



NATIONAL CENTER FOR LESBIAN RIGHTS

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September 23, 2009

The Honorable George Miller, Chairman
Committee on Education and Labor
U.S. House of Representatives

The Honorable John Kline, Ranking Member
Committee on Education and Labor
U.S. House of Representatives

RE: Crucial Protections For State And Local Government Employees under ENDA

Dear Chairman Miller and Ranking Member Kline:

On behalf of the National Center for Lesbian Rights (NCLR), we are writing to provide you with concrete information showing why it is critically important that the House Committee on Education and Labor support the Employment Non-Discrimination Act (ENDA).

NCLR is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. We provide assistance to LGBT and gender non-conforming workers through our legal information helpline and represent clients in employment matters at the claims and appeals levels. We also provide technical advice and assistance to private attorneys representing LGBT and gender non-conforming workers in employment discrimination and harassment matters. NCLR was founded in 1977. Each year, through litigation, public policy advocacy and public education, NCLR helps more than 5,000 LGBT people and their families nationwide. Through this work, NCLR has acquired extensive knowledge of the widespread pattern of discrimination against American workers who are LGBT.

This letter will focus on one issue that ENDA would address: discrimination by state and local governments against their employees on the basis of sexual orientation and gender identity. The protection that ENDA would provide is crucial to securing these employees' constitutional rights and their ability to work in an environment that is safe and respects their professional dignity as workers.

There Is A Widespread Pattern of Unconstitutional Employment Discrimination Against LGBT and Gender Non-Conforming Employees

NCLR has observed a clear and widespread pattern of unconstitutional employment discrimination against LGBT and gender non-conforming employees. This pattern is not limited to any one state or region, to any particular level of government, or to any type of government agency. Our litigation docket has included cases against the Utah Transport

Authority, a Texas school district, and a California public university. In recent years, we have also received dozens of calls from state and local employees who were facing discrimination and harassment in their workplace based on their sexual orientation and/or gender identity and expression. We have received requests for help from the western U.S., New England, the South, including Florida, and the Midwest. State and local agencies engaging in discrimination have included a state department of health, a state department of child support enforcement, county agencies, city government, and local and county sheriff's and police departments.

The discrimination and harassment faced by state and local government workers who have called NCLR has been severe and blatant. For example, one transgender woman worker in Florida was called a "thing" by her co-workers, and continuously harassed when she tried to use the bathroom. Her supervisor was aware of the problem, but refused to intervene. A lesbian worker in Georgia was humiliatingly interrogated for four hours by her employer about her sexual preferences, family life and personal acquaintances, then told not to speak about what had been asked during the interview. She was subsequently terminated.

Discrimination Against LGBT and Gender Non-Conforming State and Local Employees Perpetuates Gender Stereotypes

Homophobic and transphobic harassment and discrimination against employees has the clear effect, if not the intent, of reinforcing gender stereotypes. In NCLR's experience, victims of discrimination and harassment are often targeted as much for failing to conform to gender stereotypes as for their actual sexual orientation or gender identity. This goes against the basic and long-recognized principle that the U.S. Constitution's guarantee of Equal Protection prohibits state governments from acting in such a way as to perpetuate stereotypes about how men and women are expected to behave. *Craig v. Boren*, 429 U.S. 190 (1976).

The relationship between gender stereotypes and discrimination based on sexual orientation or gender identity is also clear from the case law. For example, in *Hamm v. Weyauwega Milk Prods., Inc.*, the plaintiff's co-workers called him "girl scout," "faggot," and "bisexual" and circulated a rumor that he and a male supervisor were having a romantic relationship, despite the fact that he was in fact heterosexual. 332 F.3d 1058, 1060 (7th Cir. 2003). The non-transgender plaintiff in *Doe by Doe v. City of Belleville, Ill.* was harassed by co-workers asking him if he was a "boy or girl" because he failed to conform to gender stereotypes, in part by wearing an earring. 119 F.3d 563 (7th Cir. 1997).

Discrimination Against LGBT and Gender Non-Conforming State and Local Employees Is Under-Reported

In NCLR's experience, LGBT and gender non-conforming state and local employees face numerous barriers to reporting discrimination and harassment in the workplace.

First, without explicit federal protections, state and local employees are not only vulnerable to discrimination, but are also less likely to speak out about it or make complaints, out of fear of retaliation by the employer and a lack of administrative or legal recourse for such discrimination or retaliation. For example, a lesbian worker in Arizona was repeatedly called a “dyke” and told she smelled of “shit and piss” by co-workers, with no intervention by her supervisor. When she made a complaint to the EEOC, she was told this was not considered sexual harassment and therefore that she had no basis for a complaint. A gay male employee in Florida faced virulent anti-gay comments from a colleague. When he complained to a supervisor, he was reprimanded for making the complaint and subsequently terminated.

In addition, the nature of the discrimination and harassment against LGBT employees frequently includes an aspect of malicious “outing” or making public of their sexual orientation or transgender status, and other private information. For such employees, making a legal or administrative claim may lead to further unwanted publicity. Many rightly fear that it would expose them to more, rather than less, discrimination based on their sexual orientation or gender identity in their community or at a subsequent employer. In one situation that NCLR was contacted about, a police captain intentionally told a lesbian worker’s potential employer about her sexual orientation in an attempt to prevent the worker from finding alternative employment, relying on homophobic discrimination in the community generally.

Protections Against Discrimination Based On Sexual Orientation and Gender Identity Are Especially Important Right Now

In these difficult economic times, protecting LGBT and gender non-conforming workers at state and local agencies from unfair treatment on the job is more crucial than ever. Even in economically prosperous times, transgender people in particular find it difficult to find dignified work in a safe environment. In 2003, we conducted a joint study with the Transgender Law Center and found that 79% of San Francisco's transgender community made less than \$50,000 a year, and over 40% lacked health insurance. *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities*, available at <http://transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf>. Under the American Recovery And Reinvestment Act, an estimated \$49 billion in funds has been provided to state and local governments. It is critical that LGBT and gender non-conforming workers have an equal shot at getting and retaining the new jobs created by this funding.

For all of these reasons and others, we urge approval and passage of ENDA. LGBT and gender non-conforming state and local employees must have explicit and clear federal statutory protections from and remedies for workplace discrimination. Thank you for your



time and for your attention to the serious discrimination facing tens of thousands of workers in the U.S. that passage of ENDA would address.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathryn Kendell".

Kathryn Kendell, Esq.
Executive Director
National Center for Lesbian Rights

A handwritten signature in black ink, appearing to read "Shannon Minter".

Shannon Minter, Esq.
Legal Director
National Center for Lesbian Rights

**ATTACHMENT ONE:
Examples of Anti-LGBT Discrimination:
State & Local Employers**

CALIFORNIA

Sulpizio and Bass v. San Diego Mesa College

(local – community college district/coach)

"Lorri Sulpizio was the Head Women’s Basketball Coach at San Diego Mesa College (Mesa), and her domestic partner, Cathy Bass, assisted the team and served as the team’s Director of Basketball Operations for over eight years. Despite Sulpizio’s and Bass’s dedication and demonstrated track record of success leading the women’s basketball program at the community college, Mesa officials unlawfully fired both coaches at the end of the 2007 academic year after Coach Sulpizio repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying Sulpizio and Bass as domestic partners." See NCLR, *Employment Case Docket: Sulpizio and Bass v. San Diego Mesa College*,

http://www.ncrlrights.org/site/PageServer?pagename=issue_caseDocket_sulpizio

Bay Area School District

(local – school district/teacher)

“One woman in particular stands out. She is a teacher who transitioned in the Bay Area in the late ‘90s. Since transitioning, she has not been able to secure a full-time teaching contract in any of the several school districts to which she has applied. Needing work, she recently applied to an entry-level federal job. After two days and multiple hours of interviews and screening, she was turned down for the position immediately after she disclosed her transgender status on a comprehensive medical questionnaire.” Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities* at 15

(National Center for Lesbian Rights & Transgender Law Center, 2003), available at

<http://transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf>.

[hereinafter *Trans Realities*].

CONNECTICUT

Conway v. City of Hartford

(local – city/employee)

The plaintiff, a transgender man, was terminated by his city employer after transitioning from female to male, and was not rehired for another position although other city employees who had been terminated around the same time were all rehired. *Conway v. City of Hartford*, 1997 WL 78585 (Conn. Super. Ct.), 19 Conn. L. Rptr. 109 (Feb. 4, 1997), cited in Shannon Minter,

Legal Dir., National Center for Lesbian Rights, *Representing Transsexual Clients: Selected Legal Issues* at 4 n.22 (2003), available at [http://www.hawaii.edu/hivandaids/Representing Transsexual Clients Selected Legal Issues.pdf](http://www.hawaii.edu/hivandaids/Representing_Transsexual_Clients_Selected_Legal_Issues.pdf) [hereinafter Minter, *Representing*].

FLORIDA

Smith v. City of Jacksonville Correctional Inst.,
(local – city jail/sergeant)

A transgender corrections officer with a stellar employment record was terminated after the fact that she was transgender was made public and a report mentioning her transgender status was circulated throughout the city jail where she worked. *Smith v. City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991), cited in Minter, *Representing* at 3 n.11.

Fishbaugh v. Brevard County Sheriff’s Dep’t
(local – country sheriff’s dep’t/employee)

A transgender deputy sheriff was forced to leave her job due to unlawful employment practices by the sheriff’s department. *Fishbaugh v. Brevard County Sheriff’s Dep’t*, Order No. 04-103 (Fla. Comm’n on Human Relations 2004), available at <http://fchr.state.fl.us/fchr/layout/set/print/content/view/full/2263>, cited in NCLR, *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws* (2008), available at http://www.ncrlrights.org/site/DocServer/state_cases091004.pdf?docID=1203 [hereinafter NCLR, *State Sex & Disability*].

Mowery v. Escambia County Utilities Authority
(local – county utilities authority/utility service technician)

Employee suffered harassment based on the perception that he was gay due to sex stereotyping (i.e. that Mowery "was forty years old, owned a house, had a truck paid for, did not have a woman, and never publicized his sexual escapades with women to his coworkers") and his supervisor retaliated against him when he complained. *Mowery v. Escambia County Utilities Authority*, 2006 FL 327965, at *6 (N.D. Fla. 2006), cited in NCLR, *Federal Cases Recognizing That Discrimination on the Basis of Gender Non-Conformity and/or Transgender Status Is a Form of Discrimination on the Basis of Sex* at 3 (2006), available at http://www.ncrlrights.org/site/DocServer/fed_gender_nonconformity.pdf?docID=1202 [hereinafter NCLR, *Federal Sex Discrimination*].

NEW JERSEY

DePiano v. Atlantic County
(local – county/corrections officer)

ATTACHMENT ONE:
Examples of Anti-LGBT Discrimination: State & Local Employers

A prison guard who cross-dressed in his private life was subject to severe and pervasive harassment at work after the fact that he sometimes cross-dressed was publicized, possibly by his supervisor, to his coworkers as well as the inmates of the prison where he worked. *DePiano v. Atlantic County*, 2005 WL 2143972 (D.N.J. 2005), cited in NCLR, *State Sex & Disability* at 2.

NEW YORK

Martin v. New York State Dep’t of Corr. Servs.,
 (state – state department of corrections/corrections officer)
 Co-workers of gay corrections officer constantly directed offensive and degrading sexual comments toward him, such as “pervert,” “fucking faggot,” “cock-sucker,” “fudge-packer,” and “you gay bastard,” and left sexually explicit pictures in his work area and written statements and pictures on the restroom walls, yard booths, his time card and his interoffice mail. The officer was retaliated against for filing complaints. *Martin v. New York State Dep’t of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (noting that discrimination based on a failure to conform to gender norms might be cognizable under Title VII), cited in NCLR, *Federal Sex Discrimination* at 4.

OHIO

Barnes v. City of Cincinnati
 (local – city/police officer)
 Officer who had passed the examination required to be promoted to sergeant and who was transitioning from male to female was singled out and "targeted for failure" during probationary period for promotion to sergeant because the officer was not masculine enough in behavior or appearance. *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005), cited in NCLR, *Federal Sex Discrimination* at 2.

Smith v. City of Salem,
 (local – city/firefighter)
 After firefighter was criticized for appearing too feminine, he informed his direct supervisor that he had gender identity disorder and would be transitioning from male to female. Upper-level city management devised a plan to terminate him for pretextual reasons. After the firefighter learned of the plan to terminate him, he retained counsel and was retaliated against through selective enforcement of fire department policies. *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004), cited in NCLR, *Federal Sex Discrimination* at 2.

PENNSYLVANIA

Bianchi v. City of Philadelphia

(local – city/firefighter)

Lieutenant firefighter experienced severe harassment from co-workers based on the perception that he was gay, including having feces smeared on his belongings and receiving anonymous letters that threatened him as well as his twin brother. After he complained, the firefighter was placed in a desk job, told that he could not return to firehouse duties until he had passed mental and physical exams, and was never reinstated even after he was cleared to return to work.

Bianchi v. City of Philadelphia, 183 F. Supp. 2d 726, 735 (E.D. Pa. 2002), cited in NCLR, *Federal Sex Discrimination* at 5.

TEXAS

Stephens v. Bloomburg School District

(local – school district/teacher)

“NCLR and attorney Michael Shirk from the National Education Association/Texas State Teacher's Association negotiated a settlement on behalf of Merry Stephens, an award-winning teacher and basketball coach with Bloomburg Independent School District in the small rural community of Bloomburg, Texas. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in three of her five years as head coach of the Lady Wildcats basketball team. During her award-winning tenure, Coach Stephens led the team to district, regional, and semi-state championships, breaking several school district coaching records in the process. Stephens also received excellent teaching evaluations throughout her tenure with the Bloomburg Independent School District. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members. In exchange for Coach Stephens' agreement not to pursue further legal action, the district agreed to pay Coach Stephens a monetary settlement.”

NCLR, *Employment Case Docket: Stephens v. Bloomburg School District*,

http://www.ncrlrights.org/site/PageServer?pagename=issue_caseDocket_stephens.

UTAH

Etsitty v. Utah Transit Authority

(state – transit authority/bus driver)

“Despite her spotless employment record, Krystal Etsitty, a transgender woman, was fired from her job as a public bus driver by the Utah Transit Authority (UTA), solely because the UTA feared that members of the public might be offended by Etsitty’s transgender identity. A federal district court in Utah dismissed Etsitty’s case, holding that federal laws prohibiting sex discrimination do not protect transgender people. Etsitty appealed this decision to the Tenth Circuit Court of Appeals, which ruled against her. NCLR, Lambda Legal, and the ACLU filed an amicus brief supporting Etsitty’s claim.”



NCLR, *Employment Case Docket: Etsitty v. Utah Transit Authority*,
http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_etsitty_v_utah_transit.

**ATTACHMENT TWO:
NCLR Litigation Involving Employment Discrimination
Against State/Local Government Employees**

Sulpizio and Bass v. San Diego Mesa College

Lorri Sulpizio was the Head Women's Basketball Coach at San Diego Mesa College (Mesa), and her domestic partner, Cathy Bass, assisted the team and served as the team's Director of Basketball Operations for over eight years. Despite Sulpizio's and Bass's dedication and demonstrated track record of success leading the women's basketball program at the community college, Mesa officials unlawfully fired both coaches at the end of the 2007 academic year after Coach Sulpizio repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying Sulpizio and Bass as domestic partners. NCLR and the law firms of Boxer & Gerson, LLP and Stock Stephens, LLP are representing Coach Sulpizio and Coach Bass in their lawsuit against San Diego Mesa College, and the San Diego Community College District. Recent high profile Title IX jury verdicts and settlements at Penn State, California State University, Fresno, and University of California, Berkeley have raised awareness about systemic gender inequities and homophobia at major colleges and universities. This case is a powerful illustration that similar problems pervade the athletic departments of community colleges as well.

Etsitty v. Utah Transit Authority

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Stephens v. Bloomburg School District

NCLR and attorney Michael Shirk from the National Education Association/Texas State Teacher's Association negotiated a settlement on behalf of Merry Stephens, an award-winning teacher and basketball coach with Bloomburg Independent School District in the small rural community of Bloomburg, Texas. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in three of her five years as head coach of the Lady Wildcats basketball team. During her award-winning tenure, Coach Stephens led the team to district, regional, and semi-state championships, breaking several school district coaching



records in the process. Stephens also received excellent teaching evaluations throughout her tenure with the Bloomburg Independent School District. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members.

**ATTACHMENT THREE:
NCLR Helpline Contacts Involving Employment Discrimination
Against State/Local Government Employees, 2001-2009**

Year	State	Employer	Description
2007	California	School District	School District fired two openly gay women claiming they violated the dress code, but they believe it was because they were openly gay.
2006	Georgia	DFCS	After other employees complained about working with her because she was a lesbian, caller was subjected to a humiliating and invasive four hour interrogation during which she was asked if she was a lesbian, who looked after her children, who she lived with and who her friends were. She was then told not to tell anybody else about what happened during the interview. Two weeks later they suspended her for “alleged misconduct”
2001	Florida	City government	City government employee told to resign or he would be outed as a cross-dresser (he cross-dressed in his own time, outside of work hours).
2004	California	Unknown State Agency	Employee tried to persuade agency to provide DP benefits in 2002 (before comprehensive statewide RDP). This caused conflict with his boss and he was put on administrative leave and eventually terminated.
2007	Tennessee	Women and Children’s Center	Caller came out to colleagues as lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.
2004	Florida	Police Department	Police officer faced harassment and was terminated when he came out as gay. He was also arrested for lewd and lascivious conduct for telling a street youth about safer sex.
2001	Florida	State Dept of Agriculture	Caller faced repeated virulently anti-gay comments from a colleague. When he complained, he was told off for complaining, and a superior told him to drop the complaint. He refused and was terminated shortly after.
2001	Florida	Florida Dept. of	Caller's supervisor said he would try to rid the

		Health	department of gays. When caller complained, he was reprimanded for complaining, and eventually terminated after a long period of harassment at work.
2004	Florida	Department of Corrections	Caller cross-dressed outside of work. When supervisors found out they confronted him about it and forced him to resign.
2005	Florida	Pinellas County Water Quality	Neighbor outed him to his supervisor. He was eventually fired.
2001	Florida	School District	Teacher got good evaluations until school found out his partner was a man, then evaluations took a downturn and his contract was not renewed.
2002	Florida	Fire Department	Openly lesbian firefighter was repeatedly passed over for promotion while less qualified employees were promoted. She was eventually fired for low test scores, even though her scores were in fact consistently high.
2004	California	County Employee	Gay man faced harassment and isolation at work causing him stress-related health problems. Although California law had sexual orientation protections, he was afraid that the county and union would not enforce the law.
2005	California	University of California at Davis	Supervisor drew up dress code specifically targeting one gay male employee, prohibiting him from wearing mid-length pants. Supervisor also forbade him from bringing gay and lesbian yellow pages into the office.
2003	Florida	Sheriff's Office	Caller is MTF. Co-workers kept using the wrong pronoun when she was out on patrol (hence outing her to anyone who could hear). She complained, but nothing changed. When co-workers started a rumor that she was posing topless on the internet, she resigned.
2008	Virginia	Police Department	Caller was harassed by her captain and made to work long shifts without breaks. When she applied to another job, captain accosted her future employer in a restaurant and announced that caller was a lesbian.
2002	Florida	School District	Caller is MTF, was called a "thing" by co-worker, harassed about which bathroom she should use.

ATTACHMENT THREE:

NCLR Helpline Contacts Involving Employment Discrimination Against State/Local Government Employees, 2001-2009

			Supervisor did not respect her either.
2008	Rhode Island	Unknown State Agency	Caller faced discrimination at work, wanted attorney information from us. Not many details.
2002	Florida	Fire Department	Caller is gay. Colleagues found his personal on the internet and circulated in the office. His supervisor wrote him up for various frivolous things and when confronted admitted they were made up.
2008	Ohio	State of Ohio	Faced daily harassment including threats and intimidation because of her sexual orientation.
2007	Florida	Unknown Agency	Social worker had worked there for about 10 years. When she came out, supervisor started giving her bad reviews, and also stood in the bathroom with her while she urinated for a drug test (not standard procedure).
2004	Florida	School District	Teacher who agreed to let students use her room for GSA meetings was harassed by other teachers to the point where she felt she had to leave. School then refused to give her a good recommendation.
2004	Louisiana	School District	Bus Driver faced harassment for gender non-conformity and sexual orientation. Her grievance was deemed invalid.
2007	Arizona	Department of Child Support Enforcement	When she came out as a lesbian, co-workers started calling her a "faggot" and "dyke" and saying she smelled of "shit and piss" and saying that she had STDs and was mentally ill. Supervisor did nothing. Harassing co-workers were transferred to another department, but no other disciplinary action was taken. Harassment continues. She filed with EEOC, but was told that this was not sexual harassment.
2004	California	School District	Lesbian who did not fit traditional gender norms was repeatedly transferred from site to site and once thrown against the wall by a principal. School district and union refuse to intervene.
2007	California	Police Department	Chief decided not to promote caller to a position she was qualified for, and for which no other qualified person was found, and instead eliminated the position, because caller was MTF.
2002	Florida	Board of Nursing (not employer)	Denied a nursing license because he was gay, though they gave other reasons (which had not

ATTACHMENT THREE:

NCLR Helpline Contacts Involving Employment Discrimination Against State/Local Government Employees, 2001-2009

			precluded others from getting a license). He had already gotten licensed in Indiana.
2007	Florida	Sheriff's Office	Caller was offered positions at two Sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.
2006	Florida	Police Department	When police department found out she was MTF, they decided not to hire her, claiming she had been dishonest
2002	Florida	Fire Department	Before coming out, got excellent assessments and was promoted. After he came out, he was told to either resign or accept a demotion. He took the demotion to keep his retirement benefits.
2006	New Jersey	State of NJ	She was demoted and made to do menial tasks below her skill level because she was a lesbian
2005	North Carolina	Medical Board (not an employer)	Transgender woman faced uncertainty about whether she had to declare that she was trans in order to proceed with application.
2004	New York	New York State Department of Law	Employee won at the trial level, sought help from us for an appeal.

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NCLR Helpline Contacts Involving Employment Discrimination Against State/Local Government Employees, 2001-2009