

LEGAL LOOPHOLE: HOW LGBTQ NONDISCRIMINATION LAWS LEAVE OUT THE PARTNERS OF TRANSGENDER PEOPLE

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I. INTRODUCTION

Since the beginning of the Lesbian, Gay, Bisexual, Transgender,¹

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1. “Transgender” refers to a person “whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth.” NAT’L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER TERMINOLOGY 1 (2014), *available at* http://transequality.org/Resources/NCTE_TransTerminology.pdf.

For example, someone who is assigned male at birth but identifies as female would be

and Queer² (“LGBTQ”) Rights Movement, substantial resources have been dedicated to passing laws that ban discrimination on the basis of sexual orientation and/or gender identity or expression. However, there is a portion of the LGBTQ community being left unprotected by these nondiscrimination laws. Sexual orientation and gender identity or expression nondiscrimination laws currently do not afford legal remedies to a cisgender³ person (“Cisgender Partner”)⁴ who is terminated by their⁵ place of employment because of their romantic relationship with a transgender person. This is especially true for a Cisgender Person who is in a relationship with a transgender person of another gender⁶ when the couple considers themselves to be in a straight relationship.

Currently, when a transgender person faces adverse employment action because of their gender identity,⁷ they have cause to sue for discrimination under either their state or local nondiscrimination laws (where available) or under Title VII.⁸ Their suit would allege

referred to as a transgender woman, and someone who is assigned female at birth but identifies as male would be referred to as a transgender man. *See id.*

2. Though the term “queer” was traditionally considered to be pejorative and has not been universally accepted by those within the LGBTQ community, in recent years it has commonly been adopted as a label used by individuals to describe their sexual orientation. *See A Definition of Queer*, PFLAG, <http://community.pflag.org/abouttheq> (last visited Feb. 4, 2015). Queer is generally interpreted “as an umbrella term . . . [that] includes anyone who a) wants to identify as queer and b) who feels somehow outside of the societal norms in regards to gender or sexuality.” *Id.* The term queer also serves as a way for individuals, who do not identify as straight but also do not feel comfortable identifying their sexual orientation in the confines of other traditionally accepted terms (i.e., gay, lesbian, bisexual, etc.), to express their orientation in a way that rejects mainstream society’s need to understand sexual orientation in relation to heteronormative norms. *See id.* For a full discussion of this and other terms used in this Note, see *infra* Part II.

3. “Cisgender” refers to a person whose gender identity and expression matches those typically associated with their sex as assigned at birth. *Trans 101: Cisgender*, BASIC RIGHTS OR., <http://www.basicrights.org/uncategorized/trans-101-cisgender/> (last visited Feb. 4, 2015). For further discussion of the use of the word “cisgender,” see *infra* pp. 8-9.

4. For the purpose of making the language less cumbersome, “Cisgender Partner” will be used throughout this Note in lieu of “a cisgender person who is in a relationship with a transgender person.”

5. For a discussion of the use of gender neutral plural pronouns in place of gendered singular pronouns, see *infra* pp. 9-10.

6. For example, a cisgender woman in a relationship with a transgender man.

7. “Gender identity refers to ‘one’s sense of oneself as male, female, or transgender.’” AM. Psychological Ass’n, *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 AM. PSYCHOLOGIST 10, 11 (2012) (quoting AM. PSYCHOLOGICAL ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER INDIVIDUALS AND GENDER IDENTITY (1st ed. 2006)).

8. *See infra* Part IV.

discrimination on the basis of either sex or gender identity.⁹ However, in the case of the Cisgender Partner, because the termination is not on the basis of their own sex or gender identity, a claim of discrimination on the basis of sex or gender identity would most likely not succeed.¹⁰ Furthermore, were the discrimination to take place in a city or state with sexual orientation nondiscrimination laws, the Cisgender Partner of a heterosexual relationship would also most likely fail to make a successful claim of sexual orientation discrimination.¹¹

While there is no record in the courts of such discrimination, this is an issue that will foreseeably arise as transgender people increasingly live more openly as transgender.¹² Those outside of the LGBTQ community are just beginning to become aware of and acknowledge the challenges that face transgender people and those who are close to them.¹³ Transgender people often hide the fact that they are transgender¹⁴ and in many cases will move, change employers, and/or cut off contact with people who knew them as their sex as assigned at birth in order to facilitate their gender transition.¹⁵

9. See *infra* Part IV.

10. See *infra* Part IV.

11. See *infra* Part IV.

12. See Jacob Bernstein, *In Their Own Terms: The Growing Transgender Presence in Pop Culture*, N.Y. TIMES (Mar. 12, 2014), <http://www.nytimes.com/2014/03/13/fashion/the-growing-transgender-presence-in-pop-culture.html>.

13. See *id.*

14. This is often referred to in the transgender community as being “stealth.” *Trans 101: Stealth*, TRANS CHRISTIANS, <http://www.transchristians.org/trans-101/trans-101-stealth> (last visited Feb. 4, 2015). Being stealth means that, after their transition, a transgender person: lives both publicly and privately as if they are a cisgender man or woman; is out to very few people, if any, about their status as a transgender person; has cut off most or all contact with anyone who knew them in their gender as assigned at birth; and typically “passes” as their preferred gender. See *id.* “Passing” is a term used to describe when a transgender person who has transitioned is “seen by others as belonging to the gender with which they personally identify.” Justin Adkins, *A Day in a Queer Life in the U.S.: Just One of the Guys*, HUFFINGTON POST (May 21, 2013, 5:12 AM), http://www.huffingtonpost.com/justin-adkins/a-day-in-my-queer-life_b_2832978.html. Generally, in order to live stealth stealthily, a transgender person must also have legally changed their name and gender marker on some or all of their identity documents. While there is no specific data identifying the percentage of the transgender population that is living stealth, a recent national survey of transgender people conducted by the National LGBTQ Task Force (formerly the National Gay and Lesbian Task Force) and the National Center for Transgender Equality, *Injustice at Every Turn*, found that approximately 41 percent of transgender people are “generally not out” about their gender identity. NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L LGBTQ TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 28 (2011) [hereinafter TASK FORCE], available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf. “Large majorities [of transgender people] attempted to avoid discrimination by hiding their gender or gender transition (71%) or delaying their gender transition (57%).” *Id.* at 3.

15. See Monica Roberts, *Stealth Was a Mistake*, FEMINISTE (Sept. 8, 2009),

There are many reasons why a transgender person would conceal the fact that they are transgender, including high incidence of violence,¹⁶ discrimination,¹⁷ and potential social ostracization.¹⁸ Similarly, some Cisgender Partners may not publicly discuss or reveal the fact that their partner is transgender out of fear of negative repercussions.¹⁹ In some cases, Cisgender Partners experience residual discrimination because of that relationship.²⁰

How and why transgender people and their cisgender partners conceal the fact that one of them is transgender mirrors how individuals in interracial relationships had to conceal the race of their partner prior to *Loving v. Virginia*²¹ out of fear of violence, discrimination, or even criminal sanctions.²² Despite *Loving*, interracial couples still experience violence aimed at the racial composition of their relationship.²³

While most Cisgender Partners may not currently be comfortable publicly discussing the discrimination they face because of their relationship, it is a foreseeable circumstance that they may—and do—experience such instances of discrimination.²⁴ In light of that likelihood, it is important that protections be put in place to help deter

<http://www.feministe.us/blog/archives/2009/09/08/stealth-was-a-mistake/>.

16. See NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE VIOLENCE IN 2012 19 (2013), available at http://www.avp.org/storage/documents/ncavp_2012_hvreport_final.pdf. Transgender women made up 53.8 percent of total LGBTQ victims of homicide in 2012. *Id.* at 21. In 2012, transgender people experienced violence at the hands of the police at a rate 3.32 times higher than that experienced by cisgender survivors and victims. *Id.* at 19.

17. See generally TASK FORCE, *supra* note 14. “Forty-seven percent (47%) said they had experienced an adverse job outcome, such as being fired, not hired or denied a promotion because of being transgender or gender non-conforming.” *Id.* at 3.

18. See *id.* at 10.

19. See Andy Marra, *I Am Loveworthy: How a Transgender Woman Found Love*, HUFFINGTON POST (Aug. 2, 2014, 5:59 AM), http://www.huffingtonpost.com/andy-marra/i-am-loveworthy-how-a-transgender-woman-found-love_b_5412981.html.

20. See CTR. FOR AM. PROGRESS & AFSCME, GAY AND TRANSGENDER DISCRIMINATION IN THE PUBLIC SECTOR: WHY IT'S A PROBLEM FOR STATE AND LOCAL GOVERNMENTS, EMPLOYEES, AND TAXPAYERS 12-17 (2012), available at <http://cdn.americanprogress.org/wp-content/uploads/2012/08/LGBTPublicSectorReport1.pdf>.

21. *Loving v. Virginia*, 388 U.S. 1 (1967).

22. See *id.* at 11-13; RL Barnes, *The History of Interracial Marriage: Colonial America to Loving v. Virginia (1967)*, US HISTORY SCENE (Dec. 12, 2011), <http://www.ushistoryscene.com/uncategorized/the-history-of-interracial-marriage-colonial-america-to-loving-v-virginia-1967/>.

23. For a discussion of the continued violence facing those in interracial relationships, see Barbara Perry & Mike Sutton, *Policing the Colour Line: Violence Against Those in Intimate Interracial Relationships*, 15 RACE, GENDER & CLASS 240 (2008).

24. See *supra* notes 15-22 and accompanying text.

the discrimination and to provide a right of action should the discrimination occur.

Pointing out this discrimination is not to devalue, minimize, or detract from the extensive discrimination faced by transgender people, nor to place blame for any residual discrimination experienced by individuals with whom transgender people enter into relationships. This Note is intended to provide remedies for potential instances of discrimination in the hopes that identifying the discrimination will help to improve efforts to address and eradicate it, and, where the eradication efforts are not successful, provide remedies for those who are harmed by this discrimination.

This analysis is also designed to make the concept of employment discrimination clearer for segments of the community who do not typically experience or do not view themselves as experiencing adverse employment action as a result of a certain identity characteristic. Calling attention to the fact that gender identity discrimination can directly affect more mainstream gender conforming cisgender people makes it more likely that the problem will be addressed.²⁵ While this Note only explores discrimination against Cisgender Partners, these theories can be applied to a variety of relationship categories, including relationships between family members, close friends, and business partners. These theories can also be applied to situations in which individuals are discriminated against on the basis of their partner's membership in other identity categories.²⁶

This Note also seeks to expand the exploration of the impacts of discrimination on the basis of gender identity beyond the current confines of mainstream analysis. Discrimination on the basis of gender identity is on its own a severe problem, but the impacts of gender identity discrimination become intensified when an individual is also being discriminated against because of other parts of their identity.²⁷ Expanding the understanding of the many possible manifestations of gender identity discrimination can and should lead to more transgender people being able to find relief for the discrimination they face.

25. See Gil Laroya, *Why Don't People Care When It Doesn't Affect Them*, HUFFINGTON POST (Sept. 26, 2014, 5:59 AM), http://www.huffingtonpost.com/gil-laroya/why-dont-people-care-when_b_5888686.html.

26. For example, this analysis could be applied to the following scenarios: when an individual is discriminated against for being in an interracial marriage, when an individual is discriminated against because of their partner's unshared religious affiliation, or when an individual is discriminated against because of their partner's disability.

27. Transgender people of color experience discrimination and the effects of discrimination at higher rates than white transgender people. See generally TASK FORCE, *supra* note 14. For example, one-fifth of Latino transgender people reported being physically assaulted at work because of their gender identity, four times the rate of physical assault in the workplace experienced by white transgender people. *Id.* at 58.

This analysis can also be expanded beyond the context of employment discrimination and used to explore gender identity discrimination in other key areas. Employment discrimination offers a unique opportunity in that the direct effects of discrimination are felt solely by one partner in a relationship.²⁸ Also, in the vast majority of employment situations, an employee's relationship status and who they are in a relationship with has no bearing on the employee's ability to carry out the duties of their employment.²⁹

This Note seeks to attain the aforementioned goals by finding a remedy within current existing laws for Cisgender Partners who are discriminated against by their employers because of their partner's transgender status, and suggests improvements to current laws that will help provide a direct right of action to these victims of discrimination.

Part II outlines and defines the language that will be used throughout the Note.

28. This is in contrast to many of the other contexts for which discrimination laws are put in place. For example, in the context of housing, if the Partner and the transgender person are living together and are discriminated against by a landlord, realtor, or other executor of the sale or rental because of the presence of the transgender person, the discrimination is a direct result of the fact that the transgender person is transgender. While the Cisgender Partner may feel the effects of the discrimination, and the seller or renter of the property may in part be discriminating against the Cisgender Partner because of their association with the transgender person, in actuality the discrimination is being directed at the transgender person's gender identity, not that of the Partner. Even if the Partner experiences residual discrimination, the circumstances will make it very difficult for them to litigate a discrimination case.

In a situation where the Cisgender Partner lives alone, but is in a relationship with a transgender person, the transgender person will presumably be interacting with the Cisgender Partner's home. The discrimination may in part be a result of the Cisgender Partner's relationship with the transgender person, but it is also aimed at the transgender person directly. The discrimination is the direct result of the actual or implied presence of the transgender person in the Cisgender Partner's home.

Discrimination in public accommodations is similar to housing discrimination. Typically, the Cisgender Partner would be discriminated against in the context of public accommodations because they are with the transgender person. As in the housing context, while the Cisgender Partner may feel the adverse effects of the discrimination, the discrimination is ultimately targeted directly at the transgender person.

Because of the complications involved in discrimination against the Cisgender Partner in housing, public accommodations, and other contexts, employment discrimination makes the best test case for establishing a right of action against persons or entities who discriminate against the Cisgender Partner because of their relationship with a transgender person.

29. The only exception would be in a situation where the Cisgender Partner's relationship status is, or is related to, a bona fide occupational qualification ("BFOQ"). Nondiscrimination statutes typically include exceptions for BFOQs, commonly defined as a qualification for employment that is "reasonably necessary to the normal operation of that particular business or enterprise." Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e-2(e)(1) (2012).

Part III outlines sexual orientation and gender identity or expression nondiscrimination laws in the United States. It begins by outlining state and local nondiscrimination laws that provide protection against discrimination on the basis of sexual orientation, gender identity, and/or gender expression. Then it moves to an assessment of the protections provided for transgender people in federal nondiscrimination laws.

Part IV introduces the legal loophole that prevents Cisgender Partners of transgender people, who experience employment discrimination because they are in a relationship with a transgender person, from being provided with any legal protections from said discrimination under current nondiscrimination laws. It explores how existing case law that extends race discrimination bans to individuals who are discriminated against because they are in an interracial relationship could be applied to Cisgender Partners. It then looks to the possibility of providing nondiscrimination coverage to Cisgender Partners under the “perceived sexual orientation” component included explicitly or implicitly in bans on discrimination based on sexual orientation.

Finally, Part V of this Note suggests alterations to sexual orientation and gender identity or expression nondiscrimination laws that, going forward, could provide adequate protections for individuals discriminated against because of their partner’s gender identity.

II. BACKGROUND INFORMATION ON LANGUAGE CHOICES AND THE DISTINCTION BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY

While many view it as arbitrary, the language used to discuss transgender people both as individuals and as a community is incredibly important.³⁰ For many transgender people, the language they use to describe themselves provides them with the opportunity to assert and express their gender identity in a way that feels good to them.³¹ It is important that a transgender person’s preference for certain pronouns, identity categories, their chosen name, and other relevant language choices be respected by those who are speaking to or about a transgender person or the transgender community, in the same way that language is used to respect the identity of cisgender people.³² It is important to note that many do not choose to respect the language transgender people use to describe themselves.³³ That can

30. Joanne Herman, *Transgender or Transgendered?*, HUFFINGTON POST (May 25, 2011, 3:45 PM), http://www.huffingtonpost.com/joanne-herman/transgender-or-transgende_b_492922.html.

31. *See id.*

32. *See id.*

33. This issue most recently came to the forefront of public consciousness when

lead to transgender people further feeling ostracized and disrespected because of their gender identity,³⁴ and arguably serves as a type of discrimination. In light of the extreme importance placed on language use within and about the transgender community, this section has been created to establish and clarify terms related to transgender people being used in this Note.

The language used to discuss transgender people and their experiences varies widely.³⁵ The most common modern day usage of the term transgender is as an umbrella term that encompasses all gender nonconforming individuals, including those who identify as transgender, genderqueer,³⁶ or otherwise outside of the socially constructed sex/gender binary.³⁷ As this Note is focused on the broad applications of discrimination based upon gender identity and expression, I have chosen to use the term transgender as an umbrella

Chelsea Manning, formerly known as Bradley Manning, publicly came out as being a transgender woman. Aaron Blake & Julie Tate, *Bradley Manning Comes Out As Transgender: 'I am a Female'*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/world/national-security/bradley-manning-comes-out-as-transgendered-i-am-a-female/2013/08/22/0ae67750-0b25-11e3-8974-f97ab3b3c677_story.html. Chelsea Manning, a former Army Private who orchestrated the largest leak of classified documents in American history to Wikileaks and was subsequently sentenced to thirty-five years in prison in August 2013, set off a media storm when she announced the day after her sentencing that she was going to transition from male-to-female. See *id.* Media outlets and newspapers noticeably struggled with what name and pronouns to use in reference to Chelsea, resulting in a series of often contradictory news articles discussing the relevant newspaper's policy surrounding name and pronoun use when referring to transgender people. See, e.g., Irin Carmon, *Who Is Still Calling Chelsea Manning 'He?'*, MSNBC (Sept. 25, 2013, 5:40 AM), <http://www.msnbc.com/msnbc/who-still-calling-chelsea-manning-he>; Emanuella Grinberg, *Chelsea or Bradley Manning: Addressing Transgender People*, CNN (Aug. 25, 2013, 8:29 AM), <http://www.cnn.com/2013/08/24/living/manning-transgender-etiquette/>; Alyssa Rosenberg, *The New York Times and The Associated Press Will Refer to Chelsea Manning by Her Preferred Pronouns*, THINKPROGRESS (Aug. 27, 2013, 1:08 PM), <http://thinkprogress.org/alyssa/2013/08/27/2534141/york-times-chelsea-manning/>.

34. See Grinberg, *supra* note 33.

35. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS: MODEL LANGUAGE, COMMENTARY & RESOURCES 1 (2014), *available at* http://www.glsen.org/sites/default/files/Trans_ModelPolicy_2014.pdf.

36. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 1, at 1 ("Genderqueer . . . [is] used by some individuals who identify as neither entirely male nor entirely female.").

37. "Socially constructed sex/gender binary" is used to describe the common division of sex and gender into two separate and distinct categories. See Michelle Dietert & Dianne Dentice, *Growing Up Trans: Socialization and the Gender Binary*, 9 J. GLBT FAMILY STUD. 24, 29-30 (2012). These categories are believed to have been constructed by society in order to "make sense of the world and to contribute sociologically to our understanding of human experiences." *Id.* at 29. However, there are numerous examples of how defining sex and gender in binary terms is inaccurate and misrepresentative of the various sexes and gender identities that exist throughout our society. See *id.* at 29-30.

term, while recognizing that the experiences of those who fall under the umbrella are vastly different and often contradictory.

Another term I use in this Note is “cisgender,” which refers to an individual whose gender identity matches the sex they were assigned at birth.³⁸ Some feel that this term is harmful because it feeds into the gender binary, often with harmful results, and serves to undermine efforts to celebrate the fluidity of gender.³⁹ However, I have chosen to use this term because it provides contrast between transgender people and cisgender people without assigning negativity to any one category or placing transgender people in the category of “other.”⁴⁰ For the purposes of this Note it is necessary to contrast between cisgender and transgender people in order to carve out a category of individuals who are not covered by our current nondiscrimination laws.

Pronouns are a key component of how transgender people assert their gender identity.⁴¹ While some transgender people adopt the traditional binarical he/him/his or she/her/hers, others have developed and utilize gender neutral pronouns, such as ze/zir/zhim.⁴² They/them/their are also used as a gender neutral alternative, although some are critical of the use of they/them/their because they, them, and their are technically plural pronouns, and therefore grammatically incorrect when used in reference to an individual.⁴³ I have chosen to use they/them/their throughout this Note, unless the preferred gender pronoun of an individual is known, as adhering to the binary would be inappropriate and I agree with the school of thought that fears embracing the use of ze/zir/zhim will only serve to create a gender trinary, rather than deconstruct the categorical system of gender classifications.⁴⁴

When discussing sexual orientation, I have chosen to utilize the terms “straight” and “queer” in place of “heterosexual” and “homosexual.” The term homosexual has roots in a clinical and scientific understanding of same-sex sexual attraction that associated those who have non-straight sexualities with disease and psychological disorders, and the queer community has subsequently

38. See BASIC RIGHTS OR., *supra* note 3.

39. See Elizabeth Hungerford, *A Feminist Critique of “Cisgender,”* LIBERATION COLLECTION (June 8, 2012), <http://liberationcollective.wordpress.com/2012/06/08/a-feminist-critique-of-cisgender/>.

40. See BASIC RIGHTS OR., *supra* note 3.

41. See Jennifer Conlin, *The Freedom to Choose Your Pronoun*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html>.

42. TAM SANGER, TRANS PEOPLE’S PARTNERSHIPS: TOWARDS AN ETHICS OF INTIMACY 17 (2010).

43. *Id.*

44. *Id.*

moved away from the use of “homosexual.”⁴⁵ The term heterosexual was developed as the normative contrast to homosexual, and to use it is to reinforce the socialized concept that opposite-sex attraction is the norm and all other forms of attraction are other.⁴⁶

As the understanding of nonheteronormative sexualities has expanded to include a more fluid conception of sexuality, so has the language used to describe those sexualities.⁴⁷ Ways to describe different conceptions of sexuality are continuously being created and added to the “alphabet soup” of sexual categories, resulting in a list far too cumbersome to be used understandably as a consistent term or phrase in a written work.⁴⁸ Although many who do not identify as straight do not embrace the term queer,⁴⁹ I have chosen to use queer as an umbrella term in order to account for non-straight sexualities without being exclusionary to certain categories in the way that “LGBTQ” highlights some members of the queer community and ignores the presence of others.⁵⁰

It is important to note that sexual orientation and gender identity are two separate and distinct identities.⁵¹ Just as cisgender people identify as straight, bisexual, lesbian, gay, or any other sexual orientation, transgender people identify as straight, bisexual, lesbian, gay, etc.⁵² Therefore, there are transgender women who identify as lesbian, bisexual, queer, asexual, and a variety of other sexual orientations, just as there are transgender men who identify as gay, bisexual, queer, asexual, etc.⁵³

45. See GLAAD *Media Reference Guide—Terms to Avoid*, GLAAD, <http://www.glaad.org/reference/offensive> (last visited Feb. 4, 2015) (“Because of the clinical history of the word ‘homosexual,’ it is aggressively used by anti-gay extremists to suggest that gay people are somehow diseased or psychologically/emotionally disordered—notions discredited by the American Psychological Association and the American Psychiatric Association in the 1970s.”).

46. See Thomas Rogers, *The Invention of the Heterosexual*, SALON (Jan. 22, 2012, 2:00 PM), http://www.salon.com/2012/01/22/the_invention_of_the_heterosexual/.

47. See Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES (Jan. 9, 2013), <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html>.

48. Chris Tina Bruce, *‘LGBT’ Transforming into Alphabet Soup?*, HUFFINGTON POST (Feb. 21, 2012, 5:12 AM), http://www.huffingtonpost.com/chris-tina-bruce/lgbt-acronym_b_1159004.html.

49. See Daniel Browne, *The Q Word*, VADA MAG. (Mar. 15, 2013), <http://vadamagazine.com/15/03/2013/opinions/the-q-word>.

50. See Richard Marceau, *We Still Forget the “T” in “LGBT”*, HUFFINGTON POST (Oct. 12, 2013, 5:12 AM), http://www.huffingtonpost.ca/richard-marceau/bill-c-279-transgender_b_3743196.html.

51. AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 2 (2d ed. 2011), available at <https://www.apa.org/topics/lgbt/transgender.pdf>.

52. *Id.*

53. See *id.*

A transgender person's sexual orientation pre-transition also does not necessarily correlate with their sexual orientation post-transition.⁵⁴ Some transgender people who identify as same-sex oriented prior to transition may identify as straight after their transition, such as a transgender man who identified as a lesbian prior to transition but post-transition identifies as straight, or they may continue to identify as same-sex oriented after their transition.⁵⁵

Sexual orientation identities are equally diverse for the partners of transgender people. Some partners who are in a relationship with a transgender person prior to and during their transition will alter the label they use to describe their sexual orientation to reflect their partner's transition, while others will not change the label they use.⁵⁶

III. THE CURRENT SITUATION REGARDING SEXUAL ORIENTATION AND GENDER IDENTITY NONDISCRIMINATION LAWS

Nondiscrimination laws have been enacted at the federal, state, and local level to prevent discrimination against a wide variety of identity categories in a wide variety of contexts, including housing,⁵⁷ voting,⁵⁸ employment,⁵⁹ education,⁶⁰ and public accommodations.⁶¹

54. *Id.*

55. *See id.*

56. *See id.*

57. *See, e.g.*, Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-19 (2012)) (federal law prohibiting discrimination in the sale or rental of housing); New York City Human Rights Law, N.Y.C. ADMIN. CODE §§ 8-201 to 8-208 (2010) (New York City law preventing discrimination in the sale or rental of housing); Texas Fair Housing Act, TEX. PROP. CODE ANN. § 301 (West 2007) (Texas statute prohibiting discrimination in the sale or rental of housing).

58. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973 to 1973bb-1 (2012)) (federal legislation that prohibits discrimination in voting); Voting Rights Act of 2001, CAL. ELEC. CODE §§ 14025-32 (West 2003) (California expansion of the federal Voting Rights Act of 1965 that makes it easier for disenfranchised voters to prove discrimination).

59. *See, e.g.*, Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 255 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2012)) (federal law prohibiting employment discrimination based on "race, color, religion, sex, or national origin"); Alaska Human Rights Law, ALASKA STAT. § 18.80.220 (1965) (Alaska law prohibiting discrimination that expands the enumerated categories, including the addition of physical or mental disability, marital status, age, and parenthood); Chicago Human Rights Ordinance, CHI., ILL. CODE §§ 2-160-010 to 2-160-030 (2012) (Chicago ordinance prohibiting employment discrimination on the basis of various enumerated categories, including military discharge status, ancestry, and credit history).

60. *See, e.g.*, Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-88 (2012)) (federal law prohibiting discrimination on the basis of sex in education programs or activities); Pennsylvania Fair Educational Opportunities Act, 24 PA. CONS. STAT. § 5001-10 (1961) (Pennsylvania law providing for equal opportunities in education "regardless of . . . race, religion, color, ancestry, national origin, sex, handicap, or disability").

61. *See, e.g.*, OHIO REV. CODE ANN. § 4112.02(G) (West 1969) (Ohio law prohibiting

Some of these nondiscrimination laws have been enacted in response to known instances of discrimination,⁶² while others have been enacted in an effort to discourage future instances of discrimination and provide legal recourse should discrimination occur.⁶³ The classes protected by these laws vary, but commonly included enumerated categories are race, sex, national origin, and religion.⁶⁴ Depending upon the context of the law and the needs of the community, additional categories may be included, such as familial status, disability, military status, and source of income.⁶⁵ Modern nondiscrimination laws have their advent in the Fifth and Fourteenth Amendments to the United States Constitution,⁶⁶ but it was not until the Civil Rights Movement in the 1950's and 1960's that federal, state, and local governments began actively passing specific nondiscrimination laws with delineated categories.⁶⁷

A. State and Local Sexual Orientation, Gender Identity, and/or Gender Expression Nondiscrimination Laws

Similarly, it was not until the LGBTQ Rights Movement entered the mainstream after the Stonewall Rebellion in 1969⁶⁸ that

discrimination in places of public accommodation because on the basis of certain enumerated characteristics, including race, sex, disability, and age).

62. See, e.g., *NAACP History: Voting Rights Act*, NAACP, <http://www.naacp.org/pages/naacp-history-voting-rights-act> (last visited Feb. 4, 2015) (discussing the passage of the Voting Rights Act as an effort to overcome restrictions on voting put in place after the Civil War to deter minorities from voting).

63. JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES: STATE NONDISCRIMINATION POLICIES FILL THE VOID BUT FEDERAL PROTECTIONS ARE STILL NEEDED 2 (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

64. See FEDERAL ANTI-DISCRIMINATION LAWS, IND. UNIV. OFFICE OF AFFIRMATIVE ACTION (2007), available at <http://www.indiana.edu/~affirm/pdf/Education&Training/FederalLaws.pdf>.

65. See *id.*; see also Marcia Stewart, *Housing Discrimination Prohibited by State and Local Law*, NOLO, <http://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter5-3.html> (last visited Feb. 4, 2015).

66. *Employment Discrimination: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/employment_discrimination (last visited Feb. 4, 2015).

67. *NAACP Legal History*, NAACP, <http://www.naacp.org/pages/naacp-legal-history> (last visited Oct. 26, 2014).

68. Garance Franke-Ruta, *An Amazing 1969 Account of the Stonewall Uprising*, THE ATLANTIC (Jan. 24, 2013, 11:32 AM), <http://www.theatlantic.com/politics/archive/2013/01/an-amazing-1969-account-of-the-stonewall-uprising/272467/>. As a result of a police raid of the Stonewall Inn, a gay bar in New York City, queer people protested and rioted for six days in the street outside of the Stonewall Inn. *Id.* This event thrust the LGBTQ Movement into the national spotlight and galvanized members of the queer community to be more open about their push for equality. See *id.* The Stonewall Rebellion is particularly poignant because

nondiscrimination laws began to include sexual orientation, gender identity, and/or gender expression as protected categories.⁶⁹ Today, sexual orientation and gender identity nondiscrimination laws are typically discussed in tandem with one another; however, sexual orientation and gender identity laws have been, and continue to be, passed independently, and sometimes to the exclusion of one another. In 1972, East Lansing, Michigan passed the first law in the country that provided protections against discrimination based upon sexual orientation.⁷⁰ The District of Columbia passed a ban on sexual orientation discrimination in 1977,⁷¹ and in 1982, Wisconsin became the first state to ban employment discrimination on the basis of sexual orientation.⁷²

Many states followed suit and passed their own laws banning discrimination based upon sexual orientation during the intervening years, but it took eleven years after Wisconsin passed its sexual orientation nondiscrimination law for a state—Minnesota—to pass a law banning employment discrimination on the basis of both sexual orientation and gender identity or expression.⁷³ Minnesota's nondiscrimination law also marked the first time that gender identity and gender expression were included as enumerated characteristics in a statewide nondiscrimination law.⁷⁴

To date, a total of four states have laws banning discrimination on the basis of sexual orientation in public and private employment,⁷⁵ and seventeen states and the District of Columbia have banned discrimination on the basis of sexual orientation and gender identity or expression in public and private employment.⁷⁶ Over 150 local

transgender people were at the forefront of the riots and Stonewall served as one of the first very public unifications in activism between those experiencing discrimination because of their sexual orientation and those experiencing discrimination because of their gender identity or gender expression. *See id.*

69. *See Stonewall at 40 Resource Kit*, GLAAD, <http://www.glaad.org/publications/stonewallkit> (last visited Feb. 4, 2015).

70. Lawrence Cosentino, *A Gay Rights First*, CITY PULSE (Mar. 7, 2012), <http://www.lansingcitypulse.com/lansing/article-7082-a-gay-rights-first.html> (“[T]he [East Lansing City] Council voted to ‘employ the best applicant for each vacancy on the basis of his qualifications for the job and without regard to race, color, creed, national origin, sex or homosexuality.’”)

71. *See State Nondiscrimination Laws in the U.S.*, NAT’L LGBTQ TASK FORCE, http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf (last updated June 21, 2013).

72. *See id.*

73. *See id.*

74. *See id.*; *see also Non-Discrimination Laws: State by State Information–Map*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Feb. 4, 2015) [hereinafter ACLU].

75. NAT’L LGBTQ TASK FORCE, *supra* note 71; ACLU, *supra* note 74. For a list of the state statutes, *see infra* app. A.

76. NAT’L LGBTQ TASK FORCE, *supra* note 71. For a list of the state statutes, *see*

municipalities also have laws prohibiting discrimination on the basis of sexual orientation and gender identity or gender expression.⁷⁷

The language used in the nondiscrimination laws is typically similar and tends to follow the language used in Title VII of the Civil Rights Act of 1964.⁷⁸ New Jersey's Law Against Discrimination is an example of common language:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: a. For an employer, because of the . . . sexual orientation, . . . sex, [or] gender identity or expression . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; . . . provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise.⁷⁹

These sexual orientation and gender identity or gender expression nondiscrimination laws have been passed through both ballot initiatives⁸⁰ and legislation.⁸¹ A majority of the states with nondiscrimination protections for both sexual orientation and gender identity or gender expression implemented the protections for sexual orientation first, and later put in place protections for gender identity and gender expression.⁸²

B. The Federal Employment Non-Discrimination Act

The Equality Act of 1974 was the first piece of proposed legislation

infra app. A.

77. NAT'L LGBTQ TASK FORCE, *supra* note 71.

78. *See infra* app. A.

79. Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (West 2010).

80. *See, e.g.*, Press Release, Nat'l LGBTQ Task Force, *Big Victory for Fairness in Bowling Green!* (Nov. 22, 2010), <http://www.thetaskforce.org/big-victory-for-fairness-in-bowling-green/>.

81. Andrew Cray, *Breaking: Delaware Legislature Passes Transgender Nondiscrimination Act*, THINKPROGRESS (June 19, 2013, 8:30 PM), <http://thinkprogress.org/lgbt/2013/06/19/2184881/breaking-delaware-legislature-passes-transgender-nondiscrimination-act/>.

82. NAT'L LGBTQ TASK FORCE, *supra* note 71. With the exception of Delaware—which passed laws protecting individuals from discrimination on the basis of sexual orientation in 2009 and gender identity and/or gender expression in 2013—the states which passed protections for sexual orientation alone took no less than eleven years to pass additional protections for gender identity/expression, with many taking significantly longer. *See id.*

at the federal level that sought to ban discrimination against individuals on the basis of sexual orientation.⁸³ The bill was written to provide protections in the areas of housing, public accommodations, and employment, but did not include protections against discrimination on the basis of gender identity.⁸⁴ It died in committee in the House and was never introduced in the Senate, and attempts to introduce similar bills through the end of the decade were unsuccessful.⁸⁵

The next anti-discrimination measure to be introduced was the Employment Non-Discrimination Act (“ENDA”).⁸⁶ ENDA was first introduced in 1994, and since then, a version has been reintroduced in every congressional session except the 109th Congress.⁸⁷ Unlike the Equality Act of 1974, ENDA only provides protection against discrimination in the context of employment.⁸⁸ The first version of ENDA only provided protections against discrimination on the basis of sexual orientation; gender identity was added to ENDA in 2007 and both sexual orientation and gender identity are included in the current iterations of the bill.⁸⁹

ENDA’s current language includes a clause that prohibits discrimination “taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.”⁹⁰ If signed into law, this clause would provide protection for Cisgender Partners who are discriminated against due to their partner’s gender identity. However, it is unlikely that ENDA will pass during the remainder of this congressional session. While the Senate passed ENDA on November 7, 2013,⁹¹ to date the Republican controlled House of Representatives

83. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>. The Equality Act also sought to ban discrimination against unmarried persons and women. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* Unlike the Equality Act of 1974’s inclusion of women and unmarried persons as protected categories, ENDA only provides protections for sexual orientation and gender identity. *See id.*

90. Employment Non-Discrimination Act of 2013, H.R. 1755, S. 815, 113th Cong. § 4(e) (2013).

91. Ed O’Keefe, *Senate Votes to Ban Discrimination Against Gay and Transgender Workers*, WASH. POST (Nov. 7, 2013), http://www.washingtonpost.com/politics/senate-set-to-approve-gay-rights-bill/2013/11/07/05717e4a-47c1-11e3-a196-3544a03c2351_story.html.

has neglected to bring ENDA to a vote.⁹² It is unlikely that they will do so during this legislative session, and even less likely when Republicans gain control of both the House and the Senate in the 114th Congress.⁹³

Even if ENDA does pass and is signed into law, it will still be necessary for current and future gender identity nondiscrimination laws to be passed by state and local governments in order to provide protection for more individuals than would be protected by the federal legislation. ENDA as it is currently written contains a broad religious exemption that entirely exempts all religious businesses and institutions.⁹⁴ Many of the existing state and local nondiscrimination laws either do not have a religious exemption or have a more narrow religious exemption.⁹⁵ As such, the laws need only be amended to provide protections for individuals discriminated against due to the gender identity of another with whom the individual associates in order to ensure that the partners, family members, and friends of transgender people are protected under all gender identity nondiscrimination laws.

C. Protections for Transgender People Provided by Bans on Sex Discrimination

In the absence of explicit statutory protections for sexual orientation, the courts have been reluctant to find protections for sexual orientation in current federal nondiscrimination laws.⁹⁶ However, even where there are no laws explicitly prohibiting discrimination on the basis of gender identity or expression, courts have used laws that prohibit discrimination on the basis of gender or sex to provide protection to transgender people.⁹⁷

92. Sunnive Brydum, *Out Rep. Jared Polis Trims ENDA's Religious Exemption*, ADVOCATE (July 24, 2014, 4:11 PM), <http://www.advocate.com/enda/2014/07/24/out-rep-jared-polis-trims-endas-religious-exemption>. Republican Speaker of the House John Boehner continues to refuse to bring ENDA to a vote in the House of Representatives. *Id.* In light of the U.S. Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), in July of 2014 eight major national LGBTQ policy and legal organizations withdrew their support for ENDA due to the legislation's overbroad religious exemptions. Brydum, *supra*. Given the withdrawal of support by these organizations, and Speaker Boehner's refusal to consider ENDA, it is unlikely that the House of Representative's leadership will permit the bill to be considered during this session. *See id.*

93. *Id.*

94. *See* Employment Non-Discrimination Act § 6.

95. *See, e.g., infra* app. A.

96. *See, e.g.,* Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.").

97. *E.g.,* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that

Title VII of the Civil Rights Act of 1964 (“Title VII”) has been established as the most effective and viable route for transgender individuals seeking federal protection from employment discrimination.⁹⁸ Initially, the courts were reluctant to use Title VII to provide protections to transgender people who were discriminated against because they were transgender.⁹⁹ However, in 1989, twenty-five years after the passage of Title VII, *Price Waterhouse v. Hopkins* opened the door to the possible inclusion of transgender people under the protections of Title VII.¹⁰⁰ *Price Waterhouse* was one of the first examples of the Supreme Court expanding the enforcement of Title VII beyond the traditional interpretation of sex discrimination.¹⁰¹ Prior to *Price Waterhouse*, in order for there to be a showing of discrimination, courts typically required that the employer blatantly state that the adverse employment action was being taken because the

discrimination against a transgender person because of their gender non-conformity is sex discrimination under the Equal Protection Clause).

98. See Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)). Title VII reads, in part:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex, . . . or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex

§ 2000e-2. Initially introduced in Congress to provide protections “on the basis of race, color, religion, or national origin,” Representative Howard W. Smith of Virginia, a staunch opponent of civil rights legislation, added “sex” to the enumerated categories in Title VII in an effort to both mock the bill itself and discourage others from passing the legislation. Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014, 12:54 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/the_50th_anniversary_of_title_vii_of_the_civil_rights_act_and_the_southern.html. Despite his efforts, the bill passed in the House of Representatives by a vote of 168 to 133. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 442 (1966).

99. See, e.g., *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975).

100. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

101. See *id.* The “traditional interpretation” by the EEOC and the courts of sex discrimination within Title VII was centered around the employer’s deliberate division of men and women into two distinct categories with the intention of treating those two categories differently. See generally Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1313-14 (2012). This interpretation effectively barred cases where an individual was discriminated against because of certain sex or gender based characteristics that differed from those that women were typically expected to embody, i.e., sex stereotyping. *Id.* It also made it more unlikely that causes of action based upon discrimination aimed directly at an individual, as opposed to discrimination aimed at one of the sexes as a whole, would succeed. *Id.*

employee was a woman.¹⁰²

In *Price Waterhouse*, a female employee was passed over for a partnership at her accounting firm because the other partners viewed her as being too masculine.¹⁰³ When reviewing her as a candidate for the partnership, the partners stated that she was too aggressive and that she should “take a course in a charm school.”¹⁰⁴ The Court held the partners’ statements to be discrimination on the basis of sex stereotypes and therefore actionable as sex discrimination.¹⁰⁵

Due to *Price Waterhouse*’s expansion of sex discrimination to include sex stereotyping, transgender people have been able to make discrimination claims under Title VII. When someone is discriminated against for being transgender, it is generally because they are not conforming to the expected behaviors of their sex as assigned at birth.¹⁰⁶ Courts have found that this amounts to the employer discriminating against a transgender person because they do not conform to sex-stereotypes, thus providing the transgender employee with an actionable claim of employment discrimination under Title VII.¹⁰⁷

The United States Equal Employment Opportunity

102. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969).

103. *Price Waterhouse*, 490 U.S. at 235-56.

104. *Id.* at 235.

105. *Id.* at 232-37, 258 (“We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.”).

106. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). For example, a transgender woman who presents herself as feminine and engages in traditionally feminine activities is going against the behavioral expectations for men.

107. See, e.g., *id.*; *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653 (S.D. Tex. 2008). For a more extensive discussion of transgender people and sex stereotyping under Title VII see Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007). Individuals who experience sexual harassment because of their sexual orientation have also been able to successfully bring charges of sex discrimination under Title VII, see, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), as have individuals who have been discriminated against because of their sexual orientation when the discrimination is a result of the individual not conforming to sex stereotypes. See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) (“Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what ‘real’ men do or don’t do.”).

Commission¹⁰⁸ (“EEOC”) affirmed the interpretation of Title VII as providing protections from employment discrimination for transgender people through the release of their decision in *Macy v. Holder* in 2012.¹⁰⁹ *Macy v. Holder* expanded the protections for transgender people beyond discrimination on the basis of sex stereotyping; the protections now also apply when a transgender person is discriminated against by an employer because they “have transitioned gender or [are] planning to transition gender” and simply because “the person is transgender.”¹¹⁰ The decision explicitly intertwines sex with gender, essentially making them interchangeable and synonymous with one another.¹¹¹

The *Macy* ruling has a national reach; all federal agencies and private employers engaged in federal contracts are bound by the decision.¹¹² In addition, the prospect of being the potential subject of investigation by the EEOC will serve as a sufficient deterrent for employers who would have otherwise discriminated.¹¹³ However, *Macy* is not binding on the courts, and if a discrimination case ends up in litigation then the courts are free to disregard the EEOC’s decision.¹¹⁴

The EEOC’s ruling in *Macy* has broad implications that go beyond the enforcement of federal employment discrimination laws.¹¹⁵ It could

108. The United States Equal Employment Opportunity Commission “is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.” *About EEOC: Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/> (last visited Sept. 14, 2014). “The EEOC [also] has the authority to investigate charges of discrimination against employers who are covered by the law.” *Id.* When charges of discrimination have been made, the EEOC will launch an investigation to determine whether a prohibited instance of discrimination did take place. If the EEOC does find that discrimination has taken place, it will attempt to broker a settlement between the employer and the employee. If a settlement cannot be reached, the EEOC can file a lawsuit on behalf of the employee against the employer, although it does not do so in all cases where discrimination is found to have occurred. If the EEOC chooses not to file a lawsuit, the employee has a right to file a lawsuit on their own behalf, and the EEOC’s findings are admissible in that suit. *Id.*

109. See *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>; *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Feb. 4, 2015).

110. LISA MOTTET, NAT’L LGBTQ TASK FORCE, MOVEMENT ANALYSIS: THE FULL IMPACT OF THE EEOC RULING ON THE LGBT MOVEMENT’S AGENDA 3 (2012), available at http://www.thetaskforce.org/downloads/reports/reports/eeoc_movement_analysis.pdf.

111. See *id.* at 4.

112. *Id.* at 5.

113. See *id.* at 3.

114. *Id.* at 6.

115. See *id.* at 5.

also prompt courts in states that do not currently have explicit protections from employment discrimination on the basis of gender identity or expression to begin providing those protections to transgender people under their state laws that protect employees from discrimination on the basis of sex.¹¹⁶

Macy can also serve as an effective impetus for a cultural change regarding society's attitudes towards transgender people.¹¹⁷ The *Macy* decision was broadly publicized by the mainstream media,¹¹⁸ and a majority of the media presented the decision as being a step in the right direction for the United States.¹¹⁹ Such an extensive level of positive press can help bring the conversation about the widespread and severe discrimination faced by transgender people more directly into the mainstream, and makes it more likely that the conversations being had by the general public will be positive.

The inclusion of transgender people in the definition of sex for the purposes of gaining access to the protections afforded to employees under Title VII has a high likelihood of filtering into other federal laws that provide protections to individuals on the basis of sex. In fact, some government agencies that enforce other laws against discrimination have already moved to include protections for transgender people when the language of the laws they enforce prohibits discrimination on the basis of sex.

The United States Department of Housing and Urban Development ("HUD") has begun to include protections for transgender people under the Fair Housing Act's¹²⁰ prohibition of sex discrimination in the context of housing. In 2013, HUD put out a call for comments¹²¹ on the proposed rule¹²² governing the reassessment of

116. *See id.*

117. *See id.* at 7-8.

118. *See, e.g., Federal Agency Says Transgender People Protected*, FOX NEWS (Apr. 25, 2012), <http://www.foxnews.com/us/2012/04/25/federal-agency-says-transgender-people-protected/>; Jesse McKinley, *Ruling Extends Sex-Discrimination Protection to Transgender Woman Denied Federal Job*, N.Y. TIMES (Apr. 24, 2012), http://www.nytimes.com/2012/04/25/us/sex-discrimination-protection-extended-to-transgender-woman.html?_r=0; *Transgender Employees Now Protected By Anti-Discrimination Law After 'Landmark' EEOC Ruling*, HUFFINGTON POST (Apr. 30, 2012, 1:09 PM), http://www.huffingtonpost.com/2012/04/24/transgender-employees-anti-discrimination-law-eeoc-n_1449282.html.

119. *See, e.g., supra* note 118.

120. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-19 (2012)).

121. Press Release, U.S. Dept. of Housing & Urban Dev., HUD Publishes New Proposed Rule on Affirmatively Furthering Fair Housing (July 19, 2013), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2013/HUDNo.13-110.

122. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43,710 (codified at 24 C.F.R. §§ 5.100, 5.105(a)(2)(ii) (2013)), *available at* <http://www.gpo.gov/fdsys/pkg/FR->

the implementation of the Fair Housing Act.¹²³ The rule as adopted includes protections for transgender people under the category of sex discrimination.¹²⁴

In July of 2013, the Department of Education (“DOE”), in conjunction with the Department of Justice (“DOJ”), issued a decision under both Title IX of the Education Amendments of 1972¹²⁵ and Title IV of the Civil Rights Act of 1964¹²⁶ that included protections for transgender students within the prohibitions of discrimination on the basis of sex.¹²⁷ This landmark decision has firmly established both the DOE and DOJ’s commitment to protecting transgender students who have been discriminated against because they are transgender.

Given these promising developments, it is clear that the tides are turning towards providing protections under federal law for transgender people, even in the absence of explicit prohibitions of discrimination on the basis of gender identity and/or gender expression. However, in the absence of federal legislation that explicitly provides those protections or consistent decisions from the federal courts affirming the use of protections on the basis of sex discrimination for transgender people, these decisions by federal agencies remain vulnerable to reversal.

IV. WHERE DO THE PARTNERS OF TRANSGENDER PEOPLE FIT IN?

Despite the presence of laws that protect transgender people on the basis of sex, gender identity, and/or gender expression, it is likely that the courts would decline to extend those protections to Cisgender Partners who are discriminated against by their employers on the basis of their relationship with a transgender person. In that situation, the Cisgender Partner is not experiencing discrimination on the basis of their own gender identity or expression.

The language used in the various state and federal sex, gender identity, and/or gender expression employment discrimination laws prohibits discrimination on the basis of the individual Cisgender Partners’s own sex, gender identity, and/or gender expression.¹²⁸ However, with the exception of just a handful of nondiscrimination

2013-07-19/pdf/2013-16751.pdf.

123. HUD moved to restructure the implementation of the Fair Housing Act in response to a finding that the initial guidelines for implementation resulted in confusion and failed to meet the goals of the Act. *Id.* at 43,710-11.

124. 24 C.F.R. §§ 5.100, 5.105(a)(2)(ii).

125. Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681-88 (2012).

126. Civil Rights Act of 1964, tit. IV, 42 U.S.C. §§ 2000c to 2000c-9 (2012).

127. Press Release, Civil Rights Division, U.S. Dep’t of Justice, United States Reaches Agreement with Arcadia, California, School District to Resolve Sex Discrimination Allegations (July 24, 2013), *available at* <http://www.justice.gov/opa/pr/2013/July/13-crt-838.html>.

128. *See infra* app. A.

laws, the language declines to extend those protections to employees discriminated against on the basis of their association with another individual whose protected identity characteristic is the target of the employer's discrimination.¹²⁹

These protections need to be implemented throughout the country at the federal, state, and local level in order to provide protections for all individuals who may currently be in or enter into a relationship with a transgender person. In order to ensure that all members of the queer community are protected, the LGBTQ Rights Movement and its allies should consciously work to include these extended protections in all future nondiscrimination laws. For those sex, gender identity, and/or gender expression nondiscrimination laws that have already been passed and implemented, the LGBTQ Rights Movement and its allies should work to amend those laws to provide the protections necessary for Cisgender Partners. In the absence of specific protections, this section of the Note introduces and assesses the viability of arguments that could be expanded in order to provide the Cisgender Partner with a right of action in the court.

A. Comparison to Similar Situations in the Context of Interracial Relationships

There exists a small body of case law that addresses situations in which one member of a biracial couple is fired because they are in a relationship with a person who is a member of a different race. These cases are in many ways analogous to a situation in which the Cisgender Partner is discriminated against on the basis of their relationship with a transgender person.

In *Holcomb v. Iona College*, the Second Circuit held that Title VII can be violated if an employer "takes action against an employee because of the employee's association with a person of another race."¹³⁰ In *Holcomb*, the plaintiff was a white man and the Associate Head Coach of Iona College's men's basketball team.¹³¹ When the plaintiff was fired from his coaching job, he claimed that the firing was a result of his marriage to an African American woman.¹³² The Court found that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."¹³³ Therefore, the employee's race is critical to the employer's decision to discriminate

129. For example, Oregon extends protections to employees discriminated against because of their association with another. Oregon Equality Act, OR. REV. STAT. § 659A.030(1) (2001).

130. *Holcomb v. Iona College*, 521 F.3d 130, 132 (2d Cir. 2008).

131. *Id.*

132. *Id.* at 131-32.

133. *Id.* at 139.

against the employee on the basis of their interracial relationship and subsequent finding of race.¹³⁴ Using similar reasoning, other circuit courts have also chosen to extend Title VII's protections to individuals who are discriminated against because of their interracial relationships.¹³⁵

In addition to providing protections against race discrimination, Title VII provides protections for discrimination against transgender individuals.¹³⁶ Nevertheless, given how the courts have justified their findings of racial discrimination in cases involving interracial couples, it is unlikely that the methods use to expand Title VII protections to interracial couples would apply to situations in which an Cisgender Partner is discriminated against because of their relationship with a transgender person.

In the case of interracial relationships, the court has based their findings of discrimination on the fact that the Cisgender Partner's own race and the race of their partner are different.¹³⁷ While an employer discriminating against a Cisgender Partner for being in a relationship with a transgender person is discriminating on the basis of sex, the discrimination is based upon the sex of the Cisgender Partner's partner, not the Cisgender Partner themselves. The target of the employer's discrimination is not the fact that the Cisgender Partner and their transgender partner have differing gender identities, it is the Cisgender Partner's relationship with a person that the employer views to have a non-normative gender identity that serves as the impetus for the discrimination. The Cisgender Partner's own sex, gender identity, and/or gender expression plays little or no part in the employer's decision to negatively impact the Cisgender Partner's employment. Because the Cisgender Partner's own sex, gender identity, and/or gender expression is irrelevant to the employer's decision to discriminate, the Cisgender Partner is not being discriminated against on the basis of their own sex, gender identity, and/or gender expression. Therefore, Title VII's requirement that the discrimination be "because of such individual's . . . sex"¹³⁸ has not been satisfied, and any charge of such discrimination would have to fail.

Many states reflect Title VII's language specifically prohibiting

134. *See id.*

135. *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) ("[S]he was discriminated against, as proscribed by the following language from Title VII, 'because of [her] race' (white), as a result of her relationship with a black person."); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

136. *See supra* Part III.C.

137. *E.g., Deffenbaugh-Williams*, 156 F.3d at 589.

138. 42 U.S.C § 2000e-2(a)(1)-(2).

discrimination against an individual because of an individual's protected characteristic.¹³⁹ Alternatively, some state nondiscrimination statutes, like New Jersey's Law Against Discrimination,¹⁴⁰ use less restrictive language than Title VII. They more generally prohibit discrimination in employment based upon enumerated characteristics.¹⁴¹ It is possible that the courts could find that the less restrictive laws would provide protections for Cisgender Partners discriminated against by their employer because of the Cisgender Partner's relationship with a transgender person as discrimination on the basis of sex, gender identity, and/or gender expression. However, in the absence of any known litigation, it is uncertain how courts would choose to interpret the less restrictive prohibitions.

B. Applying the Perceived Sexual Orientation Analysis to the Partners of Transgender People

In states that have laws in place prohibiting employment discrimination on the basis of sexual orientation, the Cisgender Partner could potentially make the argument that the employer's discrimination against them is based upon the Cisgender Partner's sexual orientation. Sexual orientation becomes implicated because the discrimination is a result of bias towards the Cisgender Partner's relationship. The Cisgender Partner could present evidence that the employer viewed the Cisgender Partner's attraction to and relationship with a transgender person to be indicative of an alternate sexual orientation.

The argument that the discrimination is based upon sexual orientation discrimination is complicated by the proposed scenario in which the Cisgender Partner identifies and presents themselves as being straight. Typically, discrimination cases are strengthened by showing a consistent history and practice of discrimination based upon the relevant characteristic.¹⁴² The Cisgender Partner would struggle to present adequate proof that they were discriminated against on the

139. See, e.g., Illinois Human Rights Act, 775 ILL. COMP. STAT. §§ 5/1-101 to -105 (2012); NEV. REV. STAT. ANN. §§ 613.310-435 (West 2011); Oregon Equality Act, OR. REV. STAT. §§ 659A.001-.990 (2013).

140. N.J. STAT. ANN. §§ 10:5-1 to -49.

141. See, e.g., CAL. GOV'T CODE § 12940 (West 2012); Minnesota Human Rights Act, MINN. STAT. §§ 363a.01-.43 (1993); State Fair Employment Practices Act, R.I. GEN. LAWS §§ 28-5-1 to -42 (2001).

142. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 625 (1982) ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.").

basis of their sexual orientation where the employer employs other straight-identified persons and lacks a consistent history of discrimination against straight-identified persons.

Even in such cases, the Cisgender Partner could still find a potential remedy in the statutes prohibiting employment discrimination on the basis of sexual orientation. Because the statutes that prohibit such discrimination typically include actual and perceived sexual orientation in the definition of sexual orientation,¹⁴³ one could make the argument that the employer discriminated on the basis of the Cisgender Partner's perceived sexual orientation. Perceived sexual orientation in this context is generally defined as a situation in which the employer makes their own determination of the employee's sexual orientation based upon a variety of observed, often stereotyped, factors, regardless of whether the employer's assessment of the employee's sexual orientation is accurate.

As many who discriminate against transgender people perceive a transgender person's gender identity to be different than the gender with which they actually identify,¹⁴⁴ it follows that the employer could categorize the Cisgender Partner as being a sexual orientation other than straight. This follows even when the Cisgender Partner is in a relationship with a transgender person who identifies as a member of the opposite gender than that with which the Cisgender Partner identifies.

However, the Cisgender Partner may want to hesitate to make the argument that the employer's discrimination was based upon their perceived sexual orientation of the Cisgender Partner because it could do damage to the perception of transgender people by outsiders. The Transgender Rights Movement is predicated on the fact that a person's gender identity is defined according to how the individual perceives their own gender, and should not be defined by either an individual's sex as assigned at birth or the gender assigned to an individual by society according to society's preconceived notions of gender.¹⁴⁵

The transgender community has worked diligently to combat the assertion that transgender people are not "real men" or "real women," an idea promulgated by propaganda produced and distributed by those who lack understanding of and are hostile towards transgender people.¹⁴⁶ By openly advocating for the court to interpret a transgender

143. See *infra* app. A.

144. See, e.g., Catherine Taibi, *Fox News' Keith Ablow: 'I Am Not Convinced' Being Transgender Exists*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2014/01/15/keith-ablow-transgender-california-law-fox-news_n_4604269.html.

145. See *Transgender 101*, GLAAD, <http://www.glaad.org/transgender/trans101> (last visited Feb. 4, 2014).

146. Katy Kreidler, *Top 10 Myths About Transgender People*, EVERYDAY FEMINISM (Aug. 2, 2012), <https://everydayfeminism.com/2012/08/myths-about-transgender->

person's gender as being fluid or as being able to be perceived as fluid, the Cisgender Partner would in effect be making the claim that a transgender person is not a "real man" or a "real woman." This would completely degrade the transgender person's ability to express their gender as they feel it should be expressed and completely undermine the Transgender Rights Movement's efforts to educate the public about the fact that a transgender man is a man and a transgender woman is a woman.

However, even if the above circumstances apply, the perceived sexual orientation argument would most likely fail, particularly given that the Cisgender Partner identifies as straight. In that situation, the employer can easily disassociate themselves from the claim of discrimination on the basis of sexual orientation through a claim that they perceive the Cisgender Partner to be straight because they present themselves as such. It would also be difficult to prove given a scenario in which the employer obviously based their discrimination against the Cisgender Partner entirely upon the gender identity of the Cisgender Partner's partner.

Aside from the effects this would have on the Cisgender Partner's assertions of their sexual orientation, attempting to make a claim that implies that the Cisgender Partner is dating someone whose gender is fluid, regardless of the person's gender identity, would also serve to reinforce the idea that transgender people are not to be given space in our traditional conceptions of gender.

V. PROPOSED LANGUAGE TO BE ADDED TO NONDISCRIMINATION LAWS

This section provides language that should be added to current or future federal, state, and local employment nondiscrimination laws in order to provide protection for Cisgender Partners who suffer adverse employment action based upon their relationship with a transgender person. The intent of these alterations is to provide more solid protections through the text of the nondiscrimination laws themselves in the absence of a clear and consistent interpretation of those laws by the courts. It will help to remove any potential confusion and, hopefully, provide a clear directive to both employers and employees facing the proscribed situation.

***** Proposed Language *****

Law Against Employment Discrimination

Unlawful Discriminatory Practices

It shall be unlawful employment practice for an employer or licensing agency-

to fail or refuse to hire or to discharge or bar from employment any individual without just cause or otherwise discriminate against

people/.

such individual with respect to his compensation, tenure, terms, conditions, or privileges of employment wholly or partially because of such employee's actual or perceived sexual orientation or gender identity or gender expression, or *wholly or partially because of the actual or perceived sexual orientation or gender identity or gender expression of another with whom the employee associates.*

to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, wholly or partially because of such employee's actual or perceived sexual orientation or gender identity or gender expression, or *wholly or partially because of the actual or perceived sexual orientation or gender identity or gender expression of another with whom the employee associates.*

It shall be unlawful employment practice for an employment agency to in any way discriminate against any individual in receiving, classifying, disposing, or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers wholly or partially because of such individual's actual or perceived sexual orientation or gender identity or gender expression, or *wholly or partially because of the actual or perceived sexual orientation or gender identity or gender expression of another with whom the individual associates.*

It shall be unlawful employment practice for a labor organization to exclude or to expel from its membership or to in any way discriminate against any of its members or against an employer or any individual employed by an employer wholly or partially because of such individual's actual or perceived sexual orientation or gender identity or gender expression, or *wholly or partially because of the actual or perceived sexual orientation or gender identity or gender expression of another with whom the individual associates.*

It shall be unlawful employment practice for any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses directly or indirectly any limitation, specification, or discrimination as to sexual orientation or gender identity or gender expression, or any intent to make such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification.

It shall be unlawful discriminatory practice for any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because that individual has opposed any practices forbidden under this article or because that individual filed a complaint, testified, or assisted in any proceeding under this article.

Any harms that occur as a result of the violation of any portion of section I of this Act can give rise to legal remedies under the common law, including compensatory and punitive damages. Such damages are to be available to all persons protected by this act and this act shall be liberally construed in combination with other protections available under the laws of this [Jurisdiction].

If any clause, sentence, paragraph, or part of this article or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, just judgment shall not affect, impair, or invalidate the remainder of this article.

Definitions:

“Sexual orientation” is defined as an individual’s

actual identity or perceived identity regarding the individual’s preference for entering into sexual or romantic relationships with another individual of another or the same gender and/or sex.

“Gender identity” is defined as an individual’s

actual identity or perceived identity regarding the individual’s gender, regardless of whether that gender identity is the same as the individual’s sex as assigned at birth.

“Gender expression” is defined as the means by which an individual expresses their gender, whether it be through appearance, behavior, expression, verbal acknowledgement, or otherwise, regardless of whether that gender expression is the same as the individual’s sex as assigned at birth.

“Association” is defined as an established relationship

between the employee and an individual or a group of individuals.

Qualified associations may include sexual relationships, romantic relationships, familial relationships, friendships, business partnerships, affiliations through church or community groups, or any other relationship that can be reasonably proven as established between two or more persons.

***** End of Proposed Language *****

The applicability of this language goes beyond the context of employment nondiscrimination laws. It can be included in a wide range of nondiscrimination laws, including those that prohibit discrimination in housing, public accommodations, education, and healthcare. Lawmakers should be encouraged to use this language in any instance where it is foreseeable that an individual can or would be discriminated against on the basis of their relationship with a transgender person.

Inclusion of the association language in nondiscrimination statutes could also provide protections for discrimination based upon characteristics other than sex, gender identity, and/or gender

expression. Depending upon the enumerated categories included in the specific nondiscrimination law, it could protect individuals who are in interracial relationships, interfaith relationships, and other nonheterogeneous relationships.

This language would serve to compliment the intent of preexisting nondiscrimination laws. It would extend the already present protections to include an individual's relationships with others. The legislation also does not limit the protected relationships to just those that involve romantic or sexual relationships. This allows for protection in situations in which someone is discriminated against based upon the identity of their parents, children, siblings, or other individuals within their family.

This extension will also allow for the accommodation of the wide variety of close relationships that resemble familial relationships but may not legally be recognized as such, an arguably necessary inclusion as society moves away from the traditional nuclear family dynamic.¹⁴⁷ This inclusion is particularly important for the queer community, as so many of whom have adopted a "chosen family" as a result of disownment by their blood relatives and/or as a means of building community with other queer people.¹⁴⁸ It is also notable that by not defining the relationships as having to exist between just two people, it allows for the inclusion of polyamorous relationships under the umbrella of protections.

Stating that adverse employment actions are unlawful whether they are "wholly or partly" a result of discrimination on the basis of sexual orientation, gender identity, and/or gender expression provides the employee with a less stringent standard of proof. In addition, it helps to combat and provide a right of action against subtle, even unconscious instances of discrimination.

The model language is based upon typical language found in other state and federal nondiscrimination statutes. The language "because of the actual or perceived sexual orientation or gender identity or gender expression of another with whom the employee associates," is designed to provide protections for an individual who is discriminated against because of the identity of another with whom they have a relationship. Where a law prohibiting discrimination on the basis of

147. See, e.g., Amelia, *I Get to Define My Own Family*, HUFFINGTON POST (Aug. 3, 2013, 5:12 AM), http://www.huffingtonpost.com/Amelia/i-get-to-define-my-own-family_b_3360035.html.

148. "Chosen family" refers to a closeknit relationship between two or more people that resembles and is viewed by those involved as a familial relationship. See *Queer & Kindred: Our Chosen Family*, VITAL VOICE (JULY 31, 2012), <http://www.thevitalvoice.com/queer-a-kindred-our-chosen-family/> (last viewed Sept. 14, 2014); see also Mark Dolliver, *LGBT Baby Boomers Turn to 'Chosen Family'*, ADWEEK (Apr. 26, 2010, 12:00 AM), <http://www.adweek.com/news/advertising-branding/lgbt-baby-boomers-turn-chosen-family-102159>.

sex, sexual orientation, and/or gender identity or expression already exists, those laws can be amended to include portions of this language. Lawmakers who wish to utilize this language are highly encouraged to include other enumerated identity categories in their own proposed law.

VI. MOVING FORWARD

Under current nondiscrimination laws, there is little likelihood that there would be any legal recourse available to an individual who is discriminated against by their employer because they are in a relationship with a transgender person. The possible remedies that are available are either ill-suited for extension to the present context, or making those arguments could undermine the transgender community's efforts to improve how the courts and the greater community understand and address transgender people and the concerns they face.

Without a viable, preexisting right of action, it is necessary that the queer community work to include more inclusive language in sexual orientation, gender identity, and/or gender expression nondiscrimination statutes. The proposed legislation contained within this Note will provide the partners of transgender people with a right of action should they be discriminated against in the context of employment because of that relationship. Because of the extensive discrimination experienced by queer people, and transgender people in particular, it is imperative that action is taken to correct this oversight and strengthen the protections against discrimination for all queer families.

Initially focusing on establishing a route through which employment nondiscrimination protections could be provided to the partners of transgender people will provide a basis through which the protections can also be provided in other areas, such as housing, public accommodations, and education. By expanding the reach of sexual orientation, gender identity, and/or gender expression employment nondiscrimination laws to include individuals discriminated against because they are in a relationship with a transgender person, the groundwork would be laid for the future expansion of nondiscrimination laws to protect the same class of individuals in a wide variety of contexts in which there are bans against discrimination.

APPENDIX A

I. States that ban discrimination on the basis of sexual orientation:

New Hampshire: New Hampshire Law Against Discrimination, N.H.

REV. STAT. ANN. §§ 354-A:1 to :26 (1995).

New York: New York Human Rights Law, N.Y. EXEC. LAW §§ 290-301

(McKinney 2012).

Wisconsin: Wisconsin Fair Employment Law, WIS. STAT. ANN. §§ 111.31-.397 (West 2002).

II. States that ban discrimination on the basis of sexual orientation and gender identity:

California: CAL. GOV'T CODE § 12940 (West 2012) (prohibiting discrimination in employment on the basis of sexual orientation, gender identity, and gender expression).

Colorado: Anti-Discrimination Act, COLO. REV. STAT. ANN. §§ 24-34-

401 to -408 (West 2007) (law prohibiting discrimination in employment on the basis of sexual orientation, where the statutory definition of sexual orientation includes transgender status).

Connecticut: (CONN. GEN. STAT. ANN. §§ 46a-58 to -81aa (West 2013) (law prohibiting discrimination on the basis of sexual orientation and gender identity or expression).

Delaware: DEL. CODE ANN. tit. 19 §§ 710–19a (2013) (law prohibiting discrimination in employment on the basis of sexual orientation and gender identity).

District of Columbia: D.C. CODE §§ 2-1402.11 to .13 (2006)

(law prohibiting discrimination in employment on the basis of sexual orientation and gender identity or expression).

Hawaii: HAW. REV. STAT. §§ 378-1 to -93 (law prohibiting discrimination in employment on the basis of sexual orientation; Hawaii provides protections from discrimination in housing and public accommodations for gender identity and expression, but does not provide protections from discrimination in employment on the basis of gender identity or expression).)

Illinois: Illinois Human Rights Act, 775 ILL. COMP. STAT. §§ 5/1-101 to -105 (2012) (law prohibiting discrimination in employment on the basis of sexual orientation, where the statutory definition of sexual orientation includes “gender-related identity”).

Iowa: Iowa Civil Rights Act of 1965, IOWA CODE ANN. §§ 216.1–.21 (West 2009) (law prohibiting discrimination in employment on the basis of sexual orientation or gender identity).

Maine: Maine Human Rights Act, ME. REV. STAT. tit. 5 §§ 4551–76 (2005) (law prohibiting discrimination in employment on the basis of sexual orientation, where the statutory definition of sexual orientation includes gender identity or expression).

Massachusetts: MASS. GEN. LAWS ch. 151B, §§ 1–10 (2012) (law prohibiting discrimination on the basis of sexual orientation and gender identity).

Maryland: Fairness for All Marylanders Act of 2014, S.B. 212, 2013 Reg. Sess. (Md. 2013) (effective Oct. 1, 2014).

Minnesota: Minnesota Human Rights Act, MINN. STAT. §§ 363A.01–.43 (1993) (law prohibiting discrimination in employment on the basis of sexual orientation, where the statutory definition of sexual orientation includes gender identity).

Nevada: NEV. REV. STAT. ANN. §§ 613.310–.435 (West 2011) (law prohibiting discrimination in employment on the basis of sexual orientation and gender identity or expression).

New Jersey: Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -49 (West 2010) (law prohibiting discrimination in employment on the basis of affectional or sexual orientation, and gender identity or expression).

New Mexico: Human Rights Act, N.M. STAT. ANN. §§ 28-1-1 to -15 (2000) (law banning discrimination in employment on the basis of sexual orientation and gender identity).

Oregon: Oregon Equality Act, OR. REV. STAT. §§ 659a.001–.990 (2013) (law prohibiting discrimination in employment on the basis of sexual orientation and gender identity).

Rhode Island: State Fair Employment Practices Act, R.I. GEN. LAWS

§§ 28-5-1 to -42 (2003) (law providing protections from discrimination in employment for sexual orientation and gender identity or expression).

Vermont: VT. STAT. ANN. tit. 21, §§ 495–96a (2003) (law prohibiting discrimination on the basis of sexual orientation and gender identity).

Washington: Law Against Discrimination, WASH. REV. CODE. ANN. §§ 49.60.010 to .505 (law prohibiting discrimination in employment on the basis of sexual orientation, where the statutory definition of sexual orientation includes gender expression or identity).