March 28, 2016

Naomi Barry-Perez
Director, Civil Rights Center
U.S. Department of Labor
200 Constitution Avenue N.W.
Room N-4123
Washington, D.C. 20210

Re: Public comment in response to the Notice of Proposed Rulemaking, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act (RIN 1291-AA36)

Dear Ms. Barry-Perez,

On behalf of the Center for American Progress (CAP), I am writing in response to the Department's request for comments regarding the proposed implementation of nondiscrimination and equal opportunity provisions of the Workforce Innovation and Opportunity Act (WIOA). CAP appreciates that the Department has undertaken this important rulemaking. We recognize the Department's longstanding commitment to ensuring that lesbian, gay, bisexual, and transgender, or LGBT, individuals have equal access to critical DOL programs that provide them with the training and skills fundamental to ensuring economic mobility and financial security. We applaud the Department's leadership on these issues and the opportunity to provide comments that we hope will further strengthen the proposed rule.

Adoption of Gender-Neutral Language

We welcome the Department's recognition that nondiscrimination principles protect individuals of all genders, including non-binary individuals who do not identify as either male or female, with its decision to adopt gender-neutral language in the updated regulations.[1] An individual's gender identity is a deeply-rooted aspect of who they are, and that is no different for those who identify with a gender other than male or female. [2] These communities are entitled to the same protections as others, and in fact, face pervasive bias and misunderstanding in work and other

[1] Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 Fed. Reg. 4494, 4495 (proposed Jan. 26, 2016) (to be codified at 29 C.F.R. pt. 38) [hereinafter Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA]; *see also,* Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015); *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395, at *7 (Apr. 1, 2015) (recognizing that individuals who identify as both male and female or neither are protected from gender identity discrimination).

[2] The medical community has widely recognized the importance of affirming gender identities other than male or female, or non-binary genders, and providing those with non-binary genders equal access to services. *See, e.g.,* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* 6 (2015) ("a non-binary understanding of gender is fundamental to the provision of affirmative care for [transgender and gender non-conforming] people"); World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People* 171, 175 (2012) (requiring physicians to provide affirming care for both binary and non-binary transgender and gender non-conforming patients); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, Version 5* 451 (2013) (defining gender identity to include identities other than male or female); Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 25-26 (2011) (same).

areas of their lives.[3] Regulatory language associated with the gender binary may exacerbate these barriers by suggesting that individuals with non-binary identities are excluded from many of the protections under WIOA. The adoption of gender-neutral language is a simple way to remove this barrier to nondiscrimination protections while signaling the Department's commitment to equal treatment for individuals with non-binary gender identities. To ensure consistency, we encourage the Department to revise the following gender-specific language remaining in the proposed rule:

> § 38.4(q)(5)(iii)(C) …because of the additional time or effort ~~he or she~~ **the individual** must spend to read, write, speak, or learn compared to most people in the general population….
>
> (ii)(A) That disease or infection prevents ~~him or her~~ **the individual** from performing the essential functions of the job in question….
>
> § 38.16(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of ~~his or her~~ **the individual's** service animal…. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by ~~his or her~~ **the individual's** service animal.
>
> § 38.30 …However, ~~he or she~~ **the EO Officer** must not have other responsibilities or activities that create a conflict or appearance of conflict with ~~the responsibilities of an EO Officer~~ **their responsibilities.**
>
> § 38.64(a) Where, as a result of a post-approval review, the Director has made a finding of noncompliance, ~~he or she~~ **the Director** must issue a Letter of Findings….
>
> § 38.81(d) Where the Director makes a referral under this section, ~~he or she~~ **they** must notify the complainant and the respondent about the referral.
>
> § 38.83 If the Director accepts the complaint for resolution, ~~he or she~~ **they** must notify in writing the complainant, the respondent, and the grantmaking agency.
>
> § 38.91(b)(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, ~~he or she~~ **the Governor** must submit to the Director for approval....
>
> § 38.115(c)(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, ~~he or she~~ **the Director** must issue a decision denying the petition.

[3] Jack Harrison, Jaime Grant, and Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey,* Harvard Kennedy School Journal of LGBTQ Policy (2011-2012), http://www.thetaskforce.org/static_html/downloads/reports/reports/gender_not_listed_here.pdf

§ 38.4(ff)(1)(i) Exclusion of Gender Dysphoria as Disability

We encourage the Department to remove explicit exclusion of "transvestism, transsexualism, or gender dysphoria not resulting from physical impairments." The Americans with Disabilities Act (ADA) currently has a similar exception from its definition of "disability,"[4] specifically excluding "[t]ransvestism, transsexualism…[and] gender identity disorders not resulting from physical impairments." Current medical science, however, strongly suggests that gender dysphoria has physiological and physical medical consequences and treatments and roots, and thus "result[s] from physical impairments."[5] In a recent brief, the Department of Justice (DOJ) took this position and argued that accordingly the ADA provision should not be read to exclude gender dysphoria from the statute:

> In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the terms "disability" and "physical impairment" be read broadly, the [Gender Identity Disorder] Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.[6]

While the statutory language in the ADA on which § 38.4(ff)(1)(i) is based remains good law, reiterating that language in the Department of Labor's regulation in the absence of any identifiable factual scenario to which it would apply would only cause confusion. Removing proposed § 38.4(ff)(1)(i) from the final rule would ensure that the rule reflects the functional impact of the ADA while avoiding uncertainty, misinterpretation, and outdated medical reasoning.

§ 38.7 Discrimination on the Basis of Sex

§ 38.7(a) Discrimination Based on Gender Identity as Sex Discrimination

We support the proposed rule's recognition of the well-supported principle that "claims of gender identity discrimination, including discrimination grounded in stereotypes about how persons express their gender, are claims of sex discrimination under Title VII."[7] Numerous federal courts have interpreted Title VII and other federal sex discrimination laws to include discrimination on the basis of gender identity, gender transition, or transgender status.[8] In 2012,

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[4] 42 U.S.C. § 12211(b)(1) (2008) (excluding "[t]ransvestism, transsexualism…[and] gender identity disorders not resulting from physical impairments" from the definition of "disability").
[5] Statement of Interest of the United States at 3-4, *Blatt v. Cabela*, No. 5:14-xc-4822-JFL (*filed* Nov. 16, 2015) (surveying medical research indicating that gender dysphoria has a physical basis).
[6] *Id.* at 1.
[7] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, 81 Fed. Reg. 4499.
[8] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Rumble v. Fairview Health Serv.*, No. 14–cv–2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Cty., Md.,* 12 F.Supp. 3d 780 (D. Md. 2014). Older cases finding that Title VII does not protect transgender workers, *see, e.g. Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984), reached their conclusions based on case law that has since been repudiated by the Supreme Court's holding in *Price Waterhouse v. Hopkins*, which

the Equal Employment Opportunity Commission followed these decisions and held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII."[9] The EEOC explained its reasoning as follows:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[10]

The EEOC stressed that its conclusion that gender identity discrimination is covered can be reached by "any number of formulations"—as based on sex stereotypes about gender identity or expression or gender roles, as based on a physical change of one's gender, or as based on gender identity itself as a component of sex—all of which "are simply different ways of describing sex discrimination."[11] The Attorney General has reaffirmed this interpretation,[12] as has the Department of Labor itself.[13]

Similarly, the Departments of Education and Justice have clarified on multiple occasions that under Title IX, discrimination based on gender identity and nonconformity to sex stereotypes is discrimination based on sex.[14] The Department of Health and Human Services has adopted a similar approach in its interpretation of Section 1557 of the Affordable Care Act, and has clarified that under the ACA discrimination based on sex includes discrimination on the basis of

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determined that Title VII's prohibition on sex discrimination includes sex stereotyping. 490 U.S. 228 (1989). For an analysis of these cases, see Statement of Interest of the United States at *14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015).

[9] *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012).

[10] *Id.* at *7.

[11] *Id.* at *10.

[12] Memorandum from Attorney General Eric Holder, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *see also* Statement of Interest of the United States, *Jamal*, No. 14-2782; Statement of the United States, *Burnett v. City of Phila.,* No. 09-4348 (E.D. Pa. Apr. 4, 2014).

[13] Apprenticeship Programs; Equal Opportunity, 80 Fed. Reg. 68,908 (proposed Nov. 6, 2015); Discrimination on the Basis of Sex, Proposed Rule, 80 Fed. Reg. 5,246 (Jan. 30, 2015); Office of Fed. Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling Individual and Systemic Sexual Orientation and Gender Identity Discrimination Complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).

[14] Finding Letter from Adele Rapport, Director of Chicago Regional Office of Office for Civil Rights of U.S. Department of Education, to Daniel E. Cates, Superintendent of Township High School District 211 (Nov. 2, 2015); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015); Statement of Interest of the United States, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, (E.D. Va. June 29, 2015); Statement of Interest of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); Dep't of Educ., *Title IX Resource Guide*, 1 (Apr. 2015); Dep't of Educ., "Questions and Answers on Title IX and Sexual Violence," 5 (Apr. 29, 2014). *See also* Dep't of Educ., "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities," 25 (Dec. 1, 2014); Dep't of Educ., "Dear Colleague," 7-8 (Oct. 26, 2010).

gender identity.[15] Numerous other federal agencies, including the Office of Special Counsel,[16] the Office of Personnel Management,[17] and the Department of Housing and Urban Development,[18] have taken the same position in guidance, proposed or final regulations, and adjudications.

§ 38.7(a) Sexual Orientation Discrimination as Unlawful Sex Discrimination

We urge the Department to include the explicit recognition that sexual orientation discrimination constitutes unlawful sex discrimination within the final rule in § 38.7(a). Federal courts and the EEOC have determined that discrimination based on sexual orientation is a form of sex discrimination prohibited by Title VII. Explicitly incorporating sexual orientation within the definition of sex in the final rule is both consistent with this current legal doctrine and essential to ensuring that LGBT individuals have access to the services and programs that they are entitled to.

1. Deference to EEOC Policy

On page 4,497 of the proposed rule, the Department specifically provides that it "defers to the EEOC's interpretations of Title VII law as it applies to applicants and employees of employers receiving WIOA Title I financial assistance."[19] The EEOC's policy regarding sexual orientation discrimination coverage under Title VII could not be clearer. In the 2015 case *Baldwin v. Foxx*, the EEOC ruled in favor of a Department of Transportation employee who alleged that he did not receive a promotion because of his sexual orientation.[20] The EEOC found that Title VII prohibits employers from relying on "sex-based considerations" when making personnel decisions and that these protections apply equally to LGB individuals under Title VII.[21] The agency concluded that the Department of Transportation wrongfully relied on sex-based considerations when supervisors declined to promote the complainant due to his sexual orientation. The EEOC held that discrimination on the basis of sexual orientation constitutes sex discrimination under Title VII because sexual orientation is inseparably linked to sex-based

[15] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54,172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92)
[16] *See* Report of Prohibited Personnel Practice, Office of Special Counsel File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014).
[17] *See* 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105; Office of Personnel Mgmt. et al., *Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities* (2015).
[18] Memorandum from John Trasviña to FHEO Regional Directors, *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010); *Dep't of Hous. & Urban Dev. v. Toone*, Charge of Discrimination, FHEO Nos. 06-12-1130-8; 06-121363-8 (Aug. 15, 2013); Dep't of Hous. & Urban Dev., *Equal Access for Transgender People: Supporting Inclusive Housing and Shelters* (Mar. 2016), https://www.hudexchange.info/resources/documents/Equal-Access-for-Transgender-People-Supporting-Inclusive-Housing-and-Shelters.pdf.
[19] Implementation of the Nondiscrimination and Equal Opportunity Provisions of WIOA, p. 4,497
[20] EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). The Commission has developed this interpretation in a long series of decisions prior to *Baldwin*. *See*, *e.g.*, *Complainant v. Johnson*, EEOC Appeal No. 0120110576 (Aug. 20, 2014); *Complainant v. Cordray*, EEOC Appeal No. 0120141108 (Dec. 18, 2014); *Complainant v. Donahoe*, EEOC Appeal No. 0120132452 (Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, EEOC Appeal No. 0120110145 (Oct. 23, 2014); *Couch v. Dep't of Energy*, EEOC Appeal No. 0120131136 (Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, EEOC Appeal No. 0120112085 (May 20, 2013); *Culp v. Dep't of Homeland Security*, EEOC Appeal No. 0720130012 (May 7, 2013); *Castello v. U.S. Postal Serv.*, Appeal No. 0120111795 (Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, EEOC Appeal No. 0120110873 (July 1, 2011).
[21] *Id.* at *4; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-42 (1989); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (Apr. 20, 2012).

considerations. The Commission clearly stated that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[22] The EEOC further clarified that "[a] complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account."[23]

In January of this year, the EEOC also filed a brief in support of the plaintiff in *Evans v. Georgia Regional Hospital*, a case in which a former security officer at a state-funded hospital alleges that she was unlawfully targeted for termination because of her sexual orientation. [24] The EEOC's brief in this case presents the Commission's clear and consistent policy regarding sexual orientation discrimination stating that, "Title VII's prohibition on sex discrimination encompasses a prohibition on sexual orientation discrimination. This interpretation is most consistent with the statutory language prohibiting employment discrimination 'because of. . . sex.' 42 U.S.C. 200e- 2(a). It also flows naturally from binding precedent because sexual orientation discrimination (1) relies on illegal sex stereotyping, (2) constitutes gender-based associational discrimination, and (3) involves impermissible sex-based considerations." Prior to the *Baldwin* decision, in January 2015, the EEOC published a final determination reflecting this interpretation of Title VII in the health care context in *Cote v. Wal-Mart.*[25] In this case, the EEOC found that Wal-Mart had discriminated against an employee when it denied the employee the opportunity to enroll her same-sex spouse in company provided health care benefits. The EEOC explicitly stated in the determination that the employee had experienced discrimination on the basis of sex under Title VII.

In March 2016, the EEOC announced that it filed two sex discrimination cases based on sexual orientation, *EEOC v. Scott Medical Health Center*[26] and *EEOC v. Pallet Companies, dba IFCO Systems NA*.[27] In *Scott*, the Commission charged that a gay male employee was subjected to harassment due to his sexual orientation, charging that the worker's manager repeatedly used various anti-gay epithets when referring to him and made other highly offensive comments related to his sexuality. The EEOC further charged that no action was taken to end the harassment when it was brought to the attention of the clinic director. Similarly, in *IFCO Systems*, the EEOC charged that a lesbian employee was harassed by her supervisor because of her sexual orientation. The Commission charged that the supervisor made numerous comments to her regarding her sexual orientation and appearance and made sexually suggestive and lewd gestures towards the employee. The employee was terminated following a formal complaint regarding the harassment to management and the employee harassment hotline.

Despite clearly acknowledging the role of the EEOC in setting administration-wide policy regarding the legal interpretation of Title VII coverage, the proposed rule fails to defer to the Commission's interpretation regarding the inclusion of sexual orientation discrimination as a prohibited form of sex discrimination, and instead seeks further comment from the public

[22] *Baldwin*, EEOC Appeal No. 0120133080, at *5.
[23] *Id.*
[24] Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and Reversal, *Evans v. Georgia*, No. 2:16-cv-00225-CB.
[25] EEOC Charge No. 523-2014-00916 (Jan. 29, 2015).
[26] No. 2:16-cv-00225-CB (W.D. Pa. *filed* Mar.1, 2016).
[27] 10 No. 1:16-cv-00595-RDB (D. Md. *filed* Mar. 1, 2016).

regarding appropriate implementation. This not only runs counter to Department-wide policy regarding Title VII interpretation, but also ignores the consistent development of federal case law regarding this issue.

2. Federal Case Law Supporting EEOC Interpretation

The EEOC position is not a novel outlier. Rather, it reflects a steady, consistent development of case law affirming that discrimination on the basis of sexual orientation is a form of sex discrimination. As the Department recounts in footnotes 132-139 of the proposed rule, federal courts have increasingly accepted this common-sense conclusion. For example, in the December 2015 case *Videckis v. Pepperdine University,* the court relied significantly on Title VII case law to interpret the reach of Title IX's sex discrimination protections and the court explicitly endorsed the EEOC's reasoning in *Baldwin*.[28] A federal judge in *Isaacs v. Felder Services, LLC*, also incorporated this reasoning in October 2015 stating that "[t]o the extent that sexual discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from heterosexually defined gender norms, this, too is sex discrimination, of the gender-stereotyping variety."[29]

These cases build on the 2014 determination in *Hall v. BNSF Railway Co*., in which a federal judge allowed an LGBT plaintiffs' sex discrimination claim under Title VII and the Equal Pay Act to proceed to the next step of litigation.[30] In *Hall,* a worker challenged the company's denial to provide healthcare coverage to a same-sex spouse when the coverage was available to workers with different-sex spouses. The judge explicitly provided that the plaintiffs "experienced adverse employment action in the denial of spousal health benefit due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit." This 2014 decision echoed the holding in *Heller v. Columbia Edgewater Country Club*, a 2002 case in which the court clearly stated that an employer is engaged in unlawful discrimination if the employee would have been treated differently if she were a man dating a woman, instead of a woman dating a woman.[31]

A 2014 Seventh Circuit decision, *Muhammad v. Caterpillar, Inc*., is also instructive.[32] In this case, the plaintiff alleged that his co-workers subjected him to both racial and sexual harassment, including references and slurs related to his sexual orientation.[33] When the plaintiff informed his supervisor of the hostile work environment, he was suspended.[34] The district court granted summary judgment for Caterpillar, relying on precedent that Title VII's protections from harassment only apply to gender and not sexual orientation.[35] A Seventh Circuit panel upheld the decision and affirmed the lower court's interpretation that Title VII protections do not extend to sexual orientation discrimination. Although the Seventh Circuit later denied the plaintiff's

[28] 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).
[29] 2015 U.S. Dist. LEXIS 146663, at *10 (M.D. Ala. Oct. 29, 2015) (internal quotation marks omitted).
[30] 4 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014).
[31] 195 F. Supp. 2d 1212, 1223-24 (D. Or. 2002).
[32] 767 F.3d 694 (7th Cir. 2014).
[33] *Id.* at 696.
[34] *Id.* at 697.
[35] *Id.*

motion for a panel rehearing, the panel, significantly, amended its original opinion by removing the explicit language stating that Title VII did not extend to discrimination based on sexual orientation.[36] The ruling was affirmed on other grounds and no longer relies on Title VII's supposedly limited scope. This significant deletion illustrates an important shift in judicial reasoning and signals the increased viability of future claims based on sexual orientation in the context of Title VII.

3. Development of this Legal Standard

Although this legal standard has been increasingly applied and accepted by both federal courts and administrative agencies, its history reflects the evolution in societal understanding of the "imprecise" borders between sex and sexual orientation as protected classes.[37] The failure of courts in the past to apply the straightforward, sex-based characteristics analysis as described in *Baldwin* illustrates a reluctance to fully apply Title VII to historically marginalized classes. In order to avoid providing these critical protections, courts have relied heavily on legislative history and unexamined precedent. The court in *Simonton v. Runyon*, for example summarily rejected each of the plaintiff's claims that the harassment and discrimination he experienced was prohibited discrimination on the basis of sexual orientation under Title VII.[38] However, the court did conclude that the sex stereotyping claim may be cognizable discrimination under sex in future cases if properly pled as in the case *Price Waterhouse v. Hopkins* discussed below.[39] This significant analysis of *Price Waterhouse* and its potential applicability to discrimination against LGB workers signals the beginning of the organic outgrowth of sexual orientation discrimination from sex stereotyping case law.

The *Simonton* court also relied on *DeSantis v. Pacific Tel. & Tel. Co.* to dismiss the plaintiff's claim concluding that Congress did not intend for Title VII protections to extend to sexual orientation-based discrimination.[40] This 1979 case concluded that "Congress had only traditional notions of 'sex' in mind" when the 1964 Civil Rights Act was passed.[41] Many courts that have dismissed sexual orientation discrimination claims under Title VII have leaned on the legislative silence – or aversion – to extending protections to LGB people. However, almost two decades ago courts began to more closely refine the understanding of the legislative intent of Title VII and the appropriate role it should play in determining whether discrimination on bases beyond the "traditional notions of 'sex'" are cognizable under the Act. As described in *Oncale v. Sundowner Offshore Services, Inc*., the Supreme Court recognized that the scope of Title VII could not have been fully understood by Congress at the time it was passed.[42] Rather than limit Title VII to its express meaning and a general understanding of "sex" supported by its legislative history, the Supreme Court broadened the scope of Title VII protections to a previously unrecognized class because doing so was consistent with Title VII's purpose.[43] Accordingly,

[36] *Muhammad v. Caterpillar*, Appeal No. 12-173 (7th Cir. 2014).
[37] *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)). ("the borders [between sexual orientation and sex as protected classes] are. . . imprecise").
[38] 232 F.3d 33, 35 (2d Cir. 2000)
[39] *Id.* at 38.
[40] *Id.* at 35-36.
[41] 608 F.2d 327, 329 (9th Cir. 1979) (quoting *Holloway v. Arthur Andersen & Co.*, 556 F.2d 659, 662 (9th Cir. 1977).
[42] 523 U.S. 75, 78-80 (1998).
[43] *Id.* at 79, 82.

discrimination on the basis of sexual orientation may not be the "principal evil" Title VII sought to remedy, but a "comparable evil" reasonably within its scope.[44]

Finally, as discussed in *Baldwin*, the EEOC conducted a review of cases cited to support the proposition that sexual orientation should not be included within the protections of Title VII.[45] These results were telling. Many courts have cited earlier and dated decisions – failing to engage in any additional analysis.[46] In *Baldwin,* the EEOC illustrated this lack of judicial analysis by referencing a recent EEOC brief to the Seventh Circuit Court of Appeals concluding that only one previous Seventh Circuit case actually analyzed the issue.[47] It is significant to note that this case was decided in 1984 and failed to reflect more recent decisions including *Price Waterhouse*.[48] As the court in *Videckis* provided in December 2015, "The line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."

We urge the Department to incorporate the modern legal standard rather than adopting an out-moded interpretation based on decades-old precedent. Failure to incorporate this consistent legal trajectory into the final rule would concretize a harmful and outdated "judicial construct" and would place DOL policy out of step with both federal courts and other federal agencies, including the Office of Personnel Management, the Equal Employment Opportunity Commission, the Office of Special Counsel, and the Merit Systems Protection Board.

§ 38.7(d) *Sexual Orientation Discrimination is Unlawful Sex Stereotyping*

In addition to explicitly including sexual orientation discrimination as unlawful sex discrimination as discussed above, we also urge the Department to clarify that it is a form of unlawful sex stereotyping under § 38.7(d). As the proposed rule acknowledges, following the decision in *Price Waterhouse v. Hopkins*, which determined that discrimination based on sex stereotyping is unlawful under the sex discrimination protections of Title VII, federal courts and the EEOC have consistently extended these protections to individuals treated adversely because of their appearance, mannerisms, or conduct. This includes an individual's sexual orientation identity, perception of that identity, and manifestations of that identity—such as being in a relationship with a person of the same gender—which fall outside of the scope of stereotypical understandings of masculinity and femininity as being necessarily heterosexual. As the EEOC describes in the *Baldwin* decision, this robust application of protections from sex stereotyping discrimination reflects the understanding that sex stereotyping can involve not only expectations for masculine and feminine gender presentation, but also beliefs related to sexual orientation, such as the stereotype that all people must identify with binary gender identity, men must date and marry women, and women must date and marry men.

In *Veretto v. United States Postal Service*, for example, the EEOC determined that the complainant's allegation of sexual orientation discrimination was a sufficient sex discrimination claim because the discrimination was based on the sex stereotype that "marrying a woman is an

[44] *Id.* at 79.
[45] *Baldwin*, EEOC Appeal No. 0120133080, at *24 n.11.
[46] *Id.*
[47] *Id.*
[48] *Id.*

essential part of being a man" and was "motivated by…attitudes about stereotypical gender roles in marriage."[49] Similarly, the court in *Terveer v. Library of Congress* rejected a motion to dismiss the plaintiff's claim of sex discrimination on the basis of sexual orientation and sex stereotyping under Title VII.[50] In this 2014 case, the court held that the plaintiff's "status as a homosexual male did not conform to [his supervisor's] gender stereotypes associated with men under his supervision and that his orientation as a homosexual had removed him from [his supervisor's] preconceived definition of male."

We urge the Department to adopt language consistent with the regulatory language included in the proposed revisions to § 60–20.7 incorporated into the proposed DOL rule, *Discrimination on the Basis of Sex*, published in January 2015.[51] Section 60-20.7(a)(3) of this proposed rule provides that employment decisions made on the basis of sex-based stereotypes include, "adverse treatment of an employee because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex." Including similarly explicit language to this proposed rule would not only reflect federal case law and EEOC policy, but would also provide much needed consistency and clarity across DOL programs.

§ 38.7(b) Prohibited discriminatory sex-based conduct

Equal Access to Workplace Facilities

We applaud the Department of Labor for its recognition that denying access to facilities consistent with an employee's gender identity because of their transgender status is a form of sex discrimination. Proposed § 38.7(b)(9) is consistent with the EEOC's established application of Title VII requiring employers to treat individuals according to their gender identity, including by ensuring equal access to gender-specific facilities.[52] The Department of Labor has reaffirmed this interpretation in guidance for the Job Corps programs[53] and other employment and training programs,[54] and in proposed sex discrimination rules for federal contractors.[55] Numerous other agencies have acknowledged this basic principle of nondiscrimination with respect to a wide range of other settings, including school restrooms and locker rooms,[56] dormitories,[57] health care

[49] 2011 WL 2663401 (E.E.O.C. July 11, 2011).
[50] 34 F. Supp. 3d 100 (D.D.C. 2014).
[51] *Discrimination on the Basis of Sex*; Proposed Rule, 80 Federal Register 20 (January 30, 2015) pp. 5246-5279.
[52] *See*, *e.g.*, *Lusardi*, E.E.O.C. App. No. 0120133395, at *15.
[e] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, *supra* note 1.
[54] Dep't of Labor, Training and Employment Guidance Letter No. 37-14, The Workforce Development System: Training and Employment Guidance Letter on Gender Identity, Gender Expression and Sex Stereotyping (May 29, 2015), http://wdr.doleta.gov/directives/attach/TEGL/TEGL_37-14_Acc.pdf; Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities* (July 2013), http://www.dol.gov/oasam/programs/crc/20130712GenderIdentity.htm#_ftn3.
[55] Discrimination on the Basis of Sex, 80 Fed. Reg. 5246 (proposed Jan. 30, 2015) (to be codified at 41 C.F.R. pt. 60).
[56] *See*, *e.g.*, Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, (4th Cir. Oct. 28, 2015); Statement of Interest of the United States at 5, *G.G.* ex rel. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54 (E.D. Va. June 29, 2015); *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 215); Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).
[57] Dep't of Labor, Job Corps Program Instruction Notice No. 14-31, *supra* note 1.

facilities,[58] and shelters.[59] To date, at least 13 states and the District of Columbia have, by regulations, guidance, case law, or specific statutory language, clarifying that state laws prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.[60] Additionally, courts have rejected claims that a third party's discomfort with the presence of a transgender person in a sex-specific facility implicates any legally cognizable right.[61]

Despite this widespread recognition, many employers and training program staff continue to misinterpret their obligations under sex discrimination laws, and frequently deny transgender people access to appropriate restrooms.[62] Proposed §38.7(b)(9) is essential for preventing this harmful and discriminatory practice in WIOA-funded programs, and we urge the Department to incorporate it into its final rule.

As detailed below, we recommend that the Department make several minor changes to the language of § 38.7 to clarify the scope of its protections. First, we urge the Department to clarify that WIOA-funded programs cannot deny individuals access to gender-specific facilities and

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[58] Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. at 54,219; Dep't of Health & Human Servs., Office for Civil Rights, Bulletin: The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients (July 14, 2015).

[59] Dep't of Justice, Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013, at 9 (Apr. 9, 2013); Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs, 80 Fed. Reg. 72,542 (proposed Nov. 20, 2015) (to be codified at 24 C.F.R. pt. 5).

[60] *See* CAL. EDUC. CODE § 221.5(f); N.J. STAT. ANN. § 10:5-12(f)(1); 3 COLO. CODE REGS. § 708-1:81.11; D.C. MUN. REGS. tit. 4, § 802.1; OR. ADMIN. R. 839-005-0031(2) (2014); WASH. ADMIN. CODE § 162-32-060 (2015); *Dep't of Fair Emp't & Hous. v. Am. Pac. Corp.*, Case No. 34-2013-00151153-CU-CR-GDS (Cal. Sup. Ct. Mar. 13, 2014); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, Determination (Colo. Div. of Civil Rights Jun. 18 2013); *Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994 (Ill. Human Rights. Comm'n, May 15, 2015); *Jones v. Johnson Cty. Sheriff's Dep't*, CP No. 12-11-61830, Finding of Probable Cause (Iowa Civil Rights. Comm'n Feb. 11, 2013); Conn. Safe Sch. Coal., Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws 8 (2012), http://www.sde.ct.gov/sde/lib/sde/pdf/equity/title_ix/guidelines_for_schools_on_gender_identity_and_expression2012oct4.pdf; Iowa Civil Rights Comm'n, Guidance on Sexual Orientation & Gender Identity: A Housing Provider's Guide to Iowa Law Compliance (2012), https://icrc.iowa.gov/sites/files/civil_rights/publications/2012/SOGIEmpl.pdf; Mass. Dep't of Elementary and Secondary Educ., *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment: Nondiscrimination on the Basis of Gender Identity* 9-10 (2013), http://www.doe.mass.edu/ssce/GenderIdentity.pdf; Nev. Equal Rights Comm'n, Facts About Gender Identity or Expression Discrimination (2012), http://detr.state.nv.us/Nerc_pages/NERC_docs/Facts_About_Gender_Identity_or_Expression_Discrimination.pdf; New York State Educ. Dep't, Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students (2015), http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf; Vt. Human Rights Comm'n, Sex, Sexual Orientation and Gender Identity: A Guide to Vermont's Anti-Discrimination Law for Employers and Employees (2012), http://hrc.vermont.gov/sites/hrc/files/publications/trans-employment-brochure.pdf.

[61] *See Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981 (8th Cir. 2002) (rejecting as insufficient teacher's assertion that her "personal privacy" was invaded when school permitted transgender woman to use women's room); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (non-transgender female prisoner's objection to sharing a cell with a transgender woman implicated no clearly established right); *see also* Nedda Reghabi, *A Balancing Act for Businesses: Transsexual Employees, Other Employees, and Customers*, 43 ARIZ. ST. L.J. 1047 (2011) (concluding invasion-of-privacy claims by customers offended by transgender employees' use of appropriate restrooms would also likely fail for lack of actual harm).

[62] *Cf.* Nat'l. LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 56 (2011), http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf. (22 percent of respondents in a national study of transgender individuals reported that they had been denied access to restrooms consistent with their gender identity in the workplace.).

activities other than bathrooms, including changing facilities, when those facilities are consistent with their gender identity. Sex nondiscrimination laws provide no basis for distinguishing between different types or layouts of gender-specific facilities or restricting transgender individuals' access to certain facilities. This principle has been routinely recognized by government agencies, which have made clear that transgender individuals must be given equal access to a full range of gender-specific settings.[63]

We also recommend that the Department make minor changes to the proposed regulatory language in order to permit individuals to access facilities that are consistent with their gender identity, rather than the facilities "used by the gender with which they identify." Based on this revised language, the Department should clarify in the preamble that WIOA-funded programs are required to ensure that individuals whose gender identity is non-binary (not male or female), can access facilities that are most consistent with their gender identity. Individuals who identify as non-binary are best equipped to determine which facility most conforms to their gender identity and particular safety needs. As with binary identified individuals, non-binary people should be given full autonomy to decide which facility best fits their needs. This is not a decision anyone other than the person in question should decide.

Finally, we encourage the Department to clarify that while programs are authorized to provide sex-segregated locker rooms and bathrooms, they are not required to. While most programs will likely continue to segregate their multi-user facilities by gender, requiring them to do so unnecessarily eliminates their control and flexibility in determining the best layout for each facility on a case-by-case basis and offering unisex facilities in appropriate contexts.

Ensuring Treatment Consistent with Individuals' Gender Identities

We appreciate the Department's inclusion of a provision prohibiting "treating an individual adversely" based on their transgender status. We believe that adverse treatment necessarily includes the failure to treat individuals according to their gender identity, including deliberately and repeatedly referring to them by a name or pronoun that is inconsistent with their gender identity, prohibiting them from dressing in a manner consistent with their gender, and, as discussed above, denying them equal access to workplace facilities. We are concerned, however, that it may not be clear to all WIOA-funded program staff that such conduct is prohibited by the Department's proposed regulation, and therefore urge the Department to clarify that refusing to treat an individual according to their gender identity constitutes sex discrimination, and include specific examples of prohibited conduct.

The EEOC has made clear that the failure to treat an employee consistent with their gender identity is prohibited under Title VII, and that such conduct includes the refusal to process a name change for a transgender employee[64] and the "persistent failure to use [an] employee's

[63] *See supra*, notes 52–59. *See also Lusardi*, E.E.O.C. App. No. 0120133395, at *13, n. 7 (observing that depriving the complainant of locker and shower room access in addition to restroom access "constituted a material employment disadvantage").
[64] *Complainant v. Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014). *See also* Consent Decree, *Deluxe Fin. Servs. Corp.,* No. 0:15-cv-02646-ADM-SER, at *10.

correct name and pronoun."[65] Transgender and gender nonconforming employees have the right to be addressed by the name and pronoun corresponding to their gender identity or gender expression. Unfortunately, in a 2011 national survey, 45 percent of transgender workers reported that they had been referred to by the wrong gender pronouns, repeatedly and on purpose.[66] As the EEOC has recognized, the deliberate and repeated use of a name and pronouns associated with a transgender employee's assigned sex at birth is "demeaning" and amounts to a refusal to recognize the validity of their gender.[67] This is consistent with the Department of Labor's internal gender identity policy, which requires managers to "[r]efer to each person by the name, and the gender-specific pronoun, by which the person wants to be called."[68] By explicitly clarifying that sex discrimination includes the refusal to treat individuals consistent with their gender identity, the Department can ensure that program participants are protected from this pervasive and harmful mistreatment.

Recommendations

We recommend that proposed § 38.7(a) be revised as follows:

> (a)…The term sex includes, but is not limited to, pregnancy, childbirth, and related medical conditions, **sexual orientation,** transgender status, and gender identity.

We further recommend that § 38.7(b) be revised as follows:

> (8) Making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient ~~must~~ **may** provide separate or single-user restrooms or changing facilities;
> (9) Denying individuals access to the bathrooms **and other workplace facilities** ~~used by~~ **consistent with** the gender with which they identify.
> **(10) Refusing to treat individuals consistent with their gender identity, such as by deliberately and repeatedly using names and gender-related pronouns and titles that are inconsistent with their gender identity.**

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[65] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15. *See also Jameson v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120130992, 2 (May 21, 2013) ("[S]upervisors and coworkers should use the name and pronoun of the gender that the employee identifies with…. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment."); Complaint, *EEOC v. Deluxe Fin. Servs. Corp.,* No. 0:15-cv-02646-ADM-SER, at *14 (alleging discrimination when co-workers and supervisors "subjected [complainant] to gender-based derogatory comments about her appearance, intentionally referred to her with male pronouns, and called her insulting names"); Office of Personnel Mgmt., *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace* (2011), https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance.("Continued misuse [of a transitioning employee's] new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment.").

[66] Nat'l LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *supra* note 62, at 56.

[67] *Lusardi*, E.E.O.C. App. No. 0120133395, at *15.

[68] Dep't of Labor, *DOL Policies on Gender Identity: Rights and Responsibilities*, *supra* note 54 (emphasis omitted). Other agencies, such as the Office of Personnel Management, are in accord with this position. *See* Office of Personnel Mgmt., *supra* note 65.

We recommend that § 38.7(d) include the additional example below, which mirrors proposed revisions in the January 30, 2015 OFCCP Notice of Proposed Rulemaking updating the rules that govern how federal contractors and subcontractors prohibit sex discrimination:

> **(10) Adverse treatment of an individual because the individual does not conform to sex-role expectations by being in a relationship with a person of the same sex.**

We recommend that § 38.10(b) be revised as follows:

> (b) Harassment because of sex includes harassment based on gender identity, **sexual orientation**, and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for harassment.

Finally, we recommend that § 38.35 be revised as follows:

> The notice must contain the following specific wording:
>
> Equal Opportunity Is the Law
>
> It is against the law for this recipient of Federal financial assistance to discriminate on the following bases: Against any individual in the United States, on the basis of race, color, religion, sex (including pregnancy and childbirth and related medical conditions, sex stereotyping, transgender status, gender identity, **and sexual orientation**), national origin (including limited English proficiency), age, disability, political affiliation or belief; and against any beneficiary of programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the beneficiary's citizenship status or his or her participation in any WIOA Title I-financially assisted program or activity."

We appreciate your consideration of these recommendations and are happy to act as an ongoing resources should you have further questions.

Sincerely,

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