

**Testimony of  
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**Before the U.S. House of Representatives  
Committee on Education and Labor  
Subcommittee on Health, Employment, Labor and Pensions  
Hearing on “An Examination of Discrimination Against  
Transgender Americans in the Workplace”**

**June 26, 2008**

**Introduction**

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

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

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

**Religious Liberty and Rights of Conscience in the Workplace**

Creating federal protection for gender identity and expression would have an unavoidable negative impact on religious liberty and rights of conscience in the workplace for religious employers and ordinary business owners. This would be true even if the legislation included the same religious exemptions provided under Title VII.

Section 702(a) of Title VII allows religious organizations to discriminate on the basis of religion for “work connected with the carrying on by such corporation, association, educational

institution, or society of its activities.”<sup>1</sup> That exemption may not always be sufficient, however, when a person who professes the same religious beliefs engages in behavior the institution deems immoral. For example, in 2005 Professor John Nemecek began appearing on campus as a woman at Spring Arbor University. When the university fired him for his behavior, he filed a claim with the Equal Employment Opportunity Commission.<sup>2</sup> The professor asserted that he had not violated a tenet of the university’s faith. Although the university should have prevailed if it had litigated the issue, it settled the claim rather than endure costly litigation.

Even though Title VII exemptions would theoretically protect churches, parachurch ministries would remain at risk. There is a great deal of debate over how closely a ministry must be connected to a church to qualify for exemption. For example, one court held that a United Methodist children’s home was *not* a “religious organization.” It made this astonishing ruling despite the fact that the home was hiring a new minister specifically to protect its religious mission.<sup>3</sup> Another court recently devised a nine-part, subjective “balancing” test to decide whether a Jewish community center was “religious” under Title VII. The court said that “not all factors will be relevant in all cases, and the weight given each factor may vary from case to case.”<sup>4</sup> Importantly, two of the nine “secularizing” factors identified by the court are very common among parachurch ministries: few such ministries are directly controlled by a church; and many will provide “secular” products (such as food, shelter, counseling, or legal services that are not of themselves religious). That includes organizations like mine, ADF. In sum, many parachurch ministries may not be protected by the Title VII exemptions. That could result in the ministries being forced to hire employees who openly violate the ministries’ standards.

Businesses that operate at a profit are even more at risk because of the difficulty of proving a bona fide occupational qualification relating to whether an employee presents him- or herself as their biological sex. The right of conscience issue is particularly acute for small business owners who are closely associated with the business. Employing a man who dresses as a woman and wants to use the women’s restroom would have a negative impact not only on other employees and customers, but would reflect on the business owner’s reputation in the community. It is an indication that the owner approves of the behavior, or at least accepts the behavior as valid. That may be an even bigger issue for owners of day-care centers and religious book stores, where customers have an expectation that their values will be respected.

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

<sup>2</sup> “Christian College Fires Transgender Professor,” Associated Press via Detroit Free Press (Feb. 4, 2007), <http://www.religionnewsblog.com/17388/transgender>.

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

<sup>4</sup> *LeBoon v. Lancaster Jewish Community Center Ass’n*, 503 F.3d 217, 226-227 (3<sup>rd</sup> Cir. 2007).

## **The Ambiguity of “Gender Identity and Expression”**

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

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

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

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

Adding gender identity and expression to employment nondiscrimination laws could result in providing special protection for most employees. For example, according to GenderPac, “At some point in their lives, most people experience some form of discrimination or bias as a

result of gender stereotyping.”<sup>5</sup> If “most people” can claim gender identity or expression discrimination when they are terminated from employment, lose out on a promotion, fail to obtain a job, etc., “employment at will” will have lost all meaning. In discussing the various kinds of civil rights statutes relating to transsexuals, GenderPac states the following: “The broadest of these protections, extending to *gender expression and identity*, could be considered the most direct way of protecting people from discrimination and harassment based on gender stereotypes.” *Ibid*. Thus, according to GenderPac’s views, any employment law prohibiting discrimination based on gender expression or identity may give rise to a significant number of discrimination claims, no matter what an employer does.

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

### **Employee Rights of Privacy**

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