choose to live and work off campus. The North Dakota Student Association believes that our students should be protected from discrimination based on their sexual orientation – just like they are protected from discrimination based on their color, age or gender-- no matter where they may choose to work or live in the state.

Our organization is proud to represent students of all walks of life, and we believe that every one of our students has the right to not be discriminated against. Our resolution to lobby in favor of this bill was passed by the General Assembly of our Association, consisting of student government representatives from each of the 11 institutions of the North Dakota University system.

I stand before you today to urge the committee to move DO PASS on S.B. 2252.

Chairman Hogue and members of the committee I would to thank you for your time, and will now stand for any questions.

Jody Ferris

North Dakota Student Association Legislative Lobbyist

Thank you Chairman Hogue and the other committee members. My name is Riah Roe and I represent my self today.

I stand here today not as a political lobbyist or paid activist. Instead, I stand here as just one of many individuals that this legislation would affect.

To begin with, a little background about me. I was born 22 years ago as Zachariah Roe to Michael Tharaldson and Tonya Roe. Since then I have traveled to 17 countries, attended 23 schools, and have saved numerous lives.

At 20 years old I knew that I needed to finally be true to myself. Ever since I was a child I knew I was gender non-conforming. However, due to societal pressure it took me two decades to finally actualize this fact and incorporate it into my current identity.

In 2010 I was hired as a man to be a debate coach for Fargo North High School. I worked closely with students as I tried to instill in them my knowledge of logic, communication, and life skills. I supported them by waking up early on frozen winter mornings to take them to tournaments all around North Dakota. I shared in my student's laughter when they won and consoled their tears when they lost. In sum, I helped them develop their potential.

That all changed when I told my boss that I was going to physically and socially alter my body and identity to match how I truly felt inside. In my meeting with my employers Troy Cody and Andy Dahlen I was pressured to answer questions about what seemed every facet of my transition at work. From how I would deal with students and parents to which restroom I would use at tournaments.

For the record, I use the women's restroom.

It took 8 days for them to replace me. In the year prior I had not received a single bad review, warning, or indication that I would lose my position. I was both furious and devastated. The only thing that had changed from 2010-2011 was my employer's perception of me. I had gone from being seen as an eloquent and thoughtful well traveled individual to a despicable tranny that was unfit to teach children.

I reached out for help. I contacted lawyers to see if I had a discrimination case... none of them responded to me. I found out later that this was because at the time there was a consensus in the legal community that transgender people did not have the same protections as cisgender people. When I contacted the department of labor to file a sex discrimination charge I was met only with confusion and redirection. I encountered one legal road block after another, each dehumanizing me a little more.

We like to think that these things don't happen in North Dakota. Not only was I fired from my job I was asked to leave downtown restaraunts, redirected to the men's department in stores, and have been the victim of sexual assault. I can never know what it is like to be a person of color in America but I know what it is like to be treated badly because of your body. To be treated like you are different and thus not as worthy of equal treatment.

I am different from almost everyone in this room. But I am also very similar. I just want to live my life, pursue my dreams, and be happy. You can not experience what I have experienced today, but you can protect others like me from the pain I have experienced. And for these reasons I encourage you to pass this bill.

Thank you!

Hello Honorable Legislators, my name is Evie Myers and I'm the Vice-President of Equity, Diversity and Global Outreach at North Dakota State University. Thank you for allowing me the time to address you on Senate Bill Number 2252.

For historical background, North Dakota State University was the first college in the state of North Dakota to include sexual orientation in our non-discrimination policy. Since the 1990s, we have made the commitment to our lesbian, gay and bisexual campus community members – students, faculty and staff – that they would not be passed over for promotion or tenure, would not be fired from a campus job, and would not be denied campus housing because of their sexual orientation. We are proud to be a leader in the North Dakota higher education community on this matter.

However, like our students, we as an institution continue to learn. And, with that learning, we realized that our commitment to non-discrimination of lesbian, gay and bisexual students, faculty and staff was missing a critical population. So, in 2009, we amended our non-discrimination policy to include gender identity and in 2011 expanded that statement to also include gender expression. We are fully committed to ensuring equal access and opportunity for all who work, study and live at NDSU, regardless of their sexual orientation, gender identity or expression.

NDSU supported and applauded the decision in 2008 by the North Dakota University System to amend its non-discrimination statement to include protections on the basis of sexual orientation. This sends a clear statement to all 48,000 college and university students in the state of North Dakota, as well as their faculty, student organization advisors, work-study supervisors, and custodians, that the higher education community in this state will not discriminate against them.

However, this is not enough. Our faculty, staff and many of our students do not live in campus housing. Unfortunately, the employment protections ensured by their colleges and universities will not help them if they have a landlord who chooses to evict them because they are gay, lesbian, bisexual or transgender. What happens then?

Many of our college students hold part-time jobs off campus, jobs that are necessary for them to pay their tuition bills, purchase their textbooks, pay for their on- or off-campus housing, and purchase food and other necessities. Even though they cannot be fired from their campus jobs, due to their sexual or gender identities, these protections will not help them in these off-campus positions. We know of college students who have been fired from their off-campus jobs, simply because they are, or are perceived to be, LGBT. Losing an important source of income, income necessary for them to continue their academic pursuits, leads to those students being forced to make difficult decisions – increasing their student loan or credit card debt to continue to fund their college costs, or transferring to a college or university set in a state that will provide employment protections for them, or quitting college altogether. Either way, those students lose.

Thank you for the opportunity to present this information.

Resolution No. _____

RESOLUTION SUPPORTING SB2252 REGARDING NORTH DAKOTA POLICY DISCRIMINATION

This resolution adopted this ____ day of _____, 2013, by the Grand Forks City Council to support the SB2252 in the 63rd Legislative Session of the North Dakota State Legislature regarding North Dakota discrimination policy.

WHEREAS; The City of Grand Forks values diversity in its community and supports efforts to end discrimination in all forms; and

WHEREAS; SB2252 works to prevent and eliminate discrimination in employment relations, public accommodations, housing, state and local government services and credit transactions; and

WHEREAS; SB2252 further identifies sexual orientation as a status to which discrimination is prohibited in the activities listed above.

Now, therefore, the Grand Forks City Council does hereby resolve that it supports SB2252 in the 63rd Session of the North Dakota Legislature to enact state policy to prohibit discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, sexual orientation, status with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during non-working hours which is not in direct conflict with the essential business-related interests of the employer and seeks legislative support to adopt this bill as the law of North Dakota.

Michael R. Brown, Mayor
City of Grand Forks

Hal Gershman, President
Grand Forks City Council

**Senate Judiciary Committee
February 6, 2013
SB 2252**

Mr. Chairman, and members of the Senate Judiciary Committee, I am Tom Freier representing the North Dakota Family Alliance. I am here testifying in opposition to SB 2252.

The North Dakota Century Code and Constitution currently provide for protection from discrimination and prejudice. Constitutional rights afforded to all should not be jeopardized by the granting of special status to some.

This bill adds 'sexual orientation' to the code for the purpose of prohibiting discrimination. The definition of sexual orientation in this bill is subjective and vague. Unlike an immutable characteristic, like race, a characteristic which cannot change, "sexual orientation" defines conduct or behavior. The sexual orientation is self-identified as perceived by the individual, and may change.

Today, "sexual orientation" is a term related to three quite different phenomena—a person's sexual attractions or desires, a person's sexual behavior, and a person's self-identification, either publically or internally. An individual's sexual attraction, sexual behavior, and self-identification are not always consistent with each other, let alone static over time.

In that light, homosexual attractions may not be a choice in most cases, but homosexual conduct and behaviors are a choice, as well as self-identifying as a gay or lesbian.

Adding "sexual orientation" to anti-discrimination code does more than protect an individual's rights or liberty, it creates a protected class, it grants special status. It grants that special status by elevating the rights of a limited few at the expense of the many.

Supreme Court criteria for a change in non-discrimination status include: an immutable, unchangeable characteristic, being economically deprived, and suffering from political powerlessness. Sexual orientation seems to fit none of these requisite categories.

How might passage of SB 2252 affect the people of North Dakota? Let's look at an actual case.

In *Winlock v. Elaine Photography*,¹ Elaine Huguenin, a Christian who owns a photography business in New Mexico, declined to photograph a "commitment ceremony" between two women. Even though the two women easily found another photographer to

memorialize their “ceremony,” one of the women filed a discrimination complaint against her, using New Mexico’s anti-discrimination law, which includes “sexual orientation.” On April 9, 2008, the New Mexico Human Rights Commission held that Elaine Photography had discriminated against the women based on their sexual orientation, and ignored Elaine Photography’s First Amendment rights to determine her own expressive activity and religious liberty.² In addition, the court ordered Elaine Photography to pay over \$6,000 to the plaintiff in attorney’s fees.

How about in our schools?

In states that have “sexual orientation” in their anti-discrimination laws, groups are attempting to use the public school as a means for normalizing this behavior. These groups have developed curriculum for use in public schools to teach children as young as kindergarten, that self-identification processes are OK and same-sex attractions are normal behaviors. Parents that object to these topics being taught in school often find difficulty removing their children from the curriculum.

Our concerns do not stop there, whether in the educational arena, businesses ability to offer services and products, religious non-profits such as schools, hospitals, pregnancy clinics—all may well be affected. We are concerned about the use of public facilities, such as rest rooms and locker room facilities.

While SB 2252 would appear to, it is not restricted to the conduct and behaviors of individuals. It most certainly may force recognition of relationships. While adding “sexual orientation” to the code does not protect the right to choose a relationship partner, it serves to promote the resulting relationships. It provides an avenue for same-sex couples to seek judicial redress when their relationship is not affirmed by private citizens or the government based on their “sexual orientation”.

Instituting “sexual orientation” protection in the law may ultimately result in a North Dakota Supreme Court case considering making “sexual orientation” a protected constitutional class. In both California and Connecticut, their respective state supreme courts elevated “sexual orientation” as a protected class in response to their anti-discrimination laws. Both states provided significant benefits to same sex couples before the courts declared a right to same-sex marriage.

In closing, we believe equal protection exists today. We believe this bill grants special status based on behavior, it will lead to forced recognition of relationships, and most certainly is a part of an effort to redefine marriage.

We respectfully ask the committee to place a Do Not Pass on SB 2252.



Kelly Fedorchak

LEGAL MEMORANDUM

DATE: February 5, 2013

RE: Legal Repercussions of Senate Bill 2252

Introduction

North Dakota Senate Bill 2252 (SB 2252)—the proposed legislation to expand nondiscrimination laws in North Dakota to include the categories of “sexual orientation” and “gender identity”—would create multiple legal issues for the state of North Dakota and detrimentally impact many of North Dakota’s citizens if it is enacted.¹ Herein we examine some of the concerns existent in SB 2252 should it be enacted.

I. SB 2252 threatens North Dakota citizens’ First Amendment freedoms.

A. Sections 14-02.4-04 and 14-02.4-05 threaten religious freedom in the employment context.

The proposed bill prohibits “sexual orientation” and “gender identity” discrimination by employment agencies and labor organizations.² However, these provisions fail to protect the constitutionally-guaranteed right to free exercise of religion for those individuals and organizations.

First, SB 2252’s requirements would infringe on the religious liberty of those who work for employment agencies. Certain individuals will have legitimate reasons to consider an employee’s or applicant’s sexual behavior when making particular employment decisions or recommendations. These situations include, for example, an employment agency assisting an all-girls school to find a basketball coach, a nursing home to hire care-takers, or a counseling center to employ therapists. The proposed law will forbid employment agencies and those who work at employment agencies from

¹ SB 2252 defines “sexual orientation” to include “gender identity”: “‘Sexual orientation’ means actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity.” SB 2252, § 14-02.4-02, 20 63rd Leg. Assem., Reg. Sess. (N.D. 2013). “Gender identity” is defined as “actual or perceived gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated gender at birth.” SB 2252, § 14-02.4-02, 10 63rd Leg. Assem., Reg. Sess. (N.D. 2013).

² See §§ 14-02.4-04, 14-02.4-05 63rd Leg. Assem., Reg. Sess (N.D. 2013). North Dakota law defines “employment agency” as “a person regularly undertaking, with or without compensation, to procure employees for an employer or to procure for employees opportunity to work for an employer and includes any agent of the person.” See N.D. CENT. CODE § 14-02.4-02, 9 (1960). North Dakota law defines “labor organization” as “a person, employee representation committee, plan in which employees participate, or other organization which exist solely or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.” See N.D. CENT. CODE § 14-02.4-02, 10 (1960).



assisting both prospective employers and employees in a way consistent with their clients' religious beliefs.³

Section 14-02.4-05 could force individuals or organizations—in violation of their sincerely held religious beliefs—to extend the same employment benefits to their employees' same-sex partners that they give to married spouses of the opposite sex.⁴

But the impact of SB 2252 will likely extend beyond employment agencies or labor organizations; it will also threaten the religious liberty of all North Dakotan employers and employees. If this law is enacted, all employers will likely have an obligation to prevent employees or customers from engaging in conduct that other employees might view as discriminating on the basis of “sexual orientation,”⁵ and this will prompt most employers to adopt policies prohibiting “sexual orientation” discrimination, which, regardless of the employers' intent, will significantly affect their employees' religious liberty in the workplace.⁶

Passage of this bill would thus affirm far-reaching discrimination against people who hold sincere religious or moral beliefs. And most troublesome of all, by enacting the proposed law, the government will be complicit in—and, indeed, a direct cause of—religious intolerance rather than adhering to its constitutional requirement to protect the people's freedom to live their lives in accordance with their faith.

B. Sections 14-02.4-06 and 14-02.5-03 would violate North Dakotans' constitutionally-protected freedoms of speech and association.

The United States Supreme Court has repeatedly recognized that certain applications of nondiscrimination laws like the proposed provisions directly infringe on cherished First Amendment freedoms, such as freedom of speech and association. In one case, for example, the Massachusetts Supreme Judicial Court ruled that private individuals—the organizers of the St. Patrick's Day Parade in Boston—violated a prohibition against “sexual orientation” discrimination when they refused to allow a group advocating homosexual behavior to interject its message into their parade.⁷ On appeal, the United States Supreme Court overruled the lower court's decision, declaring that the state court's

³ See § 14-02.4-04, 63rd Leg. Assem., Reg. Sess (N.D. 2013). “It is a discriminatory practice for an employment agency to accord adverse or unequal treatment to a person in connection with an application for employment, referral, or request for assistance in procurement of employees because of . . .sexual orientation.”

⁴ See, e.g., *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) (finding that an employer “violated Executive Law § 296(1)(a), which forbids an employer from discriminating against an employee . . . because of [her] sexual orientation,” by refusing to recognize the employee's same-sex relationship or provide benefit to her same-sex partner).

⁵ Marc D. Stern, *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 1, 50 (Laycock et al. eds., 2008) (“[E]mployers have a two-sided obligation with regard to harassment. The employer may not itself engage in harassment and it may not allow employees or customers to create an intolerable environment for an employee based on one of the prohibited bases of discrimination.”).

⁶ *Id.* at 51 (“[M]ost employers, wary of the expense of defending a harassment lawsuit, are likely to enact their own rules”).

⁷ *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994).



application of the “sexual orientation” nondiscrimination law violated the constitutional free-speech rights of the parade organizers by compelling them to communicate an unwanted message.⁸

In another case, the New Jersey Supreme Court ruled that a private organization, the Boy Scouts of America, violated the State’s “sexual orientation” nondiscrimination law when it denied a scout-leader position to an outspoken practitioner of homosexual behavior.⁹ Yet the United States Supreme Court disagreed, ruling that New Jersey’s application of the law infringed the constitutional free-association rights of the Boy Scouts to join together with those individual who believe in, and seek to promote, the organization’s core values.¹⁰ These cases tangibly demonstrate the constitutional concerns that are needlessly created by this legislation.¹¹

But if SB 2252 is enacted, North Dakotans will face fines and penalties for simply seeking to run their businesses in accordance with their conscience and their values.¹² For example, a small family-owned company that only advertises its residential properties to opposite-sex couples due to its religious beliefs regarding sexuality could face substantial penalties.¹³ Similarly, if a Christian photographer advertises that she is seeking to hire an assistant that shares her beliefs, or if a Jewish counselor advertises to hire another individual to provide “counseling consistent with the Judeo-Christian faith,” both individuals would be penalized under this law. Indeed, the penalties are so punitive that they could cause a company to go out of business. SB 2252 thus fails to extend constitutionally-required protections to North Dakota citizens to be able to communicate and promote one’s business in accordance with one’s beliefs.

C. Section 14-02.4-14 threatens religious freedom of individuals and businesses that provide “public accommodations.”

Section 14-02.4-14 would inflict widespread and pervasive harm on religious liberty, impacting—among others—individuals, business owners, professionals, and religious organizations who have a “place, establishment, or facility of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity.”¹⁴ The adoption of SB

⁸ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

⁹ *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999).

¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

¹¹ The United States Supreme Court is not alone in acknowledging the constitutional violations that often result from the existence of exceedingly broad nondiscrimination laws. Legal scholars have also remarked that the excessive and unnecessary expansion of nondiscrimination laws has emerged as a “serious threat” to constitutional rights and our nation’s timeless civil liberties. See David E. Bernstein, *YOU CAN’T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* 8 (Cato Inst. 2003); see also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 *Hofstra L. Rev.* 1155, 1200 (2005) (“[T]he broadening of antidiscrimination law . . . creates substantial . . . costs to private actors’ freedom from government restraint”).

¹² See N.D. CENT. CODE §§ 14-02.5-32, 14-02.5-37, 14-02.5-41 (1960).

¹³ *Id.*

¹⁴ N.D. CENT. CODE § 14-02.4-02, 14 (1960).



2252 would present these individuals and businesses with a diabolic choice: violate their conscience or face legal action, including fees, and possible termination of employment.¹⁵

Persecution of those with deeply held religious beliefs is not mere speculation. On the contrary, measures similar to SB 2252 enacted in other jurisdictions have resulted in shocking examples of religious intolerance. Individuals and businesses that declined to provide their services, express a message, or support or host an event inconsistent with their deeply held religious beliefs subsequently faced discrimination lawsuits. Examples of this inexplicable persecution include:

- A same-sex couple sued a Christian ministry for allegedly violating the nondiscrimination law when the Christian association chose to act according to its sincerely held religious beliefs and decline the use of its pavilion for a same-sex couple's civil union.¹⁶ The couple found a place for their ceremony but still chose to persecute the ministry.
- A Colorado same-sex couple filed a discrimination complaint against a Colorado bakery because the baker declined a request to prepare a cake for the couple's celebration.¹⁷ Plenty of bakeries will assist them, but this bakery is still being persecuted.
- A Vermont same-sex couple filed a discrimination complaint against a small family-owned-and-operated inn when the owner expressed some reluctance to host the couple's wedding ceremony because of his religious beliefs about marriage.¹⁸ Legal action was taken against this family business, and it was subjected to an investigation by a state agency for communicating its sincerely held religious beliefs, despite the fact that this couple did find a place to successfully have their wedding reception.
- An Illinois same-sex couple filed discrimination complaints with the Illinois Attorney General and the Illinois Department of Human Rights against two small family-owned bed-and-breakfasts when the owners of those establishments, for religious reasons, declined to host the couple's civil-union ceremony.¹⁹

¹⁵ See N.D. CENT. CODE § 14-02.4-20 (1960). "If the department, as the result of an administrative hearing, or the court determines that the respondent has engaged in or is engaging in a discriminatory practice, the department or the court may enjoin the respondent from engaging in the unlawful practice and order temporary or permanent injunctions, equitable relief, and backpay limited to no more than two years from the date a minimally sufficient complaint was filed with the department or the court."

¹⁶ See, e.g., *Ocean Grove Camp Meeting Ass'n of United Methodist Church v. Vespa-Papaleo*, 339 Fed.Appx. 232 C.A.3 (N.J.), 2009

¹⁷ See, e.g., *Masterpiece Cakeshop, Colorado Bakery, Allegedly Denies Wedding Cake To Local Gay Couple*, huffingtonpost.com, Jul. 23, 2012, available at http://www.huffingtonpost.com/2012/07/23/masterpiece-cakeshop-colorado-bakery-gay-wedding-cake_n_1695386.html (last visited Jan. 29, 2013) (Colorado-based bakery whose owner believes that marriage is the union of one man and one woman legally targeted by same-sex couple).

¹⁸ See, e.g., *Lesbians target innkeeper over same-sex "wedding,"* WorldNetDaily, June 30, 2005, available at http://www.wnd.com/news/article.asp?ARTICLE_ID=45073 (last visited Jan. 29, 2013); See, e.g., Anne-Marie Dorning, *ACLU: Wildflower Inn Sued Over Refusal to Host Gay Wedding*, ABCNews.com, Jul. 20, 2011, available at <http://abcnews.go.com/US/vermont-inn-sued-refusal-host-gay-couples-wedding/story?id=14110076> (last visited Feb. 5, 2013).

¹⁹ See, e.g., Terry Hillig, *Men say Alton inn won't host their civil union ceremony*, Stltoday.com, Feb. 23, 2011, available at http://www.stltoday.com/news/local/metro/article_14f7eef0-3f7a-11e0-bb53-0017a4a78c22.html (last visited Jan. 29, 2013); *Gay Couple Sues Illinois Bed And Breakfast For Refusing To Host Civil Union Ceremony*, huffingtonpost.com,



- A Virginia municipality's human-rights commission ordered a video-duplication business to copy two documentaries promoting homosexual behavior, even though the business owner said that producing the material would violate his religious and ethical values.²⁰ Several video duplication businesses were available to perform this service, but this business was still legally forced to perform a service against its beliefs.
- A Georgia woman filed a discrimination complaint against a licensed counselor, who, because of her deeply held religious beliefs about same-sex relationships, respectfully declined to provide counseling about her same-sex relationship. The counselor referred the prospective client to a colleague, who within minutes provided the client with the help she sought. The counselor was nonetheless terminated from her employment.²¹
- A young photographer in New Mexico respectfully declined to photograph a same-sex commitment ceremony because of her religious beliefs on marriage. Although the same-sex couple went on to find another photographer and had a successful commitment ceremony together, they subsequently took legal action against this young woman, and the New Mexico Human Rights Commission fined her \$6600 for the alleged discrimination.²²
- A woman with same-sex attraction filed a lawsuit alleging discrimination based on "sexual orientation" against eHarmony—a company founded and owned by an evangelical Christian who has strong religious convictions that forbid him from facilitating same-sex relationships—because the organization provided services to only "men seeking women" and "women seeking men."²³
- A California court found that physicians whose religious beliefs forbid them to provide an elective fertility procedure for an unmarried woman in a same-sex relationship violated the State's sexual-orientation nondiscrimination law.²⁴ The same-sex couple successfully found doctors to assist them, but still persecuted the religious physicians.

These individual and businesses, and others like them—who refuse to discard their religious beliefs at the door when they operate their businesses or carry out their professions—should not be forced to choose between their conscience and their livelihood. SB 2252's failure to exhibit tolerance

May 25, 2011, available at http://www.huffingtonpost.com/2011/02/23/gay-couple-sues-illinois_n_827115.html (last visited Jan. 22, 2013)

²⁰ *Vincenz v. Bono Film and Video*, Case No. 05-066 PA, Arlington County Human Rights Commission Decision (Apr. 13, 2006) (on file with author and the Arlington County Human Rights Commission) (determining that the video-duplication business, by refusing to "duplicate two documentaries . . . entitled: 'Gay and Proud' and 'Second Largest Minority,'" "discriminated against the complainant on the basis of her sexual orientation").

²¹ *Walden v. Centers for Disease Control and Prevention*, Case No. 1:08-CV-2278-JEC-WEJ, Magistrate Judge's Final Report and Recommendation, Doc. No. 111, at 16; 19-22; and 40-41 (N.D. Ga. Nov. 20, 2009).

²² *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428. Notably, the photographer declined the request based on her sincere religious beliefs about marriage; she did not decline the request based on sexual orientation, and, in fact, has gladly photographed those individuals with same-sex attraction.

²³ See Jill Serjeant, *eHarmony sued in California for excluding gays*, Reuters, May 31, 2007, available at <http://www.reuters.com/article/idUSN3122132120070531?feedType=RSS&rpc=22> (last visited Jan. 29, 2013).

²⁴ *North Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008).



imperils the constitutionally-protected religious liberty of North Dakotans and needlessly drains North Dakota of business, revenue, tax dollars, and employment opportunities.²⁵

D. Section 14-02.4-15 threatens religious freedom of child-welfare providers.

Evidence from other jurisdictions that have passed similar measures to SB 2252 reveals that “sexual orientation” nondiscrimination laws lead to government discrimination against certain individuals and organizations engaged in the provision of child welfare services. There are frequent examples of government entities refusing to contract with individuals and organizations that conduct themselves in accordance with their religious beliefs because of the government entities’ adherence to nondiscrimination laws.

Unfortunate victims of this discrimination—in addition to the children and families they serve—include the faith-based child-welfare agencies that, for religious reasons, strive to place children in homes with both a mother and a father. Indeed, statutes like the proposed law have forced charitable adoption organizations to close because they could not continue to adhere to their religious convictions.²⁶ Regrettably, this type of unnecessary discrimination has already occurred in Illinois, Massachusetts, and the District of Columbia.²⁷

E. Section 14-02.5-02 of SB 2252 threatens the religious freedom of those engaged in the provision of housing, both charitable and for-profit.

The proposed law’s disregard for religious liberty also extends to those in the housing industry that maintain certain principles about sexual conduct. For example, under the proposed law, individuals with sincere religious beliefs that run homeless shelters or other charitable housing facilities could no longer operate according to their religious tenets by, for example, prohibiting

²⁵ Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43-44 (2000) (noting that legal issues involving sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality”).

²⁶ See, e.g., Father Robert J. Carr, *Boston’s Catholic Charities to stop adoption service over same-sex law*, Catholic Online, available at http://www.catholic.org/national/national_story.php?id=19017 (last visited Jan. 22, 2013) (“Catholic Charities in Boston announced March 10 that it is getting out of the adoption business.”).

²⁷ See, e.g., Laurie Goodstein, *Illinois Catholic Charities close over adoption rule*, The Boston Globe, available at <http://www.bostonglobe.com/news/nation/2011/12/29/illinois-catholic-charities-close-rather-than-allow-same-sex-couples-adopt-children/Km9RBLkpKzABNLJbUGhvJM/story.html> (last visited Jan. 22, 2013) (“[M]ost of the Catholic Charities affiliates in Illinois are closing down rather than comply with a new requirement that says they can no longer receive state money if they turn away same-sex couples as potential foster care and adoptive parents.”); Father Robert J. Carr, *Boston’s Catholic Charities to stop adoption service over same-sex law*, Catholic Online, available at http://www.catholic.org/national/national_story.php?id=19017 (last visited Jan. 22, 2013) (“Catholic Charities in Boston announced March 10 that it is getting out of the adoption business, over Massachusetts state law requiring that the agency place children with same-sex couples.”); Julia Duin, *Catholics end D.C. foster-care program*, Washington Times, available at <http://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/> (last visited Jan. 22, 2013) (“The Archdiocese of Washington’s decision to drop its foster care program is the first casualty of the District of Columbia’s . . . same-sex marriage law.”).



unmarried couples from sharing a room or bed. Others negatively impacted include those people of faith who own an apartment complex, for example, who would no longer be allowed to deny, as required by their religious tenets, unmarried couples from living together in their apartments.

II. SB 2252's proposed codification of "gender identity" would endorse conduct caused by an established mental disorder and create harm for organizations and individuals.

Federal law governing throughout the country currently forbids discrimination on the basis of sex.²⁸ Sex is determined by a person's biology and anatomy;²⁹ it is an objectively verifiable characteristic that is familiar throughout the legal system. Indeed, traditional legal classifications of sex, as well as race and nationality, are innate, immutable characteristics that cannot be naturally changed. SB 2252, however, seeks to supplement the existing legal regime with the novel legal concept of "gender identity."

"Gender identity," unlike sex, is determined by a person's "perceived...identity, appearance, or mannerisms...regardless of the individual's designated gender at birth"; it is thus an internally conceived and objectively unverifiable characteristic with no firm legal foundation.³⁰ Placing "gender identity" in the law, as the proposed bill attempts to do, creates an unworkable legal construct based on an individual's subjective perception.³¹ Simply put, it will radically change the law's—and, in turn, society's—view of maleness and femaleness by transforming a person's legal status as male or female based on a reality determined by biology to a status rooted in a preference determined by internal reflection. North Dakota's proposed protections regarding "gender identity" raise two sets of issues.³²

First, codifying the concept of "gender identity" creates and endorses legal protection for mentally impaired conduct caused by an established psychiatric disorder. The proposed legislation's "gender identity" provisions seek to benefit persons commonly known as "transgender," a category that includes biological males who subjectively identify as women and biological females who subjectively identify as men.³³ These individuals, however, generally suffer from a psychiatric

²⁸ 42 U.S.C. § 2000e-2 ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex").

²⁹ Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, available at <http://emedicine.medscape.com/article/917990-overview> (last visited Jan. 29, 2013) ("Sex . . . is defined by the gonads, or potential gonads, either phenotypically or genotypically.").

³⁰ See § 14-02.4-02, 10 63rd Leg. Assem., Reg. Sess (N.D. 2013). See also Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine, available at <http://emedicine.medscape.com/article/917990-overview> (last visited Jan. 29, 2013).

³¹ Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 395-96 (2001) (noting that one goal of this recent push for the law to embrace the concept of gender identity is to "encourag[e] courts and society to conclude that the determination of one's sex should rest with the individual and not the state").

³² The bill defines "sexual orientation" to include "identity," so prohibiting discrimination based on "sexual orientation" also includes discrimination based on "gender identity." See § 14-02.4-02, 20 63rd Leg. Assem., Reg. Sess (N.D. 2013).

³³ Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/medical/transgendered> (last visited Jan. 29, 2013) ("[A] person . . . who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth.").



disorder known as Gender Identity Disorder (“GID”), as even supporters of these laws admit.³⁴ GID is an established mental illness recognized by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders;³⁵ it causes persons to experience “conflict between [their] physical gender and the gender he or she identifies” and to be “very uncomfortable with the gender they were born.”³⁶

SB 2252’s “gender identity” provisions thus create legal protection for a small group of citizens’ psychiatrically disordered conduct concerning their identity as male or female. Yet these provisions simultaneously force employers, businesses, and other entities to capitulate to those mentally impaired actions. The proposed law, if enacted, will thus place the government’s stamp of approval on these individuals’ mentally impaired behavior, communicating to society that these actions are socially acceptable even though the medical community has determined that they are psychiatrically disordered.

Secondly, the reach of the “gender identity” provisions are sweeping and would detrimentally impact North Dakota citizens, as well as businesses, organizations, and government agencies handling any matter that takes into account a person’s sex. This includes not only schools, universities, and government offices that deal with public records, but every organization that hires employees or maintains a public restroom. Indeed, this broad scope will impact most of the organizations throughout North Dakota. Consider the following examples of the potential impact of such a law:

- Organizations must allow persons to access sex-segregated programs, activities, and facilities in accordance with the sex they choose.³⁷ This means, for example, that a school must allow a biological male who professes a female identity to attend an all-girls school or participate in an all-girls class or athletic program.
- Organizations must allow persons to access bathrooms, showers, and locker-room facilities in accordance with the sex they choose.³⁸ Notably, it has not been sufficient in some jurisdictions for organizations to create a private “family” or “unisex” bathroom for use by such individuals. The Maine Human Rights Commission thus ruled that a middle school engaged in “gender identity” discrimination against a biologically male sixth-grade student who professed a female

³⁴ Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues*, National Center for Lesbian Rights (2003), available at <http://www.transgenderlaw.org/resources/translaw.htm> (last visited Jan. 29, 2013) (“Transsexualism is technically classified as a specific form of a broader psychiatric disorder termed ‘gender identity disorder,’ also known as ‘gender dysphoria.’”).

³⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV* (2000).

³⁶ *Gender Identity Disorder*, MedlinePlus, available at <http://www.nlm.nih.gov/medlineplus/ency/article/001527.htm> (last visited Feb. 4, 2013).

³⁷ Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 29, 2013) (“In general, students . . . must be allowed access to gender-segregated programs, activities, and facilities in accordance with their gender identity . . . , and they must be addressed by their chosen names and pronouns.”).

³⁸ Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 29, 2013) (“[S]tudents must be allowed access to the bathrooms that correspond with their gender identity”).



identity because the school provided the student with his own private bathroom and locker room instead of allowing him to use the female restroom.³⁹

- Schools must allow students to participate in sex-segregated sports in accordance with the sex they choose.⁴⁰ This requires schools to allow, for instance, a biological female to play on the boy's football team, or a biological male to join the girls' basketball team.
- Employers, schools, and other organizations must allow employees, students, and patrons to dress in accordance with the sex they choose. This means that employers will no longer be allowed to maintain a reasonable dress code,⁴¹ which they are currently able to do under federal law.⁴² It also means that schools must allow biological males who profess a female identity to wear dresses, skirts, and earrings to class and other school functions.⁴³
- Publicly accessible organizations and entities that maintain separate lodging facilities for men and women—such as homeless shelters or drug-and-alcohol-rehabilitation centers—must allow persons to lodge with the residents who share the sex that they choose.⁴⁴ This means that a women's homeless shelter, for example, must allow a biological male who professes a female identity to sleep in the women's facilities.

³⁹ Heather Steeves, *Panel rules against Orono school in transgender bathroom access*, Bangor Daily News, Sept. 20, 2010, available at <http://www.bangordailynews.com/external/mobile/?id=154263> (last visited Jan. 11, 2011); *Human Rights Panel Rules Against Orono School in Transgender Bathroom Issue*, Maine Public Broadcasting Network, Sept. 21, 2010, available at <http://www.mpbn.net/Home/tabid/36/ctl/ViewItem/mid/3478/ItemId/13583/Default.aspx> (last visited Jan. 29, 2013); *Panel: School Discriminated Against Transgender 6th Grader by Not Letting Student Use Girls' Room*, Fox News, Sept. 22, 2010, available at <http://www.foxnews.com/us/2010/09/22/panel-school-discriminated-transgender-th-grader-letting-student-use-girls-room/> (last visited Jan. 29, 2013).

⁴⁰ Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 29, 2013) (“[S]tudents must be permitted to participate in gender-segregated sports in accordance with their gender identity”).

⁴¹ *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 38 (2007) (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP, an attorney with more than 30 years of experience with labor and employment law), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf (last visited Jan. 29, 2013) (opposing a federal “gender identity” nondiscrimination law and noting that “[i]t is simply unclear how a reasonable dress code can coexist with the . . . indefinite classification of self-perceived gender identity”).

⁴² *Jepperson v. Harrah's Operating Company, Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (upholding a sex-specific dress code and grooming policy); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385 (11th Cir. 1998) (similar); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2d Cir. 1996) (similar); *Carroll v. Talman Federal Savings & Loan Assoc.*, 604 F.2d 1028 (7th Cir. 1980) (similar); *Willingham v. Macon Telegraph Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (similar); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir. 1973) (similar); *Baker v. California Land Title Co.*, 507 F.2d 895 (9th Cir. 1974) (similar); *Knott v. Missouri Pacific Ry. Co.*, 527 F.2d 1249 (8th Cir. 1975) (similar); *Barker v. Taft Broad Co.*, 549 F.2d 400 (6th Cir. 1977) (similar); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (similar).

⁴³ Maine Human Rights Commission, *Sexual Orientation in Schools and Colleges: Know Your Rights and Responsibilities*, available at http://www.foxnews.com/projects/pdf/2-08-2010_Draft_MHRC_Sexual_Orientation_Guidance.pdf (last visited Jan. 29, 2013) (“[S]tudents must be permitted to dress in accordance with their gender identity”).

⁴⁴ National Gay and Lesbian Task Force Policy Institute & National Coalition for the Homeless, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People* 31-33, 37-38 (2003), available at <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf> (last visited Jan. 29, 2013) (noting that “[a] men's shelter is [not] . . . appropriate for a [biological male who professes a female identity]”).



These bizarre—but real and demonstrated—occurrences highlight two practical problems with SB 2252’s proposed prohibition of “discrimination” based on “gender identity.” First, it disregards the rights, interests, and dignity of the unsuspecting citizens who are exposed to the individuals that profess a sex contrary to their biological reality. This includes (1) women and girls in restrooms, showers, and locker rooms when a biological male who professes a female identity accesses those facilities, (2) boys on a wrestling or football team when a biological female who professes a male identity wants to participate, (3) girls on a basketball team that must compete against a biological male who professes a female identity, and (4) women in a female-residence facility that must reside with a biological male who professes a female identity. The proposed law, in short, tosses aside the rights, interests, and dignity of all of these individuals.

Second, the proposed law exposes employers, businesses, organizations, schools, and government agencies to unnecessary liability. By forcing these entities to allow biological males access to women’s restrooms, showers, and residence facilities based solely on their perceived gender on any given day, SB 2252 leaves these organizations at the mercy of—with no reasonable means of excluding—opportunistic perverts and predators seeking entry to these sensitive areas. This, in turn, will subject those organizations to legal liability for violating their common-law duty of care to co-workers, customers, and patrons.⁴⁵

Moreover, third parties will be understandably affronted when they are forced to share a government-operated restroom, shower, locker room, or residence facility with a person of the opposite biological sex—whether an opportunistic pervert or an individual who is genuinely confused about his or her sex. Those offended third parties can sue the government for violating their constitutional right to privacy.⁴⁶ Indeed, courts have held that a person’s right to privacy may be violated when a government’s conduct enables members of the opposite sex to observe that person while he or she is undressing, using restroom facilities, or showering.⁴⁷ Similar legal claims might also exist against private businesses and organizations—or the intruding individual of the opposite sex—for violating an employee’s, customer’s, or other third party’s common-law right to privacy.⁴⁸

⁴⁵ Restatement (Second) of Torts § 343 (1965) (noting that an organization that invites persons onto its premises owes a duty, and “is subject to liability for physical harm,” to those invitees if certain conditions are satisfied).

⁴⁶ *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (“There is a constitutional right to privacy.”).

⁴⁷ *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (noting that a person’s constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while “engag[ing] in personal activities, such as undressing, using toilet facilities, or showering”); see also *Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are “entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets”); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity.”).

⁴⁸ Restatement (Second) of Torts § 652(B) (1965) (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy.”).



In conclusion, SB 2252 improperly seeks to introduce a radical concept into the law: the notion that people can self-determine whether they will identify as a male or female in many social settings. Codifying that novel idea, as shown above, has many dangerous consequences that undermine the well-being and safety of many North Dakotans.

Conclusion

SB 2252 presents serious religious freedom concerns, as outlined herein. The experiences of other jurisdictions demonstrate the legal challenges associated with such laws.

Janne Myrdal
State Director



SB 2252 Senate Judiciary Committee

Mr. Chairman and members of the committee, my name is Janne Myrdal, and I am the State Director for Concerned Women for America (CWA) of North Dakota. CWA is the largest public policy women’s organization in the nation. We are here today on behalf of our North Dakota members in opposition to SB2252.

We fail to see the evidence that sexual orientation and “gender identity” meets the criteria set forth by the U.S. Supreme Court defining a minority. The Court has devised a three-part test to determine whether a class of persons qualifies as a true minority: They must be defined by an immutable characteristic (unchangeable, like skin color); they must be economically deprived, and they must suffer from a history of discrimination and political powerlessness. Sexual orientation fits into none of these requisite categories. Instead, the facts show that sexual behavior is changeable, that those who practice non-traditional sexual preference are largely affluent, and that their activists represent one of the most powerful lobbies in the world per capita.

Special rights have historically been afforded to certain groups in order to ensure that individuals are not discriminated against due to immutable characteristics. North Dakota law already protects these characteristics. Further, the bill has no exemptions for those with personal convictions, thus forcing individuals to accept and support sexual behaviors with which they disagree.

In the case of sexual orientation and “gender identity”, the proposed addition to discrimination statutes is based on an undefined behavior. This is a dangerous precedent affecting public policy regarding marriage, families and the culture in general. A chosen behavior should not be the basis for changing law. Adding “gender identity” as an expression of self-image or identity not associated with one’s biological gender forces North Dakota’s’ employers and citizens to pretend, by force of law, that a man is a woman or vice versa based on that person’s self-perception or behavior.

This bill places sexual orientation and self-perceived gender identity not as a protected class, but as a privileged group. Sexual orientation and other manifestations of gender identity do not fit into what constitutes a true minority and should not be added to laws dealing with discrimination. North Dakota citizens are already protected equally under the law, and by responding to the emotions or perceived political correctness of the propaganda put forth nationwide as it relates to “sexual orientation”, defining it in law is a scary Pandora’s box of faulty law writing. The strategy behind promoting these types of unconstitutional laws across the nation is this: Transform morality into a form of bigotry and then use corporate and government power to eliminate that "bigotry." The goal is to alter America’s cultural values and use “bigotry” as a threat in the process of elevating a certain group to protected status above others based on sexual behaviors.

CONCERNED WOMEN FOR AMERICA
OF NORTH DAKOTA

Anne Myrdal
Executive Director



SB2252 actually creates discrimination. In general, when "sexual orientation" or "gender identity" is added to a legal or corporate nondiscrimination code, it is a giant step toward the adoption of policies that discriminate against people with traditional views. Indeed, if we look closely at the term "sexual orientation" itself, it is really a radical challenge to the beliefs of all major religious faiths because it attacks the notion that sexual behavior has moral dimensions. According to the therapeutic manual of the American Psychiatric Association, there are at least 23 distinctive sexual variations of "sexual orientation," and perhaps many more. It includes pedophilia, voyeurism, and exhibitionism, just to name a few. (See attachment) Since the underlying concept of "sexual orientation" is that all sexual behavior is equally valid, there are no good choices or bad choices, just inclinations. There is no longer any definition of the two sexes. SB2252 would force the acceptance of any "inclination." Private businesses and organizations should not be forced by the state to set aside their moral or religious principles, based upon someone's proposed rights due to the individual's sexual behavior.

This law would not protect rights but would rather grant special privileges based strictly on someone's sexual behavior. Further, those privileges would have a significant impact on the constitutional rights of North Dakotans who may have a moral objection to certain sexual behavior. Other states which have passed similar laws have faced numerous lawsuits, including some filed by individuals claiming the right to use a restroom or other public space reserved for the opposite sex. Both federal and North Dakota law already prohibits sex discrimination and sexual harassment. If SB 2252 becomes law, it will communicate to the citizens of North Dakota that the political agenda of a few is more important than the time-honored and cherished First Amendment principles upon which our country was founded and promised to everyone. Should sexual preference now trump the rights of free speech and freedom of religion?

It may be claimed to be politically incorrect, or even old fashioned, but should what happens between two consenting adults in privacy even be of public and legislative discussion or concern? We think not. If we allow "sexual orientation" and "gender identity" to become a matter of laws and policies, it will reach our workplaces, our schools, our families, our children and even our houses of worship creating a society that no longer has "equal under law" as a principle. This will surely challenge the common sense, strength of character and founding principles on which this great nation and state were built. The liberties we now all enjoy, regardless of sexual orientation, will all stand defenseless against this discriminatory proposed law. It will have a negative effect on our society, removing all moral boundaries, and allowing further sexualization of our public square.

Allow us also to state that it should be the personal duty of all citizens to behave in such respectful manner towards fellow citizens, without being compelled or directed by law, so as to afford all the right to life, liberty and pursuit of happiness. We should all strive to behave in such a way.

We, again, urge your "Do Not Pass" vote on SB2252.

CONCERNED WOMEN FOR AMERICA
OF NORTH DAKOTA

Anne Myrdal
Executive Director

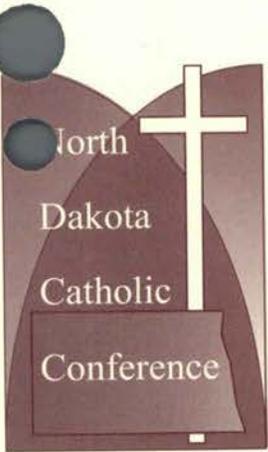


APPENDIX OF SEXUAL BEHAVIORS

WARNING: some of the descriptions may be offensive to readers' sensibilities.

[Page numbers are from " Paraphilias," Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (Washington: American Psychiatric Association, 2000), pp. 566-582.]

1. Heterosexuality: the universal norm: sexual interaction with the opposite sex.
2. Homosexuality or "Gay": sexual interaction with persons of the same sex.
3. Bisexuality: sexual interaction with both males and females.
4. Transgenderism: an umbrella term referring to and/or covering transvestitism, drag queen/kings, and transsexualism.
5. Pedophilia: "sexual activity with a prepubescent child (generally age 13 years or younger). The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account." (p.571)
6. Transsexuality: the condition in which a person's "gender" identity is different from his or her anatomical sex.
7. Transvestitism: the condition in which a person is sexually stimulated or gratified by wearing the clothes of the other sex.
8. Transvestic fetishism: for males, "intense sexually arousing fantasies, sexual urges, or behaviors involving cross-dressing." (p. 575)
9. Autogynephilia: the sexual arousal of a man by his own perception of himself as a woman or dressed as a woman. (p. 574)



Representing the Diocese of Fargo and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

To: Senate Judiciary Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2252
Date: February 6, 2013

The Catholic Church affirms the God-given dignity of every human life and rejects unjust discrimination. Acts of violence, degradation, or diminishment toward any human person, including anyone with a homosexual inclination, are contrary to the teachings of the Catholic Church.

There is no place for arbitrary discrimination and prejudice against a person because of sexual attraction. We especially deplore violence and harassment directed against such persons. Moreover, all human persons, including those with homosexual inclinations, have a right to obtain employment and housing.

We recognize that some people have a same sex attraction. This tendency is not in itself immoral or sinful. However, like all sexual activity outside of marriage, homosexual activity, as distinguished from homosexual tendency, is morally wrong. A corollary of this teaching of the Church is that patterns of life, sometimes referred to as "lifestyles," that encourage or normalize immoral behavior are also morally objectionable. This is particularly true of those patterns that encourage, promote, or advocate sexual activity outside of marriage.

Based on these principles, we cannot support SB 2252. The unique legal status granted by the bill's definition of sexual orientation appears to encompass not only homosexual inclinations, but also other sexual activities, homosexual or heterosexual, outside of marriage. Civil rights categories should not be used to cover a particular group's sexual activities. Current law already protects lawful activities outside the place of employment. This bill, however, would create special protection for a certain class of sexual activities.

This raises serious policy questions when we consider that current law does not provide protection to other activities and thoughts. Perhaps this is why most of the states have rejected similar legislation.

We realize this is an emotionally-charged issue. Respect and cooperation, however, among people with legitimate differences of opinion is what makes North Dakota great. There is no place for hate, name-calling, or stereotyping by people on either side of this issue or this particular bill. Keeping those principles in mind we urge this committee to carefully review what this bill actually does and give it a **Do Not Pass** recommendation.

Mr Chairman & members of Judicial Committee

Good News Testimony

We offer to inner healing prayer

ministry. 2 years ago we had a

Lady come to us burdened with the

~~10 years~~

Sodomy Lifestyle. We took her

thru a 3 hour inner healing

session & as of this day she

walks free from Sodomy

Point = Homosexuality is by personal
Choice. And deserves no
Legal civil protection.

Full restoration from Gay Lifestyle
is becoming a common thing found
in many churches.

Homosexuality is chosen lifestyle.

Cosale only Comes By repentance

Quero James Bible

I found Rep Lemke testimony Board of Realtors will not discriminate against Sexual Orientation.

~~This is how~~

This proves the marketplace can & should be free to decide sexual orientation issues

Let the market place decide

Mr. Chairman, I strongly believe that North Dakota is one of only a few states left in the nation that truly holds a reputation of righteous faith in God and a steadfast heritage to religious tradition.

We are a progressive and hardworking people. We are very wise and never afraid to move forward with innovations. North Dakota has also produced some of the finest national and international leaders.

North Dakota is yet a strong, honorable, moral, and righteous place to live and we must realize it is easier to lose this quality than it is to keep it. This is why I came here today.

I know that North Dakota's future ^{is} ~~and the~~ keeping ~~of~~ moral constitutional principles weighs greatly in your hands, the hands of all those who legislate our laws. You have much responsibility to bear on your shoulders because what you do today with **SB 2252 will** permanently influence the moral direction that North Dakota will go today and onto many future generations ahead. Mine and your posterity is of great significance. Passing laws that support immorality will promote more immorality today and it will not end but only grow more and more into the next generations.

I believe our state's constitution clearly instructs that all laws established shall be filtered through the lenses of Godly moral principles, our Divine Creator.

The preamble states:

We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution.

Article I of the North Dakota Constitution is entitled **Declaration of Rights**

In **Section 3** we read:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

(Li-cent-uis-ness)

I want to draw attention to the word “licentiousness”

Dictionary defines this as “sexually **unrestrained**”

Our constitution clearly secures the people, civil freedom and liberty. It goes on to say that these rights **will not include** protecting unrestrained sexual desires as described within the divine moral providence of our Heavenly Creator. SB 2252 would be in direct contradiction to our constitution and, therefore, would be unconstitutional.

Mr. Chairman, we know that legislation cannot be declared for man’s own will and shaped to achieve and protect a human craving of social or civil desire or for a socially desired fad of the day.

Our constitution prevents this and protects you, our legislators, from having to legislate laws out from every man's whim. I say this, fully realizing that the pressures of man can sometimes be great.

Mr. Chairman, and members of the committee, the moral fabric of the state of North Dakota was pre-set and put in place for your direction. It was also for your benefit to lean on.

I'll close with this:

Our constitution is there as a perpetual reminder from one generation to the next that we are first, and foremost, in covenant with Divine Ordinances, through which all laws must be filtered and within which laws are forever legislated.

I urge the committee "do not pass" on this bill! Keep North Dakota within the divine guidance of our Heavenly Creator.
Keep good moral principals for future generations.

* when I was a 16 year old I had hair long covering over my ears & because of my long hair I was refused employment
Today long hair is no problem getting job without legislating it
my point is where do we draw the line for civil rights?

many have spoken about no. great wealth - according to

Do Not Pass SB 2252

Judiciary Committee Testimony – Clint Fleckenstein

Senate Bill 2252 - February 6th, 2013

Mr. Chairman and members of the Committee:

My name is Clint Fleckenstein. I'm a North Dakotan, a Christian, a photographer, and an opponent of SB2252. Quite frankly, the intent of this bill is not equality or fairness; rather, it's a tool to force acceptance of a choice of sexual behavior. It claims to give people "equality", but in fact is legalized discrimination against religious beliefs.

This bill is the legal "foot in the door" which will allow advocates of deviant sexual behavior to use the legal system to bludgeon into submission anyone who doesn't condone their lifestyle choices. Anyone who doesn't cater to the whims of these people will promptly feel the wrath of the legal system as they use it as an instrument of intimidation and punishment.

This bill should be particularly alarming to people of faith, upon whom the hammer would fall after the passage of this bill. The advocates of sexual deviancy can't stand that someone might not agree with their lifestyle, and such people need to be dealt with decisively. These activists seem to think that people of faith, Christians and others, need to check their spirituality and belief system at the door of their church on the way out, so that no one is "offended" by them out in the rest of the world.

How a Christian conducts his or her life as a businessperson should not be legislatively mandated to be different than how they conduct the rest of their life. That, however, would be the direct result of SB2252 becoming law...and may in fact be among its primary goals. Any Christian who conducts business falls under the "public accommodations" clause in this bill, as in similar legislation in other states, to their peril.

Don't just take my word for it: with this written testimony I have included some of the results you may find from even a cursory Google search. In other states, legislation worded like SB2252 has been used to intimidate, bully, and punish their citizens:

- A New Mexico photography studio has been fighting costly legal battles since 2008 after declining to photograph a homosexual ceremony;
- An Oregon baker is in a legal battle after declining to make a wedding cake for a homosexual couple;
- A New York farm family is being sued for declining to let a homosexual "wedding" take place on their property;
- A Maryland businessman has had to shut down his trolley service after becoming a target for refusing to "accommodate" homosexual couples.

- In the UK, a woman who didn't want to have visitors to the Bed & Breakfast in her home engage in homosexual behavior is feeling similar wrath. This one is particularly scary to me, as I have rented out the basement apartment of my home from time to time.

As a Christian photographer, I would decline anyone who wanted to hire me to take a nude photo or a pornographic one. Whether the proponents of this sort of legislation like it or not, many North Dakotans like me consider homosexuality as offensive as pornography, and this bill would force us to endorse it or even cater to it against our conscience and our faith. Few of us have the resources to defend ourselves against them, their activists, and their legal foundations in court.

There are other, more mechanical problems with this legislation. Section 10 refers to "actual or perceived gender-related identity". It does not clarify *by whom* the aggrieved person or persons are perceived. Is it how they view themselves, as in a man deciding he's really a woman inside and wants access to the office ladies' room or the women's locker room at the Y? In Texas, two universities are being sued by a group of homosexual men who want to join a sorority. In Washington, a transgender man is being allowed to use the ladies' locker rooms where little girls are exposed to him walking around naked, sporting "her" male genitalia. This is protected under the anti-discrimination law in Washington.

This is about granting civil rights to a behavioral choice, despite using terms like "orientation" instead of "preference". Who will be next to appear before you seeking protected status if this passes...the tattoo and piercing crowd? Taken to its logical conclusion of granting civil rights to a behavior, what's to stop a person from seeking aggrieved status in order to ignore an office dress code? If you do not want to open the door for future "civil rights" based on a preference, you must not pass this legislation.

This bill is fraught with problems for the legislature and the courts, but I fear for the average North Dakotan, the guy like me who can't defend against this type of ill-intentioned activists. Since I've been paying attention, I've spotted a bill like this in every session. The advocates of this sort of legislation are relentless. They have activists, they have legal foundations, they've got the works - and they're coming after regular North Dakotans like me.

The Family Resource Council put it best: "Homosexual activists are absolutely determined to punish people who refuse to embrace and celebrate their lifestyle choice." Legislation like SB2252 is the instrument which would allow them to exact that punishment. I urge you on behalf of thousands of North Dakota Christians, as well as members of other faiths, who just want to be left alone: do not pass this bill.

Thank you for your time and consideration.

Clint Fleckenstein
Bismarck, ND



Photographers guilty of 'discrimination' for refusing to shoot same-sex 'wedding': New Mexico court

by Matthew Cullinan Hoffman

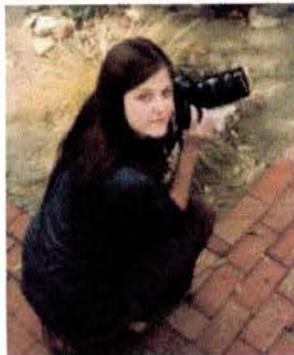
Thu Jun 07 4:42 PM EST

June 7, 2012 (LifeSitenews.com) - A New Mexico appeals court has upheld a lower court verdict that a photography studio that refused to shoot a same-sex "wedding" on religious grounds is guilty of "sexual orientation discrimination" under state law.

According to the court's verdict, the trouble began for Elane Photography when the company was contacted by lesbian Vanessa Willock asking if they could photograph a "commitment ceremony" for Willock and her "partner." The company, owned by Christian couple Elaine and Jonathan Huguenin, responded stating that they only shoot traditional weddings, and do not do "same-sex weddings," but thanked Willock for her interest.

The following day, Willock's anonymous "partner" sent an email to Elane Photography stating that she was going to "marry," without stating that the "marriage" would be between herself and a woman. She asked if the company could travel to the location of the event, and was told that it could.

The two emails would be used as proof that the Huguenins were discriminating against Willock in her suit against the company, and resulted in a judgment of \$6,637.94 against the defendant.



Although the government of New Mexico does not recognize same-sex "marriage," civil unions, or domestic partnerships for homosexuals, the court ruled that Elane Photography had engaged in illegal discrimination based on sexual preference under the New Mexico Human Rights Act (NMHRA).

The court brushed aside the claim that photography is a form of "speech" protected under state and federal law, ruling, "The NMHRA does not force Elane Photography to endorse any message or modify its own speech in any way. Rather, the NMHRA requires Elane Photography merely to offer its photography services without discrimination against any member of a protected class."

Click "like" if you want to defend true marriage.

It also dismissed the argument that compelling the owners of the company to photograph such weddings would constitute a violation of freedom of religion, stating, "the burden on freedom of religion experienced by Elane Photography is unclear."

The Alliance Defense Fund, which was representing the couple, has decided to appeal the case to a higher court.

"Americans in the marketplace should not be subjected to legal attacks for simply abiding by their beliefs," said ADF Senior Counsel Jordan Lorence. "Should the government force a videographer who is an animal rights activist to create a video promoting hunting and taxidermy?"

"Of course not, and neither should the government force this photographer to promote a message that violates her conscience. Because the U.S. Constitution prohibits the state from forcing unwilling artists to promote a message they disagree with, we will certainly appeal this decision to the New Mexico Supreme Court."

Law professor and legal commentator Eugene Volokh denounced the decision as an attack on freedom of speech protections.

"It seems to me that the right to be free from compelled speech includes the right not to create First-Amendment-protected expression — photographs, paintings, songs, press releases, or what have you — that you disagree with, even if no-one would perceive you as endorsing that expression," he wrote in his blog, the Volokh Conspiracy.

Volokh cites the U.S. Supreme Court case of *Wooley v. Maynard* (1978), in which a state license plate containing a motto that drivers disagreed with was seen as violating the first amendment, even though no reasonable person would

be believe that the bearers of the plate were in agreement with the motto.

"It follows even more strongly, I think, that people should have a First Amendment right not to create expression that they don't wish to create, regardless of whether outsiders would perceive such creation as an endorsement of the message," said Volokh.

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Photographers guilty of discrimination for refusing to shoot same-sex wedding, New Mexico court

June 3, 2013 (LifeSiteNews.com) — A New Mexico appeals court ruled on Tuesday that a lower court's ruling that a wedding photographer was guilty of discrimination for refusing to shoot a same-sex wedding was "erroneous."

According to the court's ruling, the lower court had found that the photographer's refusal to shoot a same-sex wedding was a violation of the state's anti-discrimination law. The court stated that the photographer's refusal to shoot a same-sex wedding was a violation of the state's anti-discrimination law because the photographer was a public accommodation.

The following day, the state's attorney general filed a motion to dismiss the appeal. The state argued that the photographer's refusal to shoot a same-sex wedding was a violation of the state's anti-discrimination law because the photographer was a public accommodation.

The two appeals would be heard by the state's highest court, the New Mexico Supreme Court, in the fall. The state's attorney general filed a motion to dismiss the appeal.

Although the government of New Mexico does not recognize same-sex marriage, it does recognize same-sex couples as "domestic partners" for many purposes. The state's anti-discrimination law prohibits discrimination on the basis of sexual orientation in public accommodations.

The court's ruling is a victory for the photographer and other businesses that do not want to be forced to create expression that they do not wish to create. The court stated that the photographer's refusal to shoot a same-sex wedding was a violation of the state's anti-discrimination law because the photographer was a public accommodation.

Click here if you want to share this article with your friends and family. The court's ruling is a victory for the photographer and other businesses that do not want to be forced to create expression that they do not wish to create.

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Gresham bakers refuse to make same-sex wedding cake



by Mike Benner

[Bio](#) | [Email](#) | Follow: [@MikeBennerKGW](#)

[kgw.com](#)

Posted on February 2, 2013 at 9:26 AM

Updated yesterday at 9:26 AM

GRESHAM, Ore -- The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same sex marriage.

It started on Jan. 17 when a mother and daughter showed up at Sweet Cakes by Melissa looking for the perfect wedding cake.

"My first question is what's the wedding date," said owner Aaron Klein. "My next question is bride and groom's name ... the girl giggled a little bit and said it's two brides."

Klein apologized to the women and told them he and his wife do not make cakes for same-sex marriages. Klein said the women were disgusted and walked out.

"I believe that marriage is a religious institution ordained by God," said Klein. "A man should leave his mother and father and cling to his wife ... that to me is the beginning of marriage."

At the advice of their attorney, the women are not speaking to the media, but they have plenty of support. Numerous people have blasted the Klein's on the internet.

What Klein wants to make clear is that he and his wife do not hate homosexuals.

"They can buy my stuff," said Klein. "I'll sell them stuff ... I'll talk to them, it's fine."

What is not fine, according to Klein, is a marriage between people of the same sex. He will always stand by that conviction.

"I'd rather have my kids see their dad stand up for what he believes in then to see him bow down because one person complained."

ORS 659A.403 is the law in question. In short, it prohibits discrimination in places of public accommodation. Klein and his wife have two weeks to respond to the Oregon Department of Justice's inquiry into what happened.

NEW YORK

Lesbian couple says Albany farm refused to host their 'gay' wedding

A gay couple, Melisa Erwin and Jennie McCarthy of Albany, N.Y., have filed a discrimination complaint against a potential wedding site, setting up a possible precedent-setting fight involving New York's new same-sex marriage law.

THE ASSOCIATED PRESS

TUESDAY, OCTOBER 23, 2012, 11:41 AM

Two upstate New York women say they were turned away from a potential wedding site because they are gay.

Melisa Erwin and Jennie McCarthy of Albany, have filed a discrimination complaint against Liberty Ridge Farm, setting up a possible precedent-setting fight involving New York's new same-sex marriage law.

They claim Liberty Ridge owners Robert and Cynthia Gifford found out they were a same-sex couple and told the women they would not host their wedding next summer.

The couple is no longer considering the farm as a wedding venue, but McCarthy said, "We just want to know that the policy is being changed to fit the laws so this doesn't happen to anyone else."

The Giffords have objections to gay marriage based on their values and religious background, their spokesman said Monday.

"They still have children at home and they feel that their rights are being violated and they're being discriminated against because of their position on the issue of gay marriage," said Jason McGuire, executive director of New Yorkers for Constitutional Freedoms, a group opposed to gay marriage.

Erwin's and McCarthy's complaint, filed Oct. 11 with the state Division of Human Rights, appears to be a first involving a wedding venue since same-sex marriage became legal in the state last year, advocates on both sides of the issue said.

One prominent gay marriage opponent said the case could test the breadth of the law's religious freedom language.

New York law exempts some religious-oriented institutions from having to accommodate same-sex weddings.

But Lambda Legal senior counsel Susan Sommer said it's well established that a business that serves the public is in violation of New York's human rights law if it discriminates on the basis of sexual orientation.

"If it opens its venue for weddings by the general public, it can't then shut its doors on a same-sex couple," Sommer said.

McGuire said lawyers will argue that the religious exemption protects the Giffords, though there also is a broader constitutional issue of religious freedom.



TIM ROSKE/AP

McCafrthy and Ervin have already made plans to have their wedding somewhere else after their original pick for a venue said no, but they filed a complain 'so this doesn't happen to anyone else.'

If state officials determine there is a case of discrimination, they can order Liberty Ridge to take appropriate action and can set monetary damages. The division's administrative determination can be appealed to state courts.

There is at least one similar court case in New York. In September, a gay couple in Manhattan filed a lawsuit against a restaurant they allege canceled their wedding rehearsal dinner and refused to cater their wedding after a manager said he did not want any "gay parties." The restaurant disputes the claim.



2guytux

There's a trolley business based out of Annapolis, Maryland called Discover Annapolis Tours. The business used to accommodate newly weds as part of their service until recently when it became clear that if a business turned down a same-sex couple, that business could be sued and would lose based on discrimination charges.

The owner of Discover Annapolis Tours Matt Grubbs is a Christian and is opposed to Maryland's new same-sex marriage law upheld last month by voters that allows homosexuals to "wed." He had the option to refuse to serve these homosexual newly weds but instead decided to scrap the whole wedding component to his trolley business. Now, his business will be out \$50,000 a year.

The Baltimore Sun explained that Grubbs has to refuse all wedding couples to avoid discrimination lawsuits and to stay in business:

"If they're providing services to the public, they can't discriminate who they provide their services to," said Glendora Hughes, general counsel for the Maryland Commission on Civil Rights. The commission enforces public accommodation laws that prohibit businesses from discriminating on the basis of race, sexual orientation and other characteristics."

In a free country, a business owner has every right in the world to refuse service to anyone he wants. This means a black owner can refuse service to white people if he really wants to. And likewise a Christian business can refuse service to homosexuals.

That is part of freedom. A government mandating that businesses serve certain people is the opposite of freedom. A person's business is his property, and he should be able to do with it just about whatever he wants without government interference. "Discrimination" should not be a crime. Sin, perhaps. But not a crime.

So, now to avoid discrimination lawsuits that he would for sure lose, he's had to cut loose his service to all weddings. But isn't that also discriminatory? Instead of "discriminating" against "gay" couples, he's having to discriminate against all newly-wed couples. If you just got married, sorry, he doesn't serve "your type."

While the laws extending privileges to homosexuals claim to give everyone equal rights, all they really do is discriminate against Christians.

Nation (<http://abcnews.go.com/blogs/headlines/nation/>)

HEADLINES (/BLOGS/HEADLINES/) POLITICS (/BLOGS/POLITICS/) ENTERTAINMENT (/BLOGS/ENTERTAINMENT/)

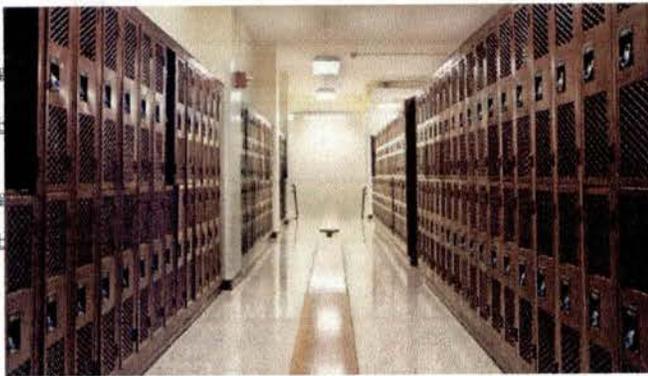
Transgender Student in Women's Locker Room Raises Uproar

126 Text |



Nov 3, 2012 6:14pm

(<http://abcnews.go.com/blogs/headlines/nation/>)
/author
/alyssa_newcomb
By Alyssa Newcomb
(<http://abcnews.go.com/blogs/headlines/nation/>)
/author
/alyssa_newcomb
@alyssanewcomb
(<http://twitter.com/alyssanewcomb>)



(Image Credit:

Getty)Image Credit: Getty Images

The decision to allow a transgender 45-year-old college student who identifies as a woman but has male genitalia to use the women's locker room has raised a fracas among parents and faith-based organizations, who say children as young as 6 years old use the locker room.

The locker room at Evergreen College in Olympia, Wash., is shared with the Capital High School swim club and a children's swim academy, along with the students at Evergreen.

"The college has to follow state law," Evergreen spokesman Jason Wettstein told ABC News affiliate KOMO (<http://www.komonews.com/>). "The college cannot discriminate based on the basis of gender identity. Gender identity is one of the protected things in discrimination law in this state."

But according to parents, the fact that the student has exposed her male genitalia, in one instance in the sauna, is cause for concern.

"[A mother] reported her daughter was upset because she observed a person at the women's locker room naked and displaying male genitalia," said a police report filed in September by a mother on behalf of her 17-year-old daughter.

The Alliance Defending Freedom, an Arizona-based religious liberties group, sent a letter to Evergreen College on Friday, warning it that the decision to allow the transgender student to continue using the locker room could put the school in jeopardy.

"The fact that this individual was sitting in plain view of young girls changing into their swimsuits puts you and Evergreen on notice of possible future harm," David Hacker, senior legal counsel, wrote.

The college has installed privacy curtains, and said it would not change its policy for now.

Alpha Kappa Alpha Sorority Sued By MiAKA For Discrimination

Huffington Post | By Sahaj Kohli

Posted: 06/19/2012 4:46 pm Updated: 06/19/2012 5:42 pm



A group of gay men known as the MiAKAs are [filing a lawsuit](#) against the Alpha Kappa Alpha Sorority, Incorporated for gender discrimination.

MiAKA, or Men interested in the Alpha Kappa Alpha Sorority, was unofficially founded a few years ago at Texas Southern University and Prairie View A&M University. Members mimic the sorority's signature rituals.

[kollegekidd.com](#) reports:

Members of the Greek community were shocked when the Tri Alpha Chapter of MiAKA presented photos of men adorned in pink and green and pearls, while throwing up their "pinkies." People were even more shocked to learn the chapter had even filmed a probate show with sounds of the sorority's famous call "skee wee" being heard in the background.

[AKA](#), the oldest sorority founded by African-American women at Howard University in 1908, has established itself as a well-known international service organization. Famous women who are members of the sorority include Wanda Sykes, Star Jones and Toni Morrison. Though the sorority was created for black women, it does not discriminate against other women. There are over 100 women who have been recognized for their outstanding achievement as honorary members, including Rosa Parks and Eleanor Roosevelt.

The conservative activist website [CampusReform.org](#) notes Alpha Kappa Alpha is a legacy of [sisterhood](#). It has barred men – gay or straight – to join its sisterhood, just as fraternities bar all women from joining their brotherhood.

[The National Pan-Hellenic Council](#) includes nine Black Greek letter organizations known collectively as the "[Divine 9](#)", five of which are fraternities. MiAKA has its options of joining these brotherhoods with similar values and principles such as Alpha Phi Alpha founded in 1906, Kappa Alpha Psi founded in 1911, Omega Psi Phi founded in 1911, Phi Beta Sigma founded in 1914, or Iota Phi Theta founded in 1963.

Gay couple turned away from B&B win discrimination case

A gay couple who were turned away from a guesthouse because the Christian owner did not want them sleeping together have been awarded damages, after a judge found they had suffered unlawful discrimination.

By Hannah Furness

1:13PM BST 18 Oct 2012

Michael Black and John Morgan have won their legal case against B&B owner Susanne Wilkinson, who declined to let them have a double bedroom in March 2010 because of her religious views.

A judgement, issued at Reading Crown Court, has now ruled that Mrs Wilkinson had breached equality legislation by unlawfully discriminating against the couple on the grounds of their sexual orientation.

The couple, who have been awarded £3,600 in compensation, say they are "delighted" with the decision.

The court heard Mr Black, 64, and Mr Morgan, 59, were refused the room in the Swiss Bed and Breakfast in Cookham, Berkshire, in despite having made a reservation and paid a deposit.

At the time, Mr Black, an exams consultant and writer, protested at this treatment but the owner refused to allow them to stay as it was "against her convictions".

Mr Morgan, a computer consultant, said they would go somewhere else and the £30 pounds deposit was returned.

They later decided to return to their home in Brampton, near Huntingdon, Cambridgeshire, rather than seeking alternative accommodation for the night.

Today, Recorder Clare Moulder found the couple, from Brampton, near Huntingdon, Cambridgeshire, had been unlawfully discriminated against on the grounds of their sexual orientation in breach of regulation 4 of the Equality Act (Sexual Orientation) Regulations 2007.

In awarding the couple damages of £1,800 pounds each, she said that she accepted the couple had to leave the B&B "in circumstances in which they had suffered injuries to feelings and they had the inconvenience of having to drive home at the end of the evening rather than stay overnight."

Today, Mr Black said: "We are delighted with the judgement and it shows the B&B was wrong not to

obey the laws of discrimination."

He added the couple still took holidays in the UK but preferred to use hotels or self-catering accomodation.

Giving evidence to the court previously, Mrs Wilkinson claimed she had been acting in accordance with her religion, and her belief that homosexual relations - as opposed to orientation - are "sinful".

She insisted she had also turned away several unmarried heterosexual couples who appeared to want the room during the day for sex.

"As a Christian I have tried to live my life and carry out my work in accordance with my deeply held Christian beliefs and to permit same sex couples to share a double room in my home would be an act against my core religious beliefs and conscience," she told the court.

Delivering her judgment, Miss Recorder Moulder said: "In my view the application of the regulations to the defendant's bed and breakfast establishment does not prevent her from holding her religious beliefs but she has chosen to operate a commercial business for financial purposes.

"The business is conducted from her home but it is still a business with a significant number of guests. I do not agree with the (defence) submission that if the restriction is unlawful the defendant would have to remove herself from public life.

"My conclusion is that the application of the regulations to the defendant bed and breakfast establishment and the finding that the refusal of the double room constituted direct discrimination, are not in breach of her (Mrs Wilkinson) Article 9 Rights."

James Welch, legal director of human rights campaign group Liberty, said: "Liberty defends the rights of religious groups to manifest their beliefs, even when we disagree with them.

"But it is simply unacceptable for people running a business to refuse to provide a service because of someone's sexual orientation.

"Hopefully today's ruling signals the death knell of such 'no gays' policies - policies that would never be tolerated if they referred to a person's race, gender or religion."

Mrs Wilkinson was granted permission to appeal against the ruling.

To Speak in Opposition to SB 2252: Senate Judiciary Committee Hearing, Feb. 6, 2013

- First, there is already legislation in place which prohibits discrimination (housing, etc.), making the inclusion of “sexual orientation” unnecessary.
- Second, Legislation which distinguishes between citizens based on subjective criteria (internal impulses or convictions) is poor legislation because it fragments society based wholly on subjective (personal, not visible) criteria. Other discriminatory legislation is based on objective, observable criteria (gender, ethnicity, country of origin, sex) or the one subjective criterion established in our constitution (religion). To add other “categories” of citizens means that every subjectively-based population group can claim particular status and protection under the law. If they want and are able to do so, such groups could claim particular and protected status on the basis of their subjective conviction or impulse (vegetarians, gun owners, alcoholics, etc.). To codify such distinctions leads to a fragmented society, not an integrated and integrating society. The ability so to categorize one portion of the population on such a subjective basis is actually a measure of the potency of a group’s ability to lobby for such delineation.
- Third, if passed, such legislation means the state endorses a particular category of behavior, and assumes a particular interpretation of that behavior. This means that those who identify homosexuality as a manifestation of personal brokenness (as has our culture historically, and as does the Christian church) are excluded from the table of public discourse. By endorsing such legislation, you make it clear that the historic opinion regarding the nature of such impulses or behavior is deemed invalid.

The identification of certain behavior as evidence of brokenness is not an assertion of dominance, fear or hostility. It is the humble recognition and assertion of this simple truth. There is a structure for life. We didn’t create it. We inherited it. We are here because that structure of life—the complementary structure of male and female—exists. Human life—all life—is defined by the fact that we are given, as a gift, as an inheritance, our identities as male and female. I appeal to that structure not because I believe asserting it will make anyone a Christian, but because I believe it informs us about what it means to be human. It is a legitimate argument to state that the departure from that structure does not assert one’s humanity, but compromises it and manifests an inability to integrate into that structure.

You may not agree with that argument, but I ask that you recognize that it asserts an objective fact, namely, the complementary (and impositional) nature of the male/female structure for begetting and bestowing life.

Respectfully,

Pastor Jay Reinke
 Concordia Lutheran Church, Williston
 Redeemer Lutheran Church, Grassy Butte
concordia@nemont.net
 701-570-3536

Jack Dalrymple
Governor

Tony J. Weiler
Commissioner



State Capitol - 13th Floor
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**Testimony on SB 2252
Prepared for the Senate Judiciary Committee**

February 6, 2013

Good morning Chairman Hogue and members of the Judiciary Committee, my name is Tony Weiler, and I am the Commissioner of Labor.

I appear before you today neutral on SB 2252. I would like to provide some background on the Department of Labor for the new committee members, as well as a refresher for those of you who heard testimony on bills dealing with my office before.

The Department of Labor has two primary areas of responsibility. The first is establishing and enforcing rules relating to the wages and working conditions of employees in North Dakota. This is our Wage and Hour division. Second, the department administers and enforces human rights laws under the North Dakota Human Rights Act and the North Dakota Housing Discrimination Act. Under these anti-discrimination laws, the department receives and investigates complaints alleging discrimination in employment, housing, public services, public accommodations, and credit transactions. As required by law, the department emphasizes conciliation to resolve complaints, provides administrative hearings on complaints where there is probable cause to believe a discriminatory practice has occurred, and fosters prevention of discrimination through education about the rights and responsibilities provided under North Dakota human rights laws.

In addition to receiving and investigating complaints directly from individuals who believe they have been victims of unlawful discrimination under state anti-discrimination laws, the department's Human Rights Division also investigates cases for the United States Department of Housing and Urban Development (HUD) and the Equal Employment Opportunity Commission (EEOC). The department obtains significant relief for claimants and aggrieved persons who file complaints with the department, both monetary and affirmative.

The North Dakota Human Rights Act was first enacted in 1983. The purpose of the law was to provide an act to declare a state policy against discrimination on the basis of race, color, religion, sex, national origin, age, the presence of any mental or physical disability, or the status with respect to marriage or public assistance. The "lawful activity" protected category was added partially in 1991

and amended again in 1993. Most of the act is based on federal laws. As originally drafted the NDDOL only had authority to investigate employment discrimination.

Currently, sexual orientation is not a protected category under North Dakota law. We have, however, drafted complaints alleging this as a protected category (in employment discrimination) and forwarded the complaint to the federal Equal Employment Opportunity Commission (EEOC). Nationally, the EEOC has received and investigated these complaints based on the basis of sex discrimination, and has had some courts agree.

The next question is what will adding a new protected category do to the department's workload. The department resolved 230 employment discrimination complaints, 50 housing discrimination complaints, 25 complaints alleging discrimination in public accommodations, public services, and credit transactions, and resolved 58 Complaints of Retaliation (CORs), which are also known as "whistleblower" laws, during the first eighteen months of the current biennium (2011-13).

During the 2009-11 biennium, the department resolved 363 employment discrimination complaints, 76 housing discrimination complaints, and 48 complaints alleging discrimination in public accommodations and public services. We also closed 72 CORs. These numbers have been fairly consistent the last few bienniums, but we do expect human rights complaints, particularly in the area of employment, to rise as the population of North Dakota continues to increase.

If the proposed legislation passes, it would be difficult, in my opinion, to foresee how many more cases the NDDOL would receive based on sexual orientation. In my research, I've found statistics indicating that adding sexual orientation as a protected category to the human rights act and fair housing act could increase our caseload by .5% to 9%. That would mean approximately 2 to 40 more cases per biennium based on numbers from 2009 to 2011. These numbers are speculative, and I think it would be very difficult to gauge accurately the number of claims we would receive.

I would be happy to answer any questions the committee may have.

Jack Dalrymple
Governor

Tony J. Weiler
Commissioner



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*Additional testimony
Handed in by Tony
Weiler
28*

Memorandum

To: Senator Hogue, and members of the Senate Judiciary Committee
From: Tony J. Weiler, Commissioner of Labor *TJW*
Date: February 6, 2013
Re: SB2252

Attached you will find documents supporting my testimony on SB2252. For the percentage increase numbers I used, I looked at estimates from the Congressional Budget Office stated that adding federal protection for sexual orientation and gender identity would likely increase complaints in the range of 5 to 7%. This information was from the late 2000s. Another study conducted by the United States General Office of Accounting in 2002 found that in states with laws making it illegal to discriminate in employment on the basis of sexual orientation, relatively few complaints had been made. The statistical data ranged from a .5% increase to a 9% increase.

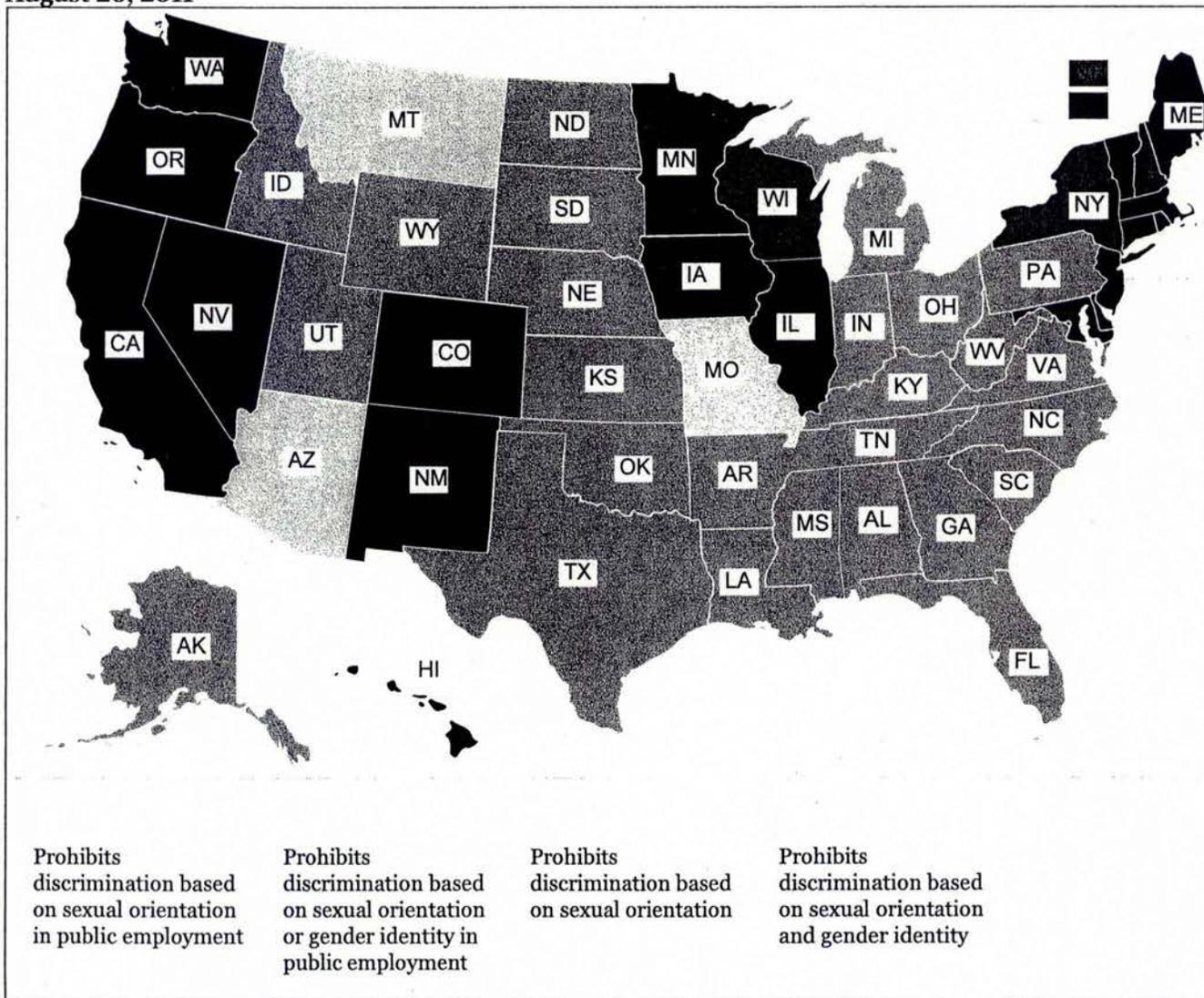
Further, some information from the Minnesota Department of Human Rights indicates that since Minnesota added protection for sexual orientation and gender identity the number of charges filed has been about 3% of the total caseload since 1994. This is somewhat older data, and I will try to get the committee something more up to date.

Based on this information, I used a number between .5% and 9% to come up with an increase in our caseload.



Non-Discrimination Laws: State by State Information - Map

August 26, 2011



• Arizona

• ARIZONA

Arizona prohibits discrimination based on sexual orientation in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

- **Arizona**

- **ARIZONA**

Arizona prohibits discrimination based on sexual orientation in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Arizona's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation only.

- **California**

- **CALIFORNIA**

California bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Colorado**

- **COLORADO**

Colorado state law bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Connecticut**

- **CONNECTICUT**

Connecticut state law bars discrimination based on sexual orientation in employment, housing and public accommodations. Gender identity discrimination is prohibited by the state under the category of sex discrimination.

- **District of Columbia**

- **DISTRICT OF COLUMBIA**

The District of Columbia bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Delaware**

- **DELAWARE**

Delaware bars discrimination based on sexual orientation in employment, housing and public accommodations, however gender identity is not protected.

Delaware's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Delaware, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Hawaii**

- **HAWAII**

Hawaii bars discrimination based on sexual orientation and gender identity in housing and public accommodations. The state also bars discrimination based on sexual orientation in employment, but gender identity is not protected.

- **Iowa**

- **IOWA**

Iowa bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Illinois**

- **ILLINOIS**

Illinois bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Indiana**

- **INDIANA**

Indiana prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Indiana's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Indiana, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Kansas**

- **KANSAS**

Kansas prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Kansas's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Kansas, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Kentucky**

- **KENTUCKY**

Kentucky prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Kentucky's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Kentucky, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Massachusetts**

- **MASSACHUSETTS**

Massachusetts state law bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Maryland**

- **MARYLAND**

Maryland bars discrimination based on sexual orientation in employment, housing and public accommodations, however gender identity is not protected.

- **Maine**

- **MAINE**

Maine bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Michigan**

- **MICHIGAN**

Michigan prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Michigan's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Michigan, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Minnesota**

- **MINNESOTA**

Minnesota bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Missouri**

- **MISSOURI**

Missouri prohibits discrimination based on sexual orientation in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Missouri's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation only. In Missouri, the order only covers executive branch employees.

- **Montana**

- **MONTANA**

Montana prohibits discrimination based on sexual orientation in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Montana's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation only.

- **New Hampshire**

- **NEW HAMPSHIRE**

New Hampshire bars discrimination based on sexual orientation in employment, housing and public accommodations, however gender identity is not protected.

- **New Jersey**

- **NEW JERSEY**

New Jersey bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **New Mexico**

- **NEW MEXICO**

New Mexico bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Nevada**

- **NEVADA**

Nevada prohibits discrimination based on sexual orientation in employment and public accommodations. The state does not bar housing discrimination based on sexual orientation or gender identity, and does not bar discrimination on the basis of gender identity in employment or public accommodations.

- **New York**

- **NEW YORK**

New York bars discrimination based on sexual orientation in employment, housing and public accommodations, however gender identity is not protected.

New York's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In New York, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Ohio**

- **OHIO**

Ohio prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Ohio's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Ohio, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Oregon**

- **OREGON**

Oregon bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Pennsylvania**

- **PENNSYLVANIA**

Pennsylvania prohibits discrimination based on sexual orientation and gender identity in public employment. The state does not bar discrimination based on sexual orientation or gender identity in private employment, housing or public accommodations.

Pennsylvania's protections were put in place by an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation and gender identity.

In Pennsylvania, the only prohibition against discrimination for gender identity is within the realm of public employment.

- **Rhode Island**

- **RHODE ISLAND**

Rhode Island bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Vermont**

- **VERMONT**

Vermont bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Washington**

- **WASHINGTON**

Washington bars discrimination based on sexual orientation and gender identity in employment, housing and public accommodations.

- **Wisconsin**
 - **WISCONSIN**

Wisconsin bars discrimination based on sexual orientation in employment, housing and public accommodations, however gender identity is not protected.

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United States Court of Appeals, Ninth Circuit.

RENE v. MGM GRAND HOTEL INC

Medina RENE, Plaintiff-Appellant, v. MGM GRAND HOTEL, INC., Defendant-Appellee.

No. 98-16924.

Argued and Submitted En Banc Sept. 25, 2001. -- September 24, 2002

Before: SCHROEDER, Chief Judge, HUG, PREGERSON, TROTT, FERNANDEZ, T.G. NELSON, THOMAS, GRABER, W. FLETCHER, FISHER, and BERZON, Circuit Judges.

Richard Segerblom, Las Vegas, NV, for the appellant. Elayna J. Youchah, Schreck Morris, Las Vegas, NV, for the appellee.

This case presents the question of whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome "physical conduct of a sexual nature" in the workplace asserts a viable claim of discrimination based on sex under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq., even if that employee also alleges that the motivation for that discrimination was his sexual orientation. We would hold that an employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action. It is enough that the harasser have engaged in severe or pervasive unwelcome physical conduct of a sexual nature. We therefore would hold that the plaintiff in this case has stated a cause of action under Title VII.

I

Medina Rene, an openly gay man, appeals from the district court's grant of summary judgment in favor of his employer MGM Grand Hotel in his Title VII action alleging sexual harassment by his male coworkers and supervisor. The relevant facts are not in dispute. Rene worked for the hotel, located in Las Vegas, Nevada, from December 1993 until his termination in June 1996. He worked as a butler on the 29th floor, where his

duties involved responding to the requests of the wealthy, high-profile and famous guests for whom that floor was reserved. All of the other butlers on the floor, as well as their supervisor, were also male.

Rene provided extensive evidence that, over the course of a two-year period, his supervisor and several of his fellow butlers subjected him to a hostile work environment on almost a daily basis. The harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "muñeca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex. On "more times than [Rene said he] could possibly count," the harassment involved offensive physical conduct of a sexual nature. Rene gave deposition testimony that he was caressed and hugged and that his coworkers would "touch [his] body like they would to a woman." On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay.

On June 20, 1996, Rene filed a charge of discrimination with the Nevada Equal Rights Commission. He alleged that he "was discriminated against because of my sex, male" and indicated "I believe that my sex, male, was a factor in the adverse treatment I received." On April 13, 1997, Rene filed a complaint in federal district court, alleging that he had been unlawfully sexually harassed in violation of Title VII¹ and attaching a copy of his Nevada Equal Rights Commission charge. MGM Grand moved for summary judgment on the grounds that "claims of discrimination based on sexual orientation are not cognizable under Title VII[.]"

The district court agreed that Rene had failed to state a cognizable Title VII claim. In granting summary judgment in favor of MGM Grand, it concluded that "Title VII's prohibition of 'sex' discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference." Rene timely appealed.

II

We review a grant of summary judgment de novo. "[Our] review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c).[We] must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Delta Savings Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir.2001) (internal citations omitted).

III

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., provides that "[i]t shall be an unlawful employment practice . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of . sex[.]"

The Supreme Court made clear, more than 15 years ago, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), that sexual harassment violates Title VII. Rene alleged that he was sexually harassed by his male supervisor and male coworkers under the hostile work environment theory of sexual harassment. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (noting “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . gender . offends Title VII's broad rule of workplace equality”).

In describing the kinds of sexual harassment that can create a hostile work environment, the Court in *Meritor* explicitly included “physical conduct of a sexual nature.” *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399 (quoting EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1985)). We have applied this holding on numerous occasions, “explain[ing] that a hostile environment exists when an employee can show (1) that he or she was subjected to . physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir.1991). See also *Little v. Windermere Relocation, Inc.*, 265 F.3d 903, 910 (9th Cir.2001); *Fielder v. UAL Corp.*, 218 F.3d 973, 985 (9th Cir.2000).

It is clear that Rene has alleged physical conduct that was so severe and pervasive as to constitute an objectively abusive working environment. It is equally clear that the conduct was “of a sexual nature.” Rene's tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.

Physical sexual assault has routinely been prohibited as sexual harassment under Title VII. A limited sampling of the reported decisions includes *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 616 (8th Cir.2000) (groping and shoving broom handle in crotch); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862, 865 (8th Cir.1999) (patting buttocks); *Bailey v. Runyon*, 167 F.3d 466, 467 (8th Cir.1999) (grabbing crotch); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1067 (10th Cir.1998) (putting mouth on breast); *Zimmerman v. Cook County Sheriff's Dep't*, 96 F.3d 1017, 1018 (7th Cir.1996) (grabbing breast and rubbing buttocks); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1374 (8th Cir.1996) (grabbing and squeezing testicles and flicking groin); *Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1211 (8th Cir.1996) (grabbing breasts); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 140 (4th Cir.1996) (rubbing genitals against buttocks); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 472 (5th Cir.1989) (grabbing breasts and directing high pressure hose at crotch); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir.1988) (rubbing thighs and grabbing breasts); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1182 (7th Cir.1986) (pressing hands against crotch); *Jones v. Wesco Invs.*, 846 F.2d 1154, 1155 (8th Cir.1986) (touching breasts, pinching and patting buttocks). Such harassment-grabbing, poking, rubbing or mouthing areas of the body linked to sexuality-is inescapably “because of . sex.” See *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir.1997), vacated and remanded, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) (“[W]e have difficulty imagining when harassment of this kind would not be, in some measure, ‘because of’ the harassee's sex-when one's genitals are grabbed, . it would seem to us

impossible to delink the harassment from the gender of the individual harassed.”). The most extreme form of offensive physical, sexual conduct-rape-clearly violates Title VII. See *Little v. Windermere Relocation*, 265 F.3d at 912 (“Rape is unquestionably among the most severe forms of sexual harassment. . . Being raped is, at minimum, an act of discrimination based on sex.”); *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir.1995) (“Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex.”).

In granting MGM Grand's motion for summary judgment, the district court did not deny that the sexual assaults alleged by Rene were so objectively offensive that they created a hostile working environment. Rather, it appears to have held that Rene's otherwise viable cause of action was defeated because he believed he was targeted because he is gay. This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim.

The premise of a sexual touching hostile work environment claim is that the conditions of the work environment have been made hostile “because of . sex.” See *Ellison*, 924 F.2d at 876. The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were “because of . sex.” Whatever else those attacks may, or may not, have been “because of” has no legal consequence. “[S]o long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.” *Doe*, 119 F.3d at 578.

Our opinion today is guided by the principles established by the Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). As recounted by the Court, the Title VII plaintiff in *Oncale* had been “forcibly subjected to sex-related, humiliating actions” and had been “physically assaulted . in a sexual manner” by other males at his place of employment. *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. We know from the circuit court's opinion that this physical assault included, among other things, “the use of force by [one co-worker] to push a bar of soap into Oncale's anus while [another co-worker] restrained Oncale as he was showering [.]” *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 118-19 (5th Cir.1996). This behavior occurred, the Court noted, in an all-male workplace. Oncale was a male plaintiff who worked on an all-male off-shore oil drilling rig “as a roustabout on an eight-man crew.” See *Oncale*, 523 U.S. at 77, 118 S.Ct. 998 (emphasis added). Oncale's employer, Sundowner, never employed women on any of its drilling rigs. See *Joint App.* at 76.

Based on these facts, the Supreme Court reversed the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed a grant of summary judgment in favor of the defendant-employer on the grounds that “same-sex harassment is not cognizable under

Title VII.” Oncale, 83 F.3d at 118. We take two lessons from the Court's decision in Oncale.

First, Title VII forbids severe or pervasive same-sex offensive sexual touching. The Court made clear that a plaintiff's action for sexual harassment under Title VII cannot be defeated by a showing that the perpetrator and the victim of an alleged sexual assault are of the same gender. The Court wrote,

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Oncale, 523 U.S. at 79, 118 S.Ct. 998; see also *id.* at 78, 118 S.Ct. 998 (“Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.” (citation and internal quotation omitted)). Thus, Oncale's cause of action could not be defeated based on the fact that he was tormented by other men.

Second, offensive sexual touching is actionable discrimination even in a same-sex workforce. The Court in Oncale made clear that “discrimination” is a necessary predicate to every Title VII claim. That is, a defendant's conduct must not merely be “because of . sex”; it must be “‘discriminat[ion] . because of . sex.’” Oncale, 523 U.S. at 81, 118 S.Ct. 998 (emphasis in original). The Court in Oncale held that “discrimina[tion] . because of . sex” can occur entirely among men, where some men are subjected to offensive sexual touching and some men are not. There were no women on Oncale's drilling rig; indeed, there were no women on any of his employer's oil rigs. Discrimination is the use of some criterion as a basis for a difference in treatment. In the context of our civil rights laws, including Title VII, discrimination is the use of a forbidden criterion as a basis for a disadvantageous difference in treatment. “Sex” is the forbidden criterion under Title VII, and discrimination is any disadvantageous difference in treatment “because of . sex.” The Oncale Court's holding that offensive sexual touching in a same-sex workforce is actionable discrimination under Title VII necessarily means that discrimination can take place between members of the same sex, not merely between members of the opposite sex. Thus, Oncale did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination in comparison to other men.

Viewing the facts, as we must, in the light most favorable to the nonmoving party, we are presented with the tale of a man who was repeatedly grabbed in the crotch and poked in the anus, and who was singled out from his other male co-workers for this treatment. It is clear that the offensive conduct was sexual. It is also clear that the offensive conduct was discriminatory. That is, Rene has alleged that he was treated differently-and

disadvantageously-based on sex. This is precisely what Title VII forbids: “discriminat[ion] . because of . sex.”

In sum, what we have in this case is a fairly straightforward sexual harassment claim. Title VII prohibits offensive “physical conduct of a sexual nature” when that conduct is sufficiently severe or pervasive. *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399. It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or different genders. See *Oncale*, 523 U.S. at 79, 118 S.Ct. 998. And it prohibits such conduct without regard to the sexual orientation-real or perceived-of the victim.

There will be close cases on the question of what constitutes physical conduct of a sexual nature, for there are some physical assaults that are intended to inflict physical injury, but are not intended to have (and are not interpreted as having) sexual meaning. That is, there will be some cases in which a physical assault, even though directed at a sexually identifiable part of the body, does not give rise to a viable Title VII claim. But this is not such a case. Like the plaintiff in *Oncale*, Rene has alleged a physical assault of a sexual nature that is sufficient to survive a defense motion for summary judgment.

This opinion is joined by Judges Trott, Thomas, Graber, and Fisher. Judge Pregerson, in a separate opinion joined by Judges Trott and Berzon, reaches the same result but under a different rationale. Taken together, these two opinions are joined by a majority of the en banc panel. Accordingly, the district court's grant of summary judgment to MGM Grand is REVERSED, and the case is REMANDED for further proceedings.

I concur in the result of Judge Fletcher's opinion. I write separately to point out that in my view, this is a case of actionable gender stereotyping harassment.

More than a decade ago, the Supreme Court held that gender stereotyping is actionable under Title VII. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). More recently, the Supreme Court held that “same-sex sexual harassment is actionable under Title VII.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). And only last year, we held that same-sex gender stereotyping of the sort suffered by Rene-i.e., gender stereotyping of a male gay employee by his male co-workers-“constituted actionable harassment under . Title VII.” *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir.2001).

Rene testified in his deposition that his co-workers teased him about the way he walked and whistled at him “[l]ike a man does to a woman.” Rene also testified that his co-workers would “caress my butt, caress my shoulders” and blow kisses at him “the way . a man would treat a woman,” hugged him from behind “like a man hugs a woman,” and would “touch my body like they would to a woman, touch my face.” Rene further testified that his co-workers called him “sweetheart” and “muñeca” (“doll”), “a word that Spanish men will say to Spanish women.” This conduct occurred “many times.” The repeated testimony that his co-workers treated Rene, in a variety of ways, “like a woman” constitutes ample evidence of gender stereotyping.¹

The conduct suffered by Rene is indistinguishable from the conduct found actionable in Nichols. In that case,

Male co-workers and a supervisor repeatedly referred to [the male gay plaintiff] in Spanish and English as “she” and “her.” Male co-workers mocked [him] for walking and carrying his serving tray “like a woman,” and taunted him in Spanish and English as, among other things, a “faggot” and a “. female whore.”

256 F.3d at 870. We concluded in Nichols that “[the] rule that bars discrimination on the basis of sex stereotypes” set in Price Waterhouse “squarely applies to preclude the harassment here.” Nichols, 256 F.3d at 874-75. More generally, we held that “this verbal abuse was closely related to gender,” “occurred because of sex,” and therefore “constituted actionable harassment under . Title VII.” Id.

The similarities between Nichols and the present case are striking. In both cases, a male gay employee was “teased” or “mocked” by his male co-workers because he walked “like a woman.”² And in both cases, a male gay employee was referred to by his male-co-workers in female terms-“she,” “her,” and “female whore” in Nichols; “sweetheart” and “muñeca” (“doll”) in the present case-to “remind[] [him] that he did not conform to their gender-based stereotypes.” Nichols, 256 F.3d at 874. For the same reasons that we concluded in Nichols that “[the] rule that bars discrimination on the basis of sex stereotypes” set in Price Waterhouse “squarely applie[d] to preclude the harassment” at issue there, Nichols, 256 F.3d at 874-75, I conclude that this rule also squarely applies to preclude the identical harassment at issue here.³ Accordingly, this is a case of actionable gender stereotyping harassment.

I concur in Judge W. Fletcher's opinion because the facts here are materially indistinguishable from the facts in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). If summary judgment in the employer's favor was inappropriate in that case, it is equally so in this one.

I write separately to note that I agree with Judge Hug's dissent on two issues that the majority opinion does not reach: (1) Title VII does not protect employees from discrimination because of sexual orientation and (2) Rene did not assert a theory of “sexual stereotyping.”

I concur in Judge Fletcher's opinion. Summary judgment is improperly granted where, as in this case, the “inference of discrimination” because of sex is “easy to draw.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The repeated physical attacks targeted at body parts clearly linked to Rene's gender constituted overwhelming evidence from which a jury could infer that the attacks were based, at least in part, on Rene's sex. See 42 U.S.C. § 2000e-2; see also, e.g., *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir.1994) (holding that when abuse directed at women “center[s] on the fact that they [are] females,” a jury may infer discrimination based on gender); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir.1997) (“Frankly, we find it hard to think of a situation in which someone intentionally

grabs another's testicles for reasons entirely unrelated to that person's gender.”), vacated and remanded by 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir.1996) (holding that “bagging” of testicles of men by other men in predominantly male workforce was “[e]vidence that members of one sex were the primary targets” of harassment “sufficient to show that the conduct was gender based for purposes of summary judgment”). The alleged abuse Rene suffered was also sufficiently hostile and abusive to distinguish it from “simple teasing and roughhousing among members of the same sex.” *Oncale*, 523 U.S. at 82, 118 S.Ct. 998.

I also agree with Judge Pregerson that the many examples in which Rene was allegedly physically touched and verbally mocked by his harassers as being “like a woman” constituted ample evidence from which a jury could conclude that the harassment Rene endured was based on gender stereotyping. See *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874-75 (9th Cir.2001).

I respectfully dissent from Judge Fletcher's plurality opinion and Judge Pregerson's opinion concurring in the result, but expressing a different rationale for the result. The basis for Judge Fletcher's opinion is that harassment of a person in the workplace in the form of severe unwelcome physical conduct of a sexual nature is sufficient to establish a cause of action under Title VII of the Civil Rights Act, regardless of whether that harassment constitutes discrimination because of race, color, religion, gender, or national origin. I disagree because this completely eliminates an essential element of that statute, that the harassment be because of discrimination against one of the five specified categories of persons named in the statute. Judge Pregerson's opinion is based upon gender stereotyping harassment, which was never asserted by Rene in the district court and was not supported by evidence presented to the district court. In my opinion this is manufacturing a claim for Rene on appeal that was never advanced by him or supported by evidence in the district court.

I.

The basis of Judge Fletcher's opinion is well expressed in the following statement from the first paragraph:

This case presents the question of whether an employee who alleges that he was subjected to severe, pervasive, and unwelcome “physical conduct of a sexual nature” in the workplace asserts a viable claim of discrimination based on sex under Title VII of the 1964 Civil Rights Act. It is enough that the harassers have engaged in severe or pervasive unwelcome physical conduct of a sexual nature.

This is a mischaracterization of the pertinent section of Title VII and the Supreme Court's interpretation of that section.

The pertinent section of Title VII provides:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a)(1) (emphasis added). Supreme Court decisions have made it clear that the term "sex" in that section refers to "gender." The terms "sex" and "gender" have been used interchangeably to mean "gender." Thus, it is discrimination based on "gender" that is prohibited. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

II.

I believe the following is a proper application of the statute as interpreted by the Supreme Court.

1. Title VII provides that it is an unlawful employment practice to discriminate against a person because of that person's race, color, religion, sex, or national origin.

2. Harassment on the job can be a form of discrimination. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

3. Thus, Title VII protects against harassment, as a type of discrimination on the job if it is because of race, color, religion, sex, or national origin. Harassment for other reasons, for example, because a person is short, fat, bald, disfigured, belongs to an unpopular social group, belongs to a particular political party, or engages in other activities outside the work-place, including sexual activities, that the harasser disfavors, is not actionable under Title VII.

4. Harassment on the job by physical assault or humiliation because a person is Asian, Black, a Jehovah's Witness, Polish, or because of the person's gender is actionable under Title VII because it is a type of discrimination and is against the particular classes of people protected by Title VII.

5. Title VII does not protect against physical assaults as a general matter. In order for an assault to be actionable under Title VII it must be a type of discrimination against one of the five protected classes.

6. If a person is assaulted or otherwise harassed on the job in a sexual manner, it is a form of discrimination against that person. However, the assault or harassment is actionable under Title VII only if it is because of that person's race, color, religion, gender, or national origin.

7. Sexual harassment on the job can be a form of discrimination that is actionable under Title VII if it is because of the person's gender. For example, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor

‘discriminate[s]’ on the basis of sex.” Meritor, 477 U.S. at 64, 106 S.Ct. 2399 (emphasis added).

8. Discrimination because of sex (gender) can extend to sexual stereotyping on the job. For example, if a woman does not act on the job in the way her employers perceived she should act as a woman, as was the situation in Price Waterhouse, or if a man does not act on the job like it is perceived a man should, as was the situation in Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir.2001), this can be sexual stereotyping and actionable under Title VII.

9. Discrimination in the form of harassment or assault on the job because of a man's activity outside the workplace, such as his sexual activities, is not a basis for discrimination based on gender stereotyping of how he is expected to work on the job. A person might conform to all the stereotypes of masculinity on the job yet have a homosexual orientation in his own private life.

10. Discrimination based on gender can extend to discrimination against a person of one sex by a person of the same sex. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

III.

It is by now clear that sexual harassment can be a form of discrimination based on sex. Meritor, 477 U.S. at 64, 106 S.Ct. 2399. The Supreme Court stated: “Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor ‘discriminate[s]’ on the basis of sex.” Id. (emphasis added). In that case the evidence that a male supervisor made unwelcome sexual advances to a woman subordinate was sufficient to constitute discrimination based on sex.

Rene alleged that he was discriminated against because he was gay. Alleging a hostile work environment theory of sexual harassment, Rene alleged that he was sexually harassed by his male co-workers and a supervisor. To succeed on that theory, Rene must first prove that he was forced to endure a subjectively and objectively abusive working environment. See Oncale, 523 U.S. at 81, 118 S.Ct. 998; Harris, 510 U.S. at 21-22, 114 S.Ct. 367; Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir.2000). In this case, the parties do not dispute the existence of a hostile work environment, for there is no doubt that the harassment that Rene alleged was so objectively offensive that it created a hostile work environment. The dispute is whether he was discriminated against because of his gender.

Rene relies on Oncale to make his case, contending that the Supreme Court impliedly held that discrimination based on sexual orientation is actionable under Title VII. This is a misreading of Oncale. That case did involve harassment of the male plaintiff by his male co-workers, some of which was similar to the harassment in this case. The Fifth Circuit Court of Appeals affirmed summary judgment in favor of the employer on the ground that “Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-

workers.” *Oncale*, 523 U.S. at 77, 118 S.Ct. 998. The sole issue before the Supreme Court on certiorari was whether same-sex sexual harassment is actionable under Title VII. The Court held that it was. However, the Supreme Court explained, “Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at ‘discriminat [ion] . because of . sex.’” *Id.* at 80, 118 S.Ct. 998. Never has it been held “that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” *Id.* Rather, under Title VII, the plaintiff “must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimina [tion] . because of . sex.’” *Id.* at 81, 118 S.Ct. 998.

Justice Thomas added a concurring opinion specifically to emphasize that the discrimination had to be “because of sex.” The concurring opinion states:

I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination “because of . sex.”

Id. at 82, 118 S.Ct. 998. Thus, the Supreme Court in *Oncale* did not hold that the harassment alleged by the plaintiff in that case was actionable under Title VII. The Court, rather, simply rejected the Fifth Circuit's holding that same-sex harassment could never be actionable under Title VII. See *Oncale*, 523 U.S. at 82, 118 S.Ct. 998 (“Because we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, the judgment of the Court of Appeals for the Fifth Circuit is reversed .”); *id.* at 79, 118 S.Ct. 998 (criticizing the Fifth Circuit's view that “same-sex sexual harassment claims are never cognizable under Title VII”).

After clarifying that same-sex sexual harassment could be actionable under Title VII, the Court remanded to the Fifth Circuit to address the question of whether the harassment was “because of sex,” that is, whether the harassment was because of *Oncale's* gender. That issue had not been addressed by the district court or the circuit court because of the holdings of those courts that same-sex harassment could never be actionable under Title VII. The Court gave illustrations of how same-sex harassment could be “because of sex” and thus actionable under Title VII. *Oncale* had alleged both quid pro quo and hostile work environment sexual harassment in the district court. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118, 119 (5th Cir.1996).¹ On remand, the lower courts were to address the question of whether this sexual harassment was because of his gender. There was no implication in the Supreme Court's opinion that the alleged sexual harassment was “because of sex.” That determination, which had not been previously considered, was to be addressed by the lower courts on remand.

Judge Fletcher's opinion in effect interprets *Oncale* to mean that if the defendant's conduct was “sexual in nature” the statutory requirements of Title VII are met. The opinion then reasons that because the touching in this case was sexual in nature and was discriminatory, Rene has stated a claim under Title VII. This misinterprets *Oncale*. The *Oncale* Court did say that “[w]e see no justification in the statutory language or our precedents for a

categorical rule excluding same-sex harassment claims from the coverage of Title VII.” 523 U.S. at 79, 118 S.Ct. 998. However, the Court qualified that by stating “Title VII prohibits ‘discriminat[ion] . because of . sex’ in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.” Oncale, 523 U.S. at 79-80, 118 S.Ct. 998 (emphasis added). Thus, the Court stressed that the harassment type of discrimination must meet the statutory requirement of “because of sex.” Justice Thomas’ concurrence emphasized that point. Oncale, 523 U.S. at 82, 118 S.Ct. 998. Differential treatment of an individual based only on conduct that is “sexual in nature” does not meet the statutory requirement.² The alleged harassment in this case was not on account of the plaintiff’s sex, i.e., this plaintiff was not treated differently from all the other male butlers because he was male. Rene contended that he was treated differently because he was homosexual.

Title VII is not an anti-harassment statute; it is an anti-discrimination statute against persons in five specific classifications: race, color, religion, sex, or national origin. Harassment can be a type of discrimination against persons in one of those five specific classifications. However, in order for harassment to be actionable it has to be a type of discrimination “because of” race, color, religion, sex, or national origin. There are many types of harassment in the workplace that are very offensive but are not actionable under the federal Title VII law.

While the Court held in Oncale that same-sex harassment can be actionable under Title VII, it did not hold that same-sex harassment because of sexual orientation is actionable under Title VII. The Court gave three examples of ways a plaintiff can prove that members of one sex can discriminate against members of the same sex because of gender. *Id.* at 80-81, 118 S.Ct. 998. These examples are not the exclusive ways, but rather are illustrative of same-sex harassment because of gender that could be actionable under Title VII.

First, the plaintiff could show that the harasser was motivated by sexual desire; this route, the Court stated, requires that there be “credible evidence that the harasser was homosexual.” *Id.* at 80, 118 S.Ct. 998. Rene has presented no evidence that any of his harassers were homosexual, nor that they were in any way motivated by sexual desire. On the contrary, evidence presented by Rene suggests not that they desired him sexually, but rather that they sought to humiliate him because of his sexual orientation.

The second route identified by the Court for proving same-sex sexual harassment requires that the plaintiff demonstrate that he was “harassed in such sex-specific and derogatory terms by another [man] as to make it clear that the harasser [was] motivated by general hostility to the presence of [men] in the workplace.” *Id.* Rene presented no evidence of this form of harassment. In fact, it is difficult to imagine how he could have; all of his co-workers on the 29th floor were male, and it would thus be strange indeed to conclude that their harassment of Rene was motivated by a “general hostility to the presence of [men] in the workplace.” *Id.*

Third, the Court stated that a plaintiff may “offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.” *Id.* at 80-

81, 118 S.Ct. 998. Rene cannot avail himself of this route because he worked on the 29th floor of the MGM Grand Hotel, where only men were employed.

In each of these illustrations the harassment type of discrimination is directed at a person because of that person's gender. Given the facts of the Oncale case itself, it is significant that the Supreme Court did not indicate that one of the ways a plaintiff can prove same-sex discrimination is harassment because of sexual orientation. In Rene's case he clearly stated in his deposition that the reason for the harassment was that he was gay. No other reason was offered to the district court.

In determining the motivation for harassment, courts must be mindful of the fact that Title VII protects against discrimination only on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Discrimination based on a victim's other characteristics, no matter how unfortunate and distasteful that discrimination may be, simply does not fall within the purview of Title VII. The Court in Price Waterhouse specifically made that point in quoting from an interpretive memorandum entered in the Congressional Record by the co-managers in the Senate of the bill that became Title VII. The Court quoted the portion of the memorandum that stated:

To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

490 U.S. at 244, 109 S.Ct. 1775 (emphasis added).

This court recognized that fact more than twenty years ago in *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329-30 (9th Cir.1979), when we held that discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII. While societal attitudes toward homosexuality have undergone some changes since *DeSantis* was decided, Title VII has not been amended to prohibit discrimination based on sexual orientation; this aspect of *DeSantis* remains good law and has been followed in other circuits. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir.1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir.1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir.1989) (per curiam).

More recently the Third Circuit in *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir.2001), cert. denied, 534 U.S. 1155, 122 S.Ct. 1126, 151 L.Ed.2d 1018 (2002), held that harassment based on sexual orientation is not actionable under Title VII. The allegations of harassment in that case, as in this one, were solely based on harassment because of sexual orientation. The court stated:

[I]t is clear that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual

connotations, but actually constituted 'discrimina [tion] . because of . sex.'” Oncale at 81[, 118 S.Ct. 998]. Bibby simply failed in this respect; indeed, he did not even argue that he was being harassed because he was a man and offered nothing that would support such a conclusion. There was no allegation that his alleged harassers were motivated by sexual desire, or that they possessed any hostility to the presence of men in the workplace or in Bibby's particular job. Moreover, he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave. His claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man.

Id. at 264 (some emphasis added).

If sexual orientation is to be a separate category of protection under Title VII, this is a matter for Congress to enact. Over the years since the passage of Title VII, numerous bills have been introduced to include sexual orientation as a protected classification.³ None has passed.

IV.

In *Price Waterhouse*, the Supreme Court held that discrimination based on sex stereotyping was a type of gender discrimination that is actionable under Title VII. The Court held that a woman, who was denied partnership in an accounting firm in part because she did not conform to what some of the partners thought was the appropriate way a woman should act, had an actionable claim under Title VII.

The Court noted:

There were clear signs . that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it's a lady using foul language.” . [Another advised her that she] should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Price Waterhouse, 490 U.S. at 235, 109 S.Ct. 1775 (internal citations to record omitted). The Court noted that the district judge had concluded “that the reactions of at least some of the partners were reactions to her as a woman manager.” Id. at 258, 109 S.Ct. 1775. Thus, in *Price Waterhouse*, there was substantial evidence that part of the reason the plaintiff was denied a partnership was that her actions on the job did not conform to those expected of a woman manager. Yet the same actions would have been tolerated, or perhaps encouraged, in a male manager.

Recently, we held in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir.2001), that harassment of a male waiter by male workers and a supervisor amounted to harassment because of sex stereotyping and thus was discrimination because of gender. In that case the plaintiff presented evidence that the harassment was because he acted too feminine on the job. He was taunted for walking and carrying his serving tray like a woman and for having feminine mannerisms. He was harassed because he did not act on the job as his co-workers perceived he should act as a man, not just because of his sexual orientation. 256 F.3d at 874-75. This corresponds to the sex stereotyping described in *Price Waterhouse*.

In Rene's case there was no contention before the district court that the harassment Rene experienced was because he acted effeminately on the job, or for any reason other than his sexual orientation. The first line of the legal argument presented to the district court in opposition to the motion for summary judgment crystalizes this point in stating:

The question raised by the motion is whether the conduct as alleged by Rene is prohibited by Title VII even though it was directed at Rene because of his sexual orientation.

Rene made no claim of sexual stereotyping and there was virtually no evidentiary basis upon which Rene could have supported such a claim had it been made. In fact, at one point in his deposition in referring to another worker who had harassed him, he stated: "He's skinny. He is not masculine like I am."⁴

Rene himself repeatedly stated that his co-workers harassed him because of his sexual orientation. On no fewer than nine occasions during his deposition, Rene affirmed that his co-workers harassed him only because he was gay. At least some of these statements bear mentioning:

Q. Do you think he did it to you and Carlos because you were gay?

A. Yes.

.

Q. It was just because you were gay?

A. Right.

.

Q. And that again was directed at you and Carlos-

A. Right.

Q. -because you were gay?

A. Right.

Q. They were teasing you because you and Carlos are gay?

A. Correct.

Q. Did any of the other guys ever get teased about the relationships they were in that you recall?

A. No.

Q. And they did this specifically because you were gay?

A. Yes. To them it was a joke.

Moreover, as I explained earlier, Rene did nothing to show the district court that the harassment was because of his gender. Instead, he stated quite plainly in his written presentation to the court that the question presented was whether the conduct he alleged "is prohibited by Title VII even though it was directed at [him] because of his sexual orientation." (Emphasis added.)

V.

The degrading and humiliating treatment Rene describes is appalling and deeply disturbing. I agree with the eloquent words of the First Circuit:

We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment-and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.

Higgins, 194 F.3d at 259.

Rene's lawsuit was brought solely on the basis that he was harassed in the workplace because of his sexual orientation, which is not actionable under Title VII of the Civil Rights Act; therefore the summary judgment was properly entered. I would affirm the district court.

FOOTNOTES

1. Rene also alleged retaliatory discharge. The district court's grant of summary judgment on that claim was not appealed and is not before us.

1. Thus, contrary to a claim in the dissent, there is much more evidence of gender stereotyping in the present case than only “one line in Rene's deposition of over one hundred pages.” Diss. at 1077 note 4.

2. It is not significant that, unlike the male employee in Nichols, Rene did not testify that his co-workers teased him for “walking . ‘like a woman,’” id. at 870, but only that his co-workers “teas[ed][him] about the way [he] walk[ed] and . whistle[d] at [him] like a woman.” There would be no reason for Rene's co-workers to whistle at Rene “like a woman,” unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and that is what Rene meant when he said he was discriminated against because he was openly gay. Likewise, contrary to a claim in the dissent, it is not significant that Rene apparently perceived himself to be “masculine.” Diss. at 1077. At issue is not what Rene perceived himself to be, but rather what his co-workers perceived him to be, and how they acted upon that perception.

3. It is also worth noting that the “butlers” that served the Grand Hotel's guests on the 29th floor were, for whatever reason, all male, as the term “butler” connotes. All-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms. See, e.g., Margaret Stockdale, Michelle Visio, and Leena Batra, *The Sexual Harassment of Men: Evidence for a Broader Theory of Harassment and Sex Discrimination*, 5 *Psychol. Pub. Pol'y & L.* 630, 653-54 (1999) (stating that “Predominantly or exclusively male environments tend to be more sexualized and less professional than gender neutral environments,” and finding that data from a Department of Defense sexual harassment survey “support the trend that same-sex sexually harassed men worked in more male-dominated workplaces than did other men”); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683, 1755 n. 387 (1998) (“[M]any male workers may view not only their jobs, but also the male-dominated composition and masculine identification of their work, as forms of property to which they are entitled.”); *Oncale*, 523 U.S. at 77, 118 S.Ct. 998 (oil rig crew in which harassed male plaintiff worked was all male).

1. There is an implication in Judge Fletcher's opinion that because sexual touching was involved in *Oncale*'s case the remand was a holding that this was sufficient. In the district court *Oncale* alleged both quid pro quo and hostile work environment sexual harassment, *Oncale*, 83 F.3d at 119, thus the remand was to consider both types of alleged harassment in light of the statutory requirement that it be because of his gender. Quid pro quo harassment is generally understood to be a supervisor seeking or insisting on sexual favors from an employee in order to maintain his or her job or to obtain advancement. This may have been involved in *Oncale*, but was never alleged by Rene.

2. One of the cases relied upon in Judge Fletcher's opinion is *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir.1997). It is noteworthy that the Supreme Court, in describing the treatments given this subject by various circuits, characterized that case as follows: “Still others suggest that work-place harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations.” *Oncale*, 523 U.S. at 79, 118 S.Ct. 998. This is essentially the same argument being made by Judge Fletcher's

opinion. Had the Supreme Court in *Doe* agreed with this proposition it would seem that it would have summarily affirmed. Instead, it vacated and remanded the case, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998). This is a strong indication that workplace harassment, which is simply "sexual in content," is not always actionable; the "because of sex" statutory requirement must be met before the harassment is actionable.

3. Among those introduced and failed to be passed are the Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994); the Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); the Employment Nondiscrimination Act of 1996, S.2056, 104th Cong. (1996); and the Employment Nondiscrimination Act of 2001, S.19, 107th Cong. (2001). The stated purposes of this last act were to provide a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation and to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation.

4. Judge Pregerson's opinion contends that the discrimination against Rene was a form of sexual stereotyping. The only evidence that was discovered to support this contention in the entire record is one line in Rene's deposition of over 100 pages. The question refers to a note that Rene made concerning harassment he had experienced from Elisio, one of the butlers, toward the end of Rene's employment. The relevant questions and answers in the deposition are:Q. And in this note he's teasing you about the way you walk and he whistles at you like a woman; is that right?A. Right. Like a man does to a woman.Q. And that's what you report on the third page of Exhibit 39 as well, that Elisio is whistling at you as a man does to a woman?A. Correct..Q. Was he whistling at you you think to make fun of you because you were gay?A. Yes. Of course. The way he looked at me, you know, and winked his eye. Come on.First of all, Rene's response, "Right. Like a man does to a woman," is obviously a response confirming the whistling, not the way he walks. Furthermore, later questions and answers confirm that the whistling was because he was gay, not because of the way he walked. It is significant that Rene never contended to the district court that the basis for the discrimination was sexual stereotyping because of the way Rene walked or any other characteristic he exhibited at the workplace.

WILLIAM A. FLETCHER, Circuit Judge.

Opinion by Judge WILLIAM A. FLETCHER; Concurrence by Judge PREGERSON; Concurrence by Judge GRABER; Concurrence by Judge FISHER; Dissent by Judge HUG.

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Ohio Judge Recognizes Sexual Orientation Discrimination Under Title VII

By Zack Ford on Aug 21, 2012 at 10:59 am

In a relatively insignificant ruling denying summary judgment, Ohio Judge James Gwin made a significant argument in favor of recognizing discrimination based on sexual orientation under Title VII's protections against discrimination based on sex. Plaintiff Jason Koren is suing his former employer, the Ohio Bell Telephone Company, for unfair treatment because he is gay that ultimately led to his termination. Among his complaints was that his supervisor, Kim Miceli, refused to acknowledge that he had taken his husband's surname when they married in Massachusetts, because she "did not recognize same-sex marriages." Judge Gwin agreed that this was discrimination based on Koren's sex:



Judge James Gwin

Koren's position is that changing his name upon marriage was a non-conforming "behavior" that supports his gender discrimination claim under a *Price Waterhouse* sex-stereotyping theory. Ohio Bell disagrees and attempts to frame Koren's claims as a simple attempt "to bootstrap protection for sexual orientation into Title VII" as prohibited by *Vickers*.

The Court agrees with Koren: homosexual males do not "by definition, fail to conform to the traditional gender norms" by changing their surname upon marriage. **And here, Koren chose to take his spouse's surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.** *Vickers* does "not suggest that [a plaintiff's] claim fails merely because he has been classified . . . as a homosexual. Rather, [the] claim fails [when the plaintiff] has failed to allege that he did not conform to traditional gender stereotypes in any observable way at work."

Koren has alleged just such a failure to conform. And he says that Miceli "harbored ill-will" because he changed his name but that she would not have done so if a female employee had changed her name. **Koren testified that Miceli refused to call him by his married name, that Miceli went out of her way to call him by his previous last name, and that**

Miceli informed him that she did not recognize same-sex marriages. And that ill-will, Koren says, resulted in seven unexcused absences and, ultimately, his termination. Accordingly, there is a “genuine dispute as to material fact[s],” and summary judgment is inappropriate on Koren’s sex-stereotype theory.

This is not a final ruling as to the merits of Koren’s case, but it’s still a worthwhile recognition of nondiscrimination protections under current law. Even though sexual orientation is not explicitly mentioned in Title VII, interpreting non-heterosexual orientations as a violation of sex stereotypes is an arguably fair interpretation of sexual identity. Indeed, Judge Gwin ruled similarly in a different case last year, arguing that the equal protection guaranteed by the Constitution is not automatically constrained by what is stipulated under the law. Sexual orientation is an invisible identity, which is why it is often characterized by the behaviors associated with it, but it makes sense to understand it as a natural variation of how one’s sex expresses itself.

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Complaints of Discrimination Based on Sexual Orientation Protected under Title VII: EDNY

Resource type: Legal Update: Archive

Status: Published on 09-Mar-2012

Jurisdiction: USA

The US District Court for the Eastern District of New York held that complaining of discrimination based on sexual orientation can constitute protected activity under Title VII of the Civil Rights Act of 1964's anti-retaliation provisions. The decision highlights an emerging split of opinion among the courts, both at the circuit and district level, that have ruled on this issue.

PLC Labor & Employment

Speedread

The US District Court for the Eastern District of New York held in *Birkholz v. City of New York* that opposing discrimination based on sexual orientation can constitute protected activity under Title VII's anti-retaliation provision, even though sexual orientation is not a protected class under Title VII. The decision highlights an emerging split of opinion among the courts, both at the circuit and district level, that have ruled on this issue.

Key Litigated Issues

On February 22, 2012, the US District Court for the Eastern District of New York issued a *decision* (www.practicallaw.com/1-518-3131) in *Birkholz v. City of New York*, granting in part and denying in part the defendants' motion to dismiss the plaintiff's claims brought under Title VII, the ADEA and state and city human rights laws. The key issue in the case was whether plaintiff could state a claim under Title VII for alleged discrimination, harassment or retaliation based on sexual orientation.

Background

The plaintiff, a 62-year-old school guidance counselor described in the complaint as a "homosexual male," alleged that school officials had discriminated against him on the basis of his sexual orientation, gender and age, leading to loss of employment, pay and benefits. In his complaint against the City of New York (City) and the New York City Department of Education (Department of Education), plaintiff alleges claims of disparate treatment, hostile work environment and constructive discharge based on sexual orientation, gender and/or age, and retaliation for complaining of the discrimination. His claims were brought under Title VII, the ADEA and New York State Human Rights Law (SHRL) and New York City Human Rights Law (CHRL).

Defendants filed a motion to dismiss all of the plaintiff's claims, specifically arguing that sexual orientation is not covered by Title VII's anti-discrimination provisions.

Outcome

As a preliminary matter, the district court dismissed all claims against the City, noting that it was a separate legal entity from the Department of Education. Since sexual orientation is not a protected class under Title VII and it is well settled in the Second Circuit that Title VII does not prohibit sexual orientation discrimination or harassment, the court dismissed the plaintiff's discrimination and harassment claims based on sexual orientation. The court also dismissed the federal age and gender discrimination claims.

However, the court denied the Department of Education's motion to dismiss the Title VII retaliation claim, holding that complaining of discrimination based on sexual orientation can constitute protected activity under Title VII.

The district court acknowledged that courts are divided on the question, with the Ninth Circuit and two district courts in the Second Circuit finding that complaints of discrimination based on sexual orientation are protected under Title VII, and the Sixth and Seventh Circuits reaching the opposite conclusion. In so holding, the court reasoned that:

Because some complaints are not legally sustainable does not license an employer to retaliate in ways that would undermine Title VII's goal of providing unfettered access to statutory protections.

New York state and city law protects employees from workplace discrimination based on sexual orientation.

Gender stereotyping of Plaintiff is unlawful gender discrimination under Title VII.

Practical Implications

The court's decision emphasizes an emerging split of opinion among courts across the US that have addressed retaliation claims involving sexual orientation under Title VII. In this evolving area of the law, employers may face uncertainty as to the breadth of Title VII anti-retaliation remedies available to employees. Pending a conclusive resolution to the question, employers should exercise caution when responding to employee complaints of alleged discrimination based on sexual orientation, as it may constitute protected activity.

Court Documents

Birkholz v. City of New York, No. 10-CV-4719 (E.D.N.Y. Feb. 22, 2012) (www.practicallaw.com/1-518-3131).

Resource information

Resource ID: 5-518-3092

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DOMESTIC VIOLENCE AND LESBIAN, GAY, BISEXUAL AND TRANSGENDER RELATIONSHIPS

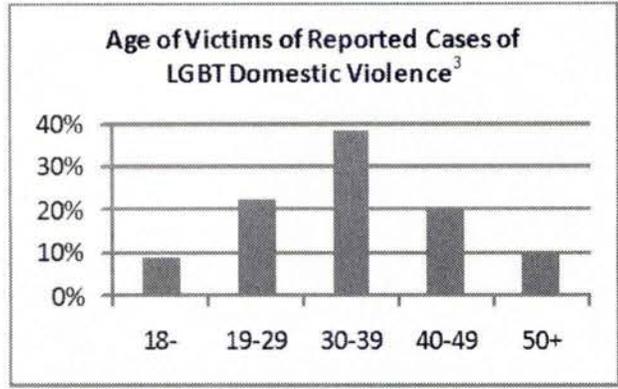
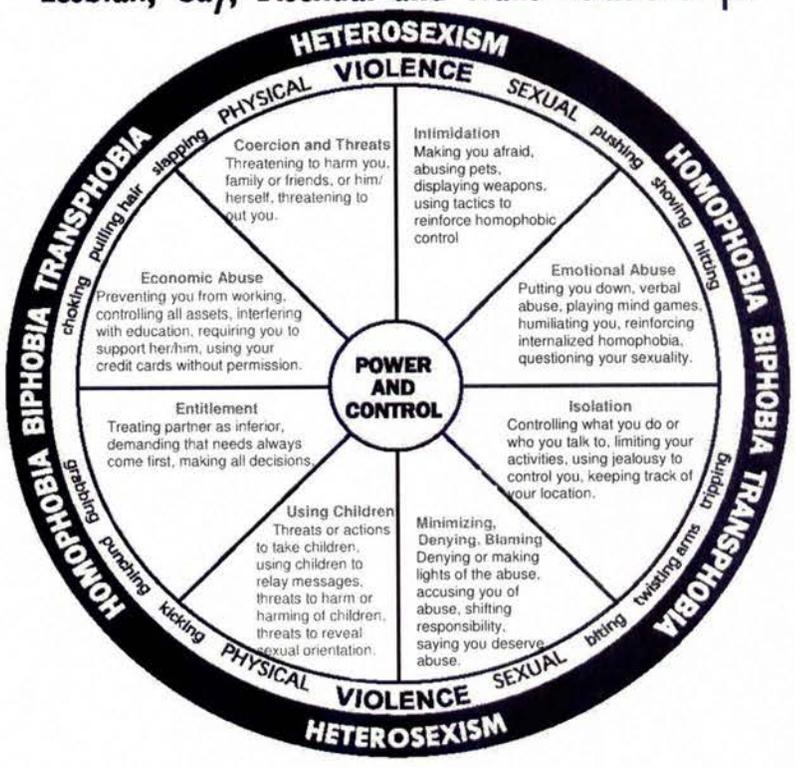
WHY IT MATTERS

Domestic violence is defined as a pattern of behaviors utilized by one partner (the batterer or abuser) to exert and maintain control over another person (the survivor or victim) where there exists an intimate and/or dependent relationship. Experts believe that domestic violence occurs in the lesbian, gay, bisexual and transgender (LGBT) community with the same amount of frequency and severity as in the heterosexual community. Society's long history of entrenched racism, sexism, homophobia and transphobia prevents LGBT victims of domestic violence from seeking help from the police, legal and court systems for fear of discrimination or bias.¹

DID YOU KNOW?

- In ten cities and two states alone, there were 3,524 incidents of domestic violence affecting LGBT individuals, according to the National Coalition of Anti-Violence Programs 2006 Report on Lesbian, Gay, Bi-Sexual and Transgender Domestic Violence.¹
- LGBT domestic violence is vastly underreported, unacknowledged, and often reported as something other than domestic violence.¹
- Delaware, Montana and South Carolina explicitly exclude same-sex survivors of domestic violence from protection under criminal laws. Eighteen states have domestic violence laws that are gender neutral but apply to household members only.²
- 30 states and DC have domestic violence laws that are gender neutral and include household members as well as dating partners.²

Power and Control Wheel for Lesbian, Gay, Bisexual and Trans Relationships



SURVIVORS

- Gay and bisexual men experience abuse in intimate partner relationships at a rate of 2 in 5, which is comparable to the amount of domestic violence experienced by heterosexual women.³
- Approximately 50% of the lesbian population has experienced or will experience domestic violence in their lifetimes.¹
- In one year, 44% of victims in LGBT domestic violence cases identified as men, while 36% identified as women.¹
- 78% of lesbians report that they have either defended themselves or fought back against an abusive partner. 18% of this group described their behavior as self-defense or "trading blow for blow or insult for insult."⁴

TYPES OF ABUSE⁵

- **Physical:** the threat of harm or any forceful physical behavior that intentionally or accidentally causes bodily harm or property destruction.
- **Sexual:** any forced or coerced sexual act or behavior motivated to acquire power and control over the partner. It is not only forced sexual contact but also contact that demeans or humiliates the partner and instigates feelings of shame or vulnerability – particularly in regards to the body, sexual performance or sexuality.
- **Emotional/Verbal:** any use of words, voice, action or lack of action meant to control, hurt or demean another person. Emotional abuse typically includes ridicule, intimidation or coercion.
- **Financial:** the use or misuse, without the victim's consent, of the financial or other monetary resources of the partner or of the relationship.
- **Identity Abuse:** using personal characteristics to demean, manipulate and control the partner. Some of these tactics overlap with other forms of abuse, particularly emotional abuse. This category is comprised of the social "isms", including racism, sexism, ageism, able-ism, beauty-ism, as well as homophobia. Includes threats to "out" victim.

TRANSGENDER ABUSE¹

Specific forms of abuse occur in relationships where one partner is transgender, including:

- ⇒ using offensive pronouns such as "it" to refer to the transgender partner;
- ⇒ ridiculing the transgender partner's body and/or appearance;
- ⇒ telling the transgender partner that he or she is not a real man or woman;
- ⇒ ridiculing the transgender partner's identity as "bisexual," "trans," "femme," "butch," "gender queer," etc.;
- ⇒ denying the transgender partner's access to medical treatment or hormones or coercing him or her to not pursue medical treatment.

HIV/AIDS RELATED ABUSE¹

The presence of HIV/AIDS in an abusive relationship may lead to specific forms of abuse, which include:

- ⇒ "outing" or threatening to tell others that the victim has HIV/AIDS;
- ⇒ an HIV+ abuser suggesting that she or he will sicken or die if the partner ends the relationship;
- ⇒ preventing the HIV+ partner from receiving needed medical care or medications;
- ⇒ taking advantage of an HIV+ partner's poor health status, assuming sole power over a partner's economic affairs, create the partner's utter dependency on the abuser;
- ⇒ An HIV+ abuser infecting or threatening to infect a partner.

BARRIERS TO SEEKING SERVICES¹

Barriers to addressing LGBT intimate partner violence (both for service providers and survivors) include:

- The belief that domestic violence does not occur in LGBT relationships and/or is a gender based issue;
- Societal anti-LGBT bias (homophobia, biphobia and transphobia);
- Lack of appropriate training regarding LGBT domestic violence for service providers;
- A fear that airing of the problems among the LGBT population will take away from progress toward equality or fuel anti-LGBT bias.
- Domestic violence shelters are typically female only, thus transgender people may not be allowed entrance into shelters or emergency facilities due to their gender/genital/legal status.

FOR MORE INFORMATION

National Coalition of Anti-Violence Programs
212-714-1184
www.ncapv.org

GLBT National Help Center
1-888-843-4564
www.glbtnationalhelpcenter.org

Gay Men's Domestic Violence Project
1-800-832-1901
www.gmdvp.org

For more information or to get help, please call the
National Domestic Violence Hotline at 1-800-799-SAFE
National Sexual Assault Hotline at 1-800-656-HOPE

SOURCES

¹ National Coalition of Anti-Violence Programs. (2006) "Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2006." www.ncapv.org

² National Gay and Lesbian Task Force. (2005) "Domestic Violence Laws in the U.S." www.thetaskforce.org

³ Greenwood, Gregory, et. al. (2002) "Battering and Victimization Among a Probability-Based Sample of Men Who Have Sex With Men." *American Journal of Public Health*, 92 (12).

⁴ Renzetti, C.M. (1992). "Violent betrayal: Partner abuse in lesbian relationships." *Violence Against Women*. Sage Publications.

⁵ Gay Men's Domestic Violence Project. "Types of Abuse." www.gmdvp.org

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE



The Public Policy Office of the National Coalition Against Domestic Violence (NCADV) is a national leader in the effort to create and influence Federal legislation that positively affects the lives of domestic violence victims and children. We work closely with advocates at the local, state and national level to identify the issues facing domestic violence victims, their children and the people who serve them and to develop a legislative agenda to address these issues. NCADV welcomes you to join us in our effort to end domestic violence.

2054 (1)
2/12

PROPOSED AMENDMENTS TO SENATE BILL NO. 2252

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 1-08 of the North Dakota Century Code, relating to a state policy on discrimination on the basis of sexual orientation; and to amend and reenact subsection 1 of section 14-02.4-02 and section 14-02.4-20 of the North Dakota Century Code, relating to the definition of age and to the relief for discriminatory practices.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 1-08 of the North Dakota Century Code is created and enacted as follows:

State policy - Discrimination based on sexual orientation.

It is the policy of the state of North Dakota that this state does not condone discrimination on the basis of sexual orientation. This section does not:

1. Create a right to a cause of action for damages for a claim of discrimination on the basis of sexual orientation;
2. Create any rights or protections with respect to discrimination on the basis of sexual orientation; or
3. Amend or change state personnel policies, contracting policies, or other law or policy related to state action.

SECTION 2. AMENDMENT. Subsection 1 of section 14-02.4-02 of the North Dakota Century Code is amended and reenacted as follows:

1. "Age" insofar as it refers to any prohibited unfair employment or other practice means at least ~~forty~~fifty-five years of age.

SECTION 3. AMENDMENT. Section 14-02.4-20 of the North Dakota Century Code is amended and reenacted as follows:

14-02.4-20. Relief.

If the department, as the result of an administrative hearing, or the court determines that the respondent has engaged in or is engaging in a discriminatory practice, the department or the court may enjoin the respondent from engaging in the unlawful practice and order temporary or permanent injunctions, equitable relief, and backpay limited to no more than ~~two years~~one year from the date a minimally sufficient complaint was filed with the department or the court. Neither the department nor an administrative hearing officer may order compensatory or punitive damages under this chapter. Interim earnings or amounts earnable with reasonable diligence by the person discriminated against reduce the backpay otherwise allowable. In any action or proceeding under this chapter, the court may grant the prevailing party a reasonable

attorney's fee as part of the costs. If the court finds that the complainant's allegation of a discriminatory practice is false and not made in good faith, the court shall order the complainant to pay court costs and reasonable attorney's fees incurred by the respondent in responding to the allegation."

Renumber accordingly

2756 (2)
2/12

List of state definitions of gender identity and expression, as of February 12, 2013

California - "Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. Cal.Penal Code § 422.56.

Colorado - "Sexual orientation" means a person's orientation toward heterosexuality, homosexuality, bisexuality, or *transgender status or an employer's perception thereof*. C.R.S.A. § 24-34-401.

Connecticut - "gender identity or expression" means a person's gender-related identity, appearance, or behavior, whether or not that identity, appearance, or behavior differs from that traditionally associated with the person's physiology or assigned sex at birth. Conn. Gen. Stat. § 46a - 81c-m

DC - "Gender identity or expression" means a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth. DC ST § 2-1401.02.

Hawaii - "Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth. HRS § 489-2 and HRS § 515-2.

Iowa - "Gender identity" means a gender-related identity of a person, regardless of the person's assigned sex at birth. I.C.A. § 216.2.

Illinois - "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, or *gender-related identity, whether or not traditionally associated with the person's designated sex at birth*. "Sexual orientation" does not include a physical or sexual attraction to a minor by an adult. 775 ILCS 5/1-103.

Massachusetts - "Gender identity" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose. Mass Gen. Laws Part I, Title I, Chapter 4, Section 7.59

Maine - "Sexual orientation" means a person's actual or perceived heterosexuality, bisexuality, homosexuality or *gender identity or expression*. 5 M.R.S.A. § 4553.

Minnesota - "Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, *or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.* "Sexual orientation" does not include a physical or sexual attachment to children by an adult. M.S.A. § 363A.03.

Nevada - "Gender identity or expression" is defined as "gender-related identity, appearance, expression or behavior of a person, regardless of the person's assigned sex at birth." NRS 613.310

New Jersey - "Gender identity or expression" means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth. N.J.S.A. 10:5-5.

New Mexico - "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth. N. M. S. A. 1978, § 28-1-2.

Oregon - "Sexual orientation" means an individual's actual or perceived heterosexuality, homosexuality, bisexuality or *gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth.* O.R.S. § 174.100

Rhode Island - The term "gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth. RI ST § 34-37-3.

Vermont - The term "gender identity" means an individual's actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual's gender or gender-identity, regardless of the individual's assigned sex at birth. 1 V.S.A. § 144.

Washington - "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "*gender expression or identity*" means *having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.* RCWA 49.60.040.