

**Statement by Jennifer L. Levi, Esq.
Before the Joint Committee on the Judiciary
in Support of House Bill No. 1722**

Honorable Co-Chairs and Members of the Committee:

I am grateful for the opportunity to testify in strong support of House Bill No. 1722 which would add the phrase “gender identity or expression”¹ to provisions of Massachusetts law that already prohibit discrimination in the areas of employment, housing, credit, public accommodations, and public education. The bill would also add “gender identity or expression” to the Massachusetts hate crimes law. I am a Senior Staff Attorney at Gay & Lesbian Advocates & Defenders in addition to being on the full-time faculty at the Western New England College School of Law. As an attorney at New England’s leading legal rights organization dedicated to ensuring legal equality for lesbians, gay men, bisexuals, transgender people (“LGBT”), and those living with HIV or AIDS, a key focus of my work has been addressing the pervasive discrimination faced by transgender people in the areas addressed by this bill. My goal today is to explain why it is so crucial that the legislature add the phrase “gender identity or expression” to Massachusetts’ non-discrimination statutes and hate crimes law.

I. Transgender People Desperately Need Legal Protection from Discrimination

The need to protect people from discrimination on the basis of gender identity and expression is great. At GLAD, we staff a Legal Information line through which members of the LGBT community can contact our organization to report incidents of discrimination and obtain legal resources. The number of calls we receive from the transgender community has increased dramatically in the last ten years. A number of publicly reported incidents of violence and discrimination reflect the kind of calls we receive and highlight the need for this legislation.

¹ HB 1722 provides this definition: “The term “gender identity or expression” shall mean a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth.”

Last June, Jenine Nickola, a transgender young woman, was attacked and brutally beaten in Lowell. According to publicly released reports, she was attacked by two men very early one Saturday morning while she was walking home. Early news reported indicated that she was a gay man. The truth, Ms. Nickola later disclosed, is that she is transgender but had hidden that fact. Her decision to hide the truth of her life is unsurprising given both the serious stigma attached to being transgender and confusion about the state of the law which has no clear protections for transgender people.

In addition to receiving reports of violence against transgender people, GLAD receives many calls relating to experiences of discrimination transgender people have in the context of employment. The reality is that transgender people face serious unemployment and underemployment because of pervasive prejudice and bias. Rachel Jette has spoken out publicly about her experience working at Honey Farms Mini Market and did pursue a claim against her former employer at the Massachusetts Commission Against Discrimination. Ms. Jette began working at the retail market in December 1994. During the hiring process, her employer learned of the fact that she is transgender in part because of her former name and former legal gender being included on the identity documents she presented as part of the application process. Shortly after she began working, she faced serious difficulties with managers who told her that she could not present as female in the workplace despite her female gender identity and medical history of transition. Pressure and harassment on her intensified over time and she was eventually fired, all because she was transgender.

Unfortunately, these cases represent just the tip of the iceberg. Transgender people throughout Massachusetts face serious discrimination every day in jobs, housing, lending, and public accommodations. We also face a serious risk of violence on the streets. Unfortunately, because of pervasive prejudice, discrimination, and misunderstanding, transgender people need a law to allow us to do that which most people take for granted – walk safely down the street, work, take out loans, seek and find housing, and use public accommodations without being subjected to prejudice and discrimination.

II. Massachusetts Will Join Other State and Local Jurisdictions That Ensure Freedom from Discrimination Based on Gender Identity or Expression

Massachusetts need not fear that by prohibiting discrimination based on gender identity or expression it will be entering into uncharted territory. Instead, Massachusetts will join the growing number of state and local governments that have already recognized that preventing discrimination based on gender identity and expression is both necessary and desirable, and therefore should be addressed explicitly in law. In passing House Bill 1722, Massachusetts would become the 14th state to explicitly prohibit discrimination against transgender people, joining California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia.

Massachusetts was a leader in 1989 when it passed a law prohibiting sexual orientation discrimination. The history of enforcement of that law has proven that it is an important public policy of the Commonwealth and has created no difficulties in enforcement of our laws. To the contrary, Massachusetts provided a model for the 19 other states that have since adopted similar protections for their gay, lesbian, and bisexual citizens. On the issue of gender identity or expression discrimination prohibited by this law, supporters of HB 1722 are not asking the Commonwealth to lead the way. To the contrary, at this point, Massachusetts will be following along a well-trodden path in adding to the number of states having already codified protections for their transgender citizens.

Over 30 years ago, Minneapolis became the first municipality to adopt transgender-specific non-discrimination language. Since then, the number of additional jurisdictions that have adopted similar measures has grown at a dramatic rate. One study estimates that nearly one-third of the country's population live in a jurisdiction that has in place some form of explicit protection for transgender people.² In addition, there are hundreds of employers and dozens of universities with non-discrimination policies protecting transgender people.³ There are many public and private models for accomplishing what HB1722 proposes. Adding "gender identity or expression" to our laws will protect our most vulnerable citizens and visitors while creating no problems for the Commonwealth to solve. The history of enforcement of 14 other states' laws proves this.

III. This Bill is a Clarification, Not a Change in Law

It bears mention that the proposed bill is a clarification of law, not a change. As the Massachusetts Commission Against Discrimination ("MCAD") correctly explained in two opinions issued by the full commission, transgender people are already covered under existing state sex and disability discrimination prohibitions. Jette v. Honey Farms Mini Mart, 2001 WL 1602799 (Mass. Comm'n Against Discrimination 2001); Millett v. Ludco, Inc., 2001 WL 1602800 (Mass. Comm'n Against Discrimination 2001). The Massachusetts Superior and Appeals Courts have agreed with the MCAD analysis. Doe v. Yunits, 2001 WL 664947 (Mass. Super. 2001); Doe v. Yunits, 2000 WL 33162199

² National Gay and Lesbian Task Force, 2005: The Year in Review, available at http://www.thetaskforce.org/downloads/reports/fact_sheets/transgender_year_in_review.pdf [last visited, March 4, 2008].

³ A small sampling of universities and employers with non-discrimination policies protecting transgender people includes: Brandeis University, Lucent Technologies, IBM, Apple Computers, Harvard University, Hewlett Packard, Intel, J.P. Morgan, Brown University, Johns Hopkins University, Prudential, Suffolk University, Tufts University, Verizon Wireless, and Williams College. For a complete list see <http://www.transgenderlaw.org/college/index.htm#policies> and <http://www.transgenderlaw.org/employer/index.htm> [sites last visited, March 4, 2008].

(Mass. Super. 2000) aff'd Doe v. Brockton School Comm., 2000 WL 33342399 (Mass. App. Ct. 2000)..

The MCAD analysis is well-established by current state and federal precedent despite some earlier case law to the contrary. As the MCAD decisions make clear, the approach of federal courts in the 1970s and early 1980s excluding transgender people from existing law under a “transgender exception,” see, e.g., Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Powell v. Read’s, Inc., 436 F.Supp 369 (D.Md. 1977); Voyles v. Ralph K. Davies Medical Center, 403 F.Supp 456 (N.D.Cal., 1975); Sommers v. Iowa Civil Rights Comm’n, 337 N.W.2d 470 (Iowa, 1983), has been rejected by contemporary courts and state agencies.

In those early cases, federal and state courts heard claims brought by transgender individuals who had been terminated from their jobs after notifying employers of their intention to undergo sex-reassignment surgery (“SRS”) or when employers learned that an employee had undergone sex-reassignment in the past. The claims brought were straightforward sex discrimination claims. For example, a highly regarded airline pilot (hired as male) was terminated when her employer, Eastern Airlines, learned that she intended to undergo SRS. Ulane, 742 F.2d at 1084. Karen Ulane argued that because she was qualified when employed as a male and fired when intending to work as a female, the basis of her claim was clearly rooted in sex discrimination. The Seventh Circuit Court of Appeals disagreed. Based on reasoning that many other courts have now rejected as discriminatory, the court created an unprincipled exclusion from existing sex discrimination law for transgender persons. Ulane, 742 F.2d at 1084. For a period of time, several other jurisdictions replicated this analysis. Holloway, 566 F.2d 659; Powell, 436 F.Supp 369; Voyles, 403 F.Supp 456; Sommers, 337 N.W.2d 470.

Earlier cases notwithstanding, as the MCAD decisions make clear, the 1989 United States Supreme Court case of Price-Waterhouse v. Hopkins, 490 U.S. 228, changed the legal landscape for transgender people and, as recent courts have explained, “eviscerated” the older exclusion. See, e.g., Smith v. City of Salem, Ohio, 378 F.3d 566, 573 (6th Cir. 2004). As MCAD explained, “Sex discrimination is a result of stereotypes of women and men, mandating conformity with society’s expectations of each sex; discrimination against transsexual people is, oftentimes, because the individual is well outside these expectations[.]” Millett at *4.

The MCAD approach reflects the near-consensus position of contemporary state and federal courts that have considered sex discrimination claims by transgender litigants. See Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith, 378 F.3d 566; Rosa v. Park West Bank & Trust, Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir., 2000); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D.Penn. February 17, 2006); Kastl v. Maricopa County Comm. College Dist., No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D.Ariz., June 3, 2004); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Doe v. United Consumer Financial Serv., No. 1:01

CV 112, 2001 WL 34350174 (N.D. Ohio, Nov. 9, 2001); Lie v. Sky Publ'g Corp., 15 Mass. L. Rptr. 412 (Mass. Super. 2002); Enriquez v. West Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001); Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. 2000); Maffei v. Kolaeton Industry, Inc., 626 N.Y.S.2nd 391 (N.Y. Sup., 1995). And, as Massachusetts courts have recognized, the MCAD analysis better reflects the intended scope of existing laws. Doe v. Yunits, 2001 WL 664947 (Mass. Super. 2001); Doe v. Yunits, 2000 WL 33162199 (Mass. Super. 2000) aff'd Doe v. Brockton School Comm., 2000 WL 33342399 (Mass. App. Ct. 2000) .

IV. Laws State a Public Policy in Addition to Providing an Enforcement Mechanism

Despite there now being clarity based on the MCAD decisions, there remain very important reasons to pass HB1722. The purpose of non-discrimination laws is at least two-fold. One purpose is to create a vehicle for preventing and redressing discrimination against vulnerable and targeted communities or individuals. Because House Bill 1722 codifies existing law, it serves this purpose by clarifying that Massachusetts law prohibits discrimination against transgender persons. A second and no less important purpose is to establish a clear statement of public policy in favor of equal treatment of transgender persons. By making this policy clear, the law helps to discourage discrimination and to limit the need for the enforcement mechanisms in place. In other words, part of the goal of adopting clear non-discrimination laws is to give notice to employers, landlords, lenders, and owners of establishments in order to keep discrimination from occurring in the first place.

The supporters of the raised bill ask this Committee and the legislature to add the phrase “gender identity or expression” to Massachusetts non-discrimination laws to make clear that existing law protects transgender and gender non-conforming people. While the current scope of “sex” discrimination prohibitions in our laws may be apparent to persons with legal training or background, it may not be clear to ordinary individuals who have no reason to know of the MCAD decisions or the courts’ interpretation of laws. House Bill 1722 will provide this notice and clarity.

In addition, HB1722 specifically adds gender identity or expression to Massachusetts hate crimes law, giving prosecutors and other law enforcement officials an essential tool to work towards guaranteeing the safety of our transgender citizens and visitors. Both because our hate crimes law does not include the classification of “sex” within it and because of the specific need for clarity of laws in the criminal context, HB1722 creates a new protection under our laws, one essential to transgender people’s security, that does not exist without its adoption.

V. Conclusion

In closing, and on a personal note, this legislation is very important to me not just because of the work I do but because of the way it would impact my life. As a visibly gender non-conforming person (and one who identifies as transgender), I have often faced discrimination or adverse treatment because I am a woman who does not look like one. It is, for me, a daily experience to be referred to as “he” or be given hostile stares in the women’s department of a clothing store. Shopkeepers and people in the service industry who have reflexively called me “Mr. Levi” often make me the object of their derision when they learn my name is “Jennifer.” While the proposed legislation will not and need not change people’s understandings of who is male and who is female, it will allow transgender people like me to continue to work, find housing, obtain credit, use public accommodations, and walk safely down the street despite others’ outdated notions of what it means to be a “real man” or a “real woman.”

Submitted by:
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