Testimony of
Glen Lavy

Before the U.S. House of Representatives
Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions

Hearing on "An Examination of Discrimination Against Transgender Americans in the Workplace"

June 26, 2008

Introduction

Chairman Andrews, Ranking Member Kline, members of the Committee, thank you for inviting me to testify today on the issue of "An Examination of Discrimination Against Transgender Americans in the Workplace."

I am senior counsel at the Alliance Defense Fund. For more than 7 years my colleagues and I at ADF have been working to protect the unique status of marriage as being between one man and one woman. Three times I have argued in support of marriage in the California courts, most recently in the California Supreme Court, and have been involved in some capacity in every major marriage case in the country. But the radical efforts to eliminate the unique, opposite-sex nature of marriage are only a precursor to the opposition's most dangerous principle. That principle is simply stated: that biological sex and gender are utterly divorced from one another. If the proponents of the idea that individuals have the right to pick their own gender succeed, upholding the definition of marriage as a man and a woman will be meaningless.

Today I speak out of my experience because of the palpable danger to religious liberty and freedom of conscience if Congress were to define gender identity and expression as a protected class. Certainly there are individuals who suffer very real emotional strife from sexual confusion – it is a distinct psychological diagnosis in some cases. Declining to accommodate an employee's belief that he or she is actually a member of the opposite sex, however, is not a form of invidious discrimination. This is not an issue that should be the subject of federal legislation.

Religious Liberty and Rights of Conscience in the Workplace

It is important to recognize that religious objections to the concept of "transgender" are based on theological beliefs rather than discomfort with or fear of the unfamiliar. The concepts of male and female being established at birth and the two sexes being joined in marriage are integrally related to theological beliefs about the relationship between God and the church. Forcing persons with such beliefs to treat "transgender" as a valid concept is like forcing an Orthodox Jew to eat pork. Regardless of one's views of the merits of such beliefs, it is

undeniable that such good faith beliefs exist. Trampling those beliefs raise serious constitutional issues under the First Amendment.

The sincerity of religious beliefs about male and female is why creating federal protection for gender identity and expression would have an unavoidable negative impact on religious liberty and rights of conscience in the workplace (providing such legislation were not ultimately deemed unconstitutional as applied to religious persons or organizations). The legislation would infringe on religious liberty and rights of conscience of both religious employers and ordinary business owners. This would be true even if the legislation included the same religious exemptions provided under Title VII.

Section 702(a) of Title VII allows religious organizations to discriminate on the basis of religion for "work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[1] But we've already seen that these "exemptions" are not sufficient to protect the fundamental right to freely exercise religion. For example, when a person who professes the same religious beliefs as an employer engages in behavior the organization deems immoral, the employer may at least face costly litigation. In 2005 Professor John Nemecek began appearing on campus as a woman at Spring Arbor University, a Christian liberal arts school. When the university fired him for his behavior, he filed a claim with the Equal Employment Opportunity Commission.[2] The professor asserted that he had not violated a tenet of the university's faith. Although the university should have prevailed if it had litigated the issue, it settled the claim rather than endure costly litigation.

Many Christians exercise their faith through religious ministries – often called "parachurch ministries" – that have even less protection than traditional churches have under these "exceptions." There is a great deal of debate over how closely such a ministry must be connected to a church to qualify for exemption. For example, one court held that a United Methodist children's home was *not* a "religious organization." It made this astonishing ruling despite the fact that the home was hiring a new minister specifically to protect its religions mission.[3] Another court recently devised a nine-part, subjective "balancing" test to decide whether a Jewish community center was "religious" under Title VII. The court said that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case."[4] Importantly, two of the nine "secularaizing" factors identified by the court are very common among parachurch ministries: few such ministries are directly controlled by a church;

---

[1] Section 703(e)(1) provides an exemption for discrimination on the basis of religion, sex, or national origin where they are "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

[2] "Christian College Fires Transgender Professor," Associated Press via Detroit Free Press (Feb. 4, 2007), http://www.religionnewsblog.com/17388/transgender.

[3] *Fike v. United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983).

[4] *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 226-227 (3rd Cir. 2007).

and many will provide "secular" products (such as food, shelter, counseling, or legal services that are not of themselves religious). That includes organizations like mine, ADF. In sum, many parachurch ministries may not be protected by the Title VII exemptions. That could result in the ministries being forced to hire employees who openly violate the ministries' standards.

Commercial business owners with strong religious views about transsexual issues would have no protection at all under Title VII exemptions. That would be especially problematic for small business owners who are closely associated with the business. In addition to violating the employer's conscience, employing a man who dresses as a woman and wants to use the women's restroom would have a negative impact not only on other employees and customers, but would reflect on the business owner's reputation in the community. It creates an implication that the owner approves of the behavior, or at least accepts the behavior as valid. That is an even bigger issue for owners of day-care centers and religious book stores, where customers have an expectation that their values will be respected.

The Ambiguity of "Gender Identity and Expression"

Gender identity and expression are extremely vague concepts. Gender Public Advocacy Coalition ("GenderPac"), an organization dedicated to eliminating gender norms, defines gender identity as "an individual's self-awareness or fundamental sense of themselves as being masculine or feminine, and male or female." GenderLaw Guide to the Federal Courts and 50 States, p. 3 of 90 (available at http://www.gpac.org/workplace/ GenderLAW.pdf; viewed June 24, 2008). It defines gender expression as "the expression through clothing and behavior that manifests a person's fundamental sense of themselves as masculine or feminine, and male or female. This can include dress, posture, vocal inflection, and so on." *Ibid*. In essence, the concept of gender expression is that the totality of the way a person looks, dresses, and acts is his or her gender – in other words, there are an infinite number of genders. Everyone really has their own gender.

Typical gender identity provisions prohibit discrimination based upon "actual or perceived" gender identity or expression. This type of provision is highly problematic for employers. How is an employer to know what an employee's actual gender identity is without asking? Could an employer ask without eventually being accused of discrimination? How is one to know how an employer perceives an employee's gender identity or expression? The ultimate subjectivity in gender identity and expression arises from the idea that a person can self-identify his or her gender identity, and this subjective self-identification can change an infinite number of times without notice to the employer. There is simply no objective criteria an employer can utilize to ascertain an employee's gender identity.

The subjective nature of gender identity makes it wholly unlike an objective, immutable characteristic like race. An employer seldom, if ever, needs to wonder whether an employee is African American, Asian, Latino, or Caucasian. He or she can tell by observation. That is

impossible with the concept of gender identity. Indeed, gender identity is as unobservable as religion. And religion has never received protection under Title VII without the employee specifically requesting an accommodation of a religious belief. Even then, employers are not generally required to provide the accommodation if it is too inconvenient.

Gender expression is likewise a problematic criterion for employers. How could an employer ever adopt and enforce dress codes if gender expression is a protected category? How is an employer to know whether a person's attire, posture, vocal inflection, and so on really reflects that individual's "fundamental sense of themselves as masculine or feminine, and male or female"? If the totality of the way a person presents oneself is "gender," then gender is the ultimate reason that any employee is disliked. That concept is too subjective and elastic for an employer to know what is required.

Adding gender identity and expression to employment nondiscrimination laws could result in providing special protection for most employees. For example, according to GenderPac, "At some point in their lives, most people experience some form of discrimination or bias as a result of gender stereotyping."[5] Under this view, any employment law prohibiting discrimination based on gender expression or identity may give rise to a significant number of discrimination claims, no matter what an employer does. If "most people" can claim gender identity or expression discrimination when they are terminated from employment, lose out on a promotion, fail to obtain a job, etc., "employment at will" will have lost all meaning.

Gender identity or expression laws have not existed long enough to allow a thorough analysis of how they will be applied. But there have already been lawsuits by transsexuals against employers claiming the right to use restrooms reserved for members of the opposite sex. In fact, eight years ago the Minnesota Court of Appeals ruled that an employer violated an employee's rights by designating restrooms and restroom use on the basis of biological sex. *Goins v. West Group*, 619 N.W.2d 424, 429 (Minn. App. 2000). Fortunately, the Minnesota Supreme Court reversed the decision (635 N.W. 2d 717, 723 (Minn. 2001)). The Court of Appeals opinion, however, shows how some courts are likely to construe employment laws creating a protected class for gender identity or expression.

Rights of Privacy

Many women in particular are concerned about the infringement on their right to privacy in restrooms if transsexuals with male anatomy are permitted to use women's restrooms. Parents also have a legitimate concern if persons who exercise authority over their children, such as teachers or day care workers, are permitted to use restrooms that are inconsistent with their physical anatomy. The extent of these concerns is evident from recent events in Montgomery

[5]GenderPac says that "Gender Stereotyping can be considered the root cause of discrimination based on gender expression, identity, or characteristics, and – in an expanded reading – discrimination based on sex and sexual orientation." *Ibid*, p. 3 of 90.

County, Maryland, where citizens are attempting to challenge a new gender identity law in a referendum. One of the primary complaints of those challenging the law is that it allows men to use a women's restroom when women and girls are in it.[6] The primary privacy concern is not what happens *after* a transsexual has surgical alteration, but what may happen if physical anatomy is not the criteria for restroom usage. With gender identity being totally subjective, who could challenge any male who says he wants to use a women's restroom? Women and girls should not have to risk having their privacy violated by anatomical males using women's rest rooms.

Given the extent of concern about rights of privacy in restroom usage, employers have a legitimate concern about how to deal with employees who wish to use a restroom designated for members of the opposite sex. The concern is most obvious when a transsexual employee retains his or her original anatomy, but is dressing as a member of the opposite sex. That is the situation that arose in a recent case from Utah, *Etsitty v. Utah Transit Authority*.[7] A man who had been diagnosed with Gender Identity Disorder and had been taking female hormones for nearly 4 years obtained employment as a substitute bus driver. As a bus driver, the employee had to use public restrooms along whatever route he drove. The employee dressed as a man when hired and during orientation, but notified his supervisor of his intent to present himself as a female soon after being hired. While presenting as a woman, the employee began using public restrooms designated for women. When the operations manager learned of the situation, she and a human resources generalist met with the man to inquire about his circumstances. The company ultimately terminated the employee because of concerns about his use of women's restrooms while retaining his male anatomy. The United States Court of Appeals for the Tenth Circuit upheld the termination as valid because gender identity is not covered by Title VII. If gender identity or expression were a protected category, however, the transportation company would have been forced to keep the man as a bus driver. It would have also been forced to face the risk of liability to the public for knowingly allowing a male employee to use public restrooms designated for women.

Conclusion

I strongly urge the committee to reject pressure to extend protected class status to gender identity and expression. The concepts are far too ambiguous to be susceptible to objective regulations that would protect the privacy rights of the public and other employees, or the religious liberty and rights of conscience of religious organizations, parachurch ministries, and commercial employers. "Transgender discrimination" is not an issue that should be the subject of federal legislation.

Thank you

---

[6] "Transgender Bill Facing New Round of Opposition," Courtney Mabeus, *The Examiner* (Jan. 17, 2008), available at http://www.examiner.com/a-1163314~Transgender_bill_facing_new_round_of_opposition.html.

[7] 502 F.3d 1215 (10th Cir. 2007).