STATE OF MAINE		SUPERIOR COURT CIVIL ACTION
ANDROSCOGGIN, ss.		DOCKET NO. CV-2009-00199
BRIANNA FREEMAN, Plaintiff, v. REALTY RESOURCES HOSPITALITY, LLC, d/b/a DENNY'S OF AUBURN, Defendant.	: : : : : : : : : :	PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant's Motion for Summary Judgment fails for the simple reason that Defendant's justification for excluding Plaintiff Brianna Freeman from the women's restroom is facially discriminatory. As Ms. Freeman argues in her own Motion for Summary Judgment, Defendant's express reason for excluding her from the women's restroom – that she is a transgender woman who has not had genital surgery – relies upon the very characteristic that is protected under the Maine Human Rights Act ("MHRA"), i.e. the inconsistency between Ms. Freeman's gender identity and her assigned sex and anatomy at birth. Because Defendant's proffered justification is direct evidence of discrimination, this Court should deny Defendant's Motion and should grant judgment for Ms. Freeman instead.

Even if this Court disagrees that Defendant's explanation constitutes direct evidence of discrimination on the basis of gender identity, the material facts as to the existence, enforceability, and plausibility of Defendant's purported policy (i.e. all customers with male genitals must use the men's restroom and all customers with female genitals must use the women's restroom) are sufficiently disputed to deny Defendant's Motion. Ms. Freeman disputes

that Defendant has such a policy, given that Defendant failed to inform its employees of the policy and provided no training on how to enforce this policy. Even if Defendant has some type of policy, it is at best enforced in seemingly random ways. As such, a jury could find that Defendant's reliance on its purported policy as the justification for Ms. Freeman's exclusion from the restroom is pretextual and that the real motivating factor for the exclusion was Ms. Freeman's gender identity or expression. Accordingly, even if this Court does not grant summary judgment in favor of Ms. Freeman, this Court must also deny Defendant's Motion and allow this case to move forward to trial.

ARGUMENT

I. THIS COURT SHOULD DENY DEFENDANT'S MOTION AND INSTEAD SHOULD ENTER SUMMARY JUDGMENT FOR MS. FREEMAN BECAUSE DEFENDANT'S OWN STATED REASON FOR DENYING MS. FREEMAN THE USE OF THE WOMEN'S RESTROOM EXPRESSLY VIOLATES THE MHRA.

Ms. Freeman and Defendant both have filed cross-motions for summary judgment. See Pl.'s Mot. for Summ. J.; Def's Mot. for Summ. J ("Def.'s Mot."). Defendant contends that because Ms. Freeman is a transgender woman who has not had genital surgery (i.e. she has a female gender identity and lives as a woman despite being assigned the sex of male based upon her anatomy at birth), she is a "biological male" who can only use the men's restroom. Def.'s Mot., at 1-6. However, as Ms. Freeman argues in her own Motion for Summary Judgment, Defendant's stated reason constitutes a direct violation of the MHRA whether or not Defendant's stated reason was the actual reason for the exclusion.[1] See Pl.'s Memo. in Supp. of Mot. For Summ. J.

[1] In order to succeed on a disparate treatment discrimination claim, a plaintiff must show that she was discriminated against because of a protected characteristic. See Cumpiano v. Banco

As Ms. Freeman argues in her Motion, the MHRA prohibits discrimination in a public accommodation on account of a person's sexual orientation, which includes a person's "gender identity or expression." 5 M.R.S.A. §§ 4553(9-C) & 4592(1).[2] By its plain meaning and the reasonable interpretation of the MHRA, "gender identity" means "an individual's gender-related identity, regardless of whether that identity is different from that traditionally associated with that individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous." 94-348 C.M.R. Ch. 3, § 3.02(C)(2). Accordingly, the MHRA prohibits, inter alia, discrimination because a person's gender identity does not match his/her

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Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990); Maine Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1263 (Me. 1979). A plaintiff may meet her burden of proof by either showing direct evidence of discrimination, Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 (1st Cir. 2002), or by meeting the burden-shifting test laid out in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973), for cases where there is only circumstantial evidence of discrimination. Garrett v. Tandy Corp., No. 00-384-P-H, 2003 WL 21250679, at *9 (D. Me. May 30, 2003) (applying federal Title II standards to MHRA claim). Because Defendant's own articulation of why it denied Ms. Freeman access to the women's restroom directly violates the MHRA, Ms. Freeman can meet her burden of proof through direct evidence.

[2] Despite Defendant's protestations otherwise, access to safe and appropriate restrooms is a protected right under civil rights laws. See, e.g., Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972) (abrogated on separate issue of statute of limitations) (finding that racially segregated bathrooms constituted a discriminatory practice under Title VII of the Civil Rights Act); DeClue v. Central Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000) (absence of female bathroom facilities, which would deter women from seeking or holding a job, can constitute disparate impact discrimination); Catlett v. Missouri Highway and Transp. Comm'n, 828 F.2d 1260 (8th Cir. 1987) (demonstrating that some employers emphasized the lack of restroom facilities as a way to keep women out of the workplace); Acevedo Garcia v. Vera Monroig, 30 F. Supp. 2d 141 (D.P.R. 1998) (municipal employees' allegations that they were forbidden from using the bathroom at work to retaliate against them for their political support of another political party were sufficient to state a claim for violation of their First Amendment rights); Lynch v. Freeman, 817 F.2d 380, 387-88 (6th Cir. 1987) (finding that the lack of sanitary bathroom facilities may give rise to a disparate impact claim based on sex).

In addition, to the extent that Defendant attempts to mischaracterize Ms. Freeman's request as one for the "use of a woman's restroom by a biological male" in order to argue that Ms. Freeman's claim falls outside the scope of the MHRA's public accommodation protections, such a mischaracterization is merely a restatement of its purported reason and, as such, constitutes a direct violation of the MHRA for the same reasons.

assigned sex at birth as well as his/her anatomy, which is the basis on which sex is assigned at birth. And, as discussed further below, beyond the plain language of the MHRA, the legislative history also makes clear that the MHRA's protection must extend to all transgender persons, regardless of whether they have undergone any particular medical procedure, including whether or not they have had genital surgery.

Defendant asserts that it denied Ms. Freeman access to the women's restroom because she is a transgender woman who has not undergone genital surgery.[3] See Def.'s Mot., at 1-6; Pl.'s Statement of Additional Material Facts ("Pl.'s Additional Facts"), ¶ 15. By purportedly requiring Ms. Freeman to first undergo genital surgery before allowing her to use the women's restroom, Defendant has targeted the one characteristic that is uniquely related to Ms Freeman's transgender status – i.e., the incongruence between her gender identity and the anatomy (specifically, her genitals) that determined her birth sex. Defendant's rationale relies upon the very definition of what it means to be transgender – i.e., living consistent with a gender identity that is not the same as a person's assigned sex at birth – to justify its actions. For the MHRA's sexual orientation protection to have any real meaning for transgender people, it must protect a transgender woman's ability to live in her community as a woman, including ensuring that she can use the women's restroom in public accommodations.

[3] It does not help Defendant at all to point to the definition of "sex" used in In re Estate of Gardiner, 273 Kan. 191, 212-213 (Kan. 2002) in its Motion, which relies upon a person's reproductive role in determining their sex. Not only is there no evidence that Defendant actually relied upon this definition in excluding Ms. Freeman from the women's restroom, but creating an exception based upon such a definition would effectively exclude all transgender people from protection under the MHRA, an outcome the Maine Legislature certainly did not intend.

Defendant's repeated and misplaced attempt to rely on Goins v. West Group, 635 N.W.2d 717 (Minn. 2001), is unavailing.[4] First, the Maine Law Court has instructed that when the issue regarding a Maine statute's application is of first impression, Maine courts should first look to the plain language of the statute, legislative intent, and related Maine cases, before looking at case law from other jurisdictions. Despres v. Moyer, 2003 ME 41, ¶ 16, 827 A.2d 61, 65. See also McKeeman v. Cianbro Corp., 2002 ME 144, ¶ 8, 804 A.2d 406, 409 (court considered the plain language of the statute, legislative intent and related areas of law in Maine before even reaching a discussion of the decisions of other state courts); State v. Rudman, 136 A. 817, 820 (Me. 1927) ("[T]he statutes of other states cannot control [Maine's Supreme Judicial Court] in its construction of the language of [the Maine statute at issue].") In this case, as argued above and in Plaintiff's Motion, the statutory language is clear: the MHRA protects a person based upon their "gender identity," without any regard to what a person's genitals or anatomy happen to be.

However, to the extent this Court finds other state courts' interpretations of similar statutes helpful, it should not look to the Minnesota Supreme Court's opinion in Goins, which wrongly construed Minnesota's anti-discrimination statute to add an exception that simply did

[4] Defendant already has attempted unsuccessfully to rely on the Minnesota Supreme Court's opinion in Goins to argue in its Motion to Dismiss that Ms. Freeman did not have any legal right to access the restroom that accords with her gender identity. See Def.'s Mot. to Dismiss, at 3-4 (arguing that asking a "biological male" to use the men's restroom does not constitute sexual orientation discrimination as a matter of law). This Court rejected such an attempt by denying Defendant's Motion to Dismiss on Ms. Freeman's claim of sexual orientation discrimination. Freeman v. Realty Resources Hospitality, LLC, Decision, at 3 - 4 (May 27, 2010 Androscoggin Sup. Ct.). As such, this Court should consider its prior rejection of the ratio decidendi of Goins to be the controlling law of the case. United Air Lines, Inc. v. Hewins Travel Consultants, Inc., 622 A.2d 1163, 1167 (Me. 1993) ("The law of the case doctrine is based on 'the sound policy that in the interests of finality and intra-court comity a Superior Court justice should not, in subsequent proceedings involving the same case, overrule or reconsider the decision of another justice.'") (quoting Grant v. City of Saco, 436 A.2d 403, 405 (Me. 1981)).

not exist in the plain language.[5] See Goins, 635 N.W.2d at 723 ("We believe . . . that the MHRA neither requires nor prohibits restroom designation according to self-image of gender or according to biological gender."). Instead, this Court should look to the Minnesota appellate court's opinion below, which more persuasively found for the plaintiff based on the plain and clear language of the statute. Goins v. West Group, 619 N.W.2d 424 (Minn. App. Ct. 2001) (overruled by Goins, 635 N.W.2d 717) ("The statute prohibits discrimination on the basis of the inconsistency between anatomy and self-image…The MHRA, however, does not require an employee to eliminate an inconsistency between self-image and anatomy; it protects the employee from discrimination based on such an inconsistency.").[6]

Even if the Minnesota Supreme Court correctly decided Goins, it should not control in this case, which is being decided under Maine law, especially where the Maine legislature has already spoken directly to the issue. In Goins, the Court was left to interpret Minnesota's anti-discrimination statute in the absence of "more express guidance from the [Minnesota] legislature." Goins, 635 N.W.2d at 723. In this case, the Maine legislature provided the precise guidance to interpret the MHRA that the Goins court found absent. As argued in Plaintiff's Motion, the full Maine House of Representatives in 2005 voted 83-67 to reject an amendment that would have provided that the Maine Human Rights Act "may not be construed to permit a person to use a locker room or bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth [unless] the person has [undergone] a medical

[5] The anti-discrimination statute in Goins defines "sexual orientation," in part, as "having, or being perceived a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 263.01.

[6] In addition, neither Hispanic AIDS Forum v. Estate of Bruno, 16 A.D.3d 294, 792 N.Y.S.2d 43 (N.Y. App. Div. 2005) nor Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007), help Defendant's case at all. Hispanic AIDS Forum simply relied upon Goins and therefore falls for the same reasons as stated above. Etsitty presented only a sex discrimination claim and not a gender identity discrimination claim.

procedure in which that person's gender is changed...."[7] In 2007, a similar amendment was introduced and again rejected by a joint legislative committee without even reaching the full body of either chamber of the Maine Legislature. [8]

The plain language of the MHRA and its legislative history clearly demonstrate the Maine Legislature's intent to protect the right of transgender individuals to be able to live their lives consistent with their gender identity, including the use of restrooms, without regard to whether the transgender person had ever undergone any particular medical treatment as part of his/her gender transition. See, e.g., Arsenault v. Secretary of State, 2006 ME 111, ¶ 11, 905 A.2d 285, 288 ("[The Court's] primary purpose in statutory interpretation is to give effect to the intent of the Legislature."); Littlefield v. State, Dept. of Human Services, 480 A.2d 731, 739 (Me. 1984) ("if from an analysis of the legislative history of a specific piece of legislation … a court can ascertain congressional purpose behind the enactment, this will usually dispose of an issue of statutory construction."). As such, it would be inappropriate for this Court to ignore the clear meaning of the statute and the intent of the Legislature in favor of another state court's interpretation of an entirely different statute, particularly where the Maine legislature had provided just the guidance that the other state court found lacking.

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[7] H-86, 122nd Leg., 1st Reg. Sess. (Me. 2005). See also, Roll-calls and Actions for LD 1196, 122nd Leg., 1st Reg. Sess. (Me. 2005) for voting history. Relevant parts of the legislative history have been attached as Attachment A for the convenience of the Court.

[8] LD 1589 ("An Act to Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms") stated:

> [A] person may not use a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth. If a person completely undergoes a medical procedure in which that person's gender is changed, that person must use a public locker room, changing room or bathroom facility designated for use by the person's new gender. A violation of this subsection is a Class E crime." LD 1589, 123rd Leg., 1st Reg. Sess., (Me. 2007).

Relevant parts of the legislative history have been attached as Attachment B for the convenience of the Court.

II. IF THIS COURT DOES NOT GRANT SUMMARY JUDGMENT FOR MS. FREEMAN, THERE ARE GENUINE ISSUES OF MATERIAL FACTS THAT PRECLUDE GRANTING SUMMARY JUDGMENT FOR DEFENDANT.

Even if this Court does not find that Defendant's asserted rationale for excluding Ms. Freeman from the women's restroom constitutes direct evidence of discrimination based on her gender identity, there is strong evidence under the McDonnell-Douglas indirect evidence analysis that Defendant's asserted rationale is pretext and the real basis for her exclusion from the restroom is an impermissible and discriminatory one. While Defendant claims that it has a policy at all of its restaurants requiring all customers with male genitals to use the men's restroom and all customers with female genitals to use the women's restroom, Pl.'s Additional Facts, ¶ 15, a jury could readily conclude that no such policy actually exists. Several uncontroverted facts suggest that the so-called policy is a sham. For example, Defendant failed to communicate this alleged policy to its employees or to train its employees on how to enforce any such policy. Pl.'s Additional Facts, ¶¶ 16-21. Defendant's so-called policy is even more implausible because it is neither workable nor enforceable, given that it is impossible to determine what a person's genitals are from his/her outward appearance. In effect, Defendant's policy, to be enforced, would require customers to remove their clothing and display their genitals for inspection, which Defendant admits it does not and would not require. Pl.'s Additional Facts, ¶¶ 26-30. Finally, even if there were some sort of policy in place, it is not clear that it is enforced in a consistent and/or non-discriminatory fashion. Pl.'s Additional Facts, ¶¶ 22-25 & 31-36. Accordingly, viewing the evidence in the light most favorable to the non-movant, Lightfoot v. School Administrative Dist. No. 35, 2003 ME 24, ¶ 6, 816 A.2d 63, 65, the material facts are sufficiently disputed to deny Defendant's Motion. See, e.g., Arrow Fastener Co. v Wrabacon, Inc., 2007 ME 34, ¶ 17, 917 A.2d 123, 126 ("[e]ven when one party's version

of the facts appears more credible and persuasive to the court, a summary judgment is inappropriate if a genuine factual dispute exists that is material to the outcome"); Brown Dev. Corp. v. Hemond, 2008 ME 146, ¶ 10, 956 A.2d 104, 108 ("An issue is genuine if there is sufficient evidence supporting the claimed factual dispute to require a choice between the different versions."); Chadwick v. WellPoint, Inc., 561 F.3d 38, 47 n.11 (1st Cir. 2009) ("at summary judgment we do not decide which explanation for the [adverse action] is most convincing, but only whether [the plaintiff] has presented sufficient evidence regarding *her* explanation.").

Under the McDonnell-Douglas indirect evidence test, the plaintiff has the burden of making her prima facie case by showing that she (i) is a member of a protected class, (ii) attempted to exercise the right to full benefits and enjoyment of a place of public accommodation, (iii) was denied those benefits and enjoyment, and (iv) was treated less favorably than similarly situated persons who are not members of the protected class. Garrett v. Tandy Corp., No. 00-384-P-H, 2003 WL 21250679, at *9 (D. Me. May 30, 2003). Once a plaintiff makes out her prima facie case, the burden of production then shifts to the defendant to demonstrate a "legitimate, non-discriminatory reason" for its action. Id. at *9. However, a plaintiff can overcome a defendant's legitimate, non-discriminatory reason by showing that such reason is merely pretext for discrimination. Id. In other words, a plaintiff must be provided the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). There is no "mechanical formula" for finding pretext. Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 39 (1st Cir. 2003). Instead, to establish pretext in the absence of direct evidence, a plaintiff can offer many different forms of

circumstantial evidence; Mesnick v. Gen. Elec. Co., 950 F.2d 816 (1st Cir. 1991); Rathbun v. Autozone, Inc., 361 F.3d 62, 72 (1st Cir. 2004); including weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the defendant's proffered legitimate reasons. E.C. Waste, Inc. v. NLRB, 359 F.3d 36, 44 (1st Cir. 2004).

Ms. Freeman can easily make out her prima facie case. She is a woman who is transgender and who sought and was denied access to the use of the women's restroom at Denny's restaurant. Pl.'s Additional Facts, ¶¶ 1-11; Def.'s Statement of Material Facts, ¶ 19; Affidavit of Brianna Freeman in Supp. of Mot. for Summ. J., attached as Exh. C to Pl.'s Opp. to Def.'s Statement of Material Facts, ¶ 21. Defendant has done nothing to dispute Ms. Freeman's prima facie showing. See Meléndez v. Autogermana, Inc., 622 F.3d 46, 51 (1st Cir. 2010) ("The burden of making out a prima facie case of discrimination is not onerous.").

Defendant's only proffered justification for its actions is that it has a general policy in all of its restaurants that all customers with male genitals must use the men's room and those with female genitals must use the women's restroom. Pl.'s Additional Facts, ¶ 15. However, as set forth above, it is doubtful that any such policy even exists. Defendant's vice-president, regional manager, and restaurant managers could not confirm that its purported policy was and continues to be communicated generally to its employees. Pl.'s Additional Facts, ¶¶ 16-20. In addition, Defendant's vice-president Kevin Labree, who was responsible for devising and implementing its so-called policy, has "no knowledge" of "any guidance to managers about how to enforce the policy," nor did Defendant provide any training to its employees on how to implement its purported policy. Pl.'s Additional Facts, ¶ 21. See Gibbons v. Burnley, 737 F. Supp. 1217 (D. Me. 1990) (finding that employer's purported policy did not exist when it had never been articulated nor enforced until seeking reason for terminating employee).

The existence of such a general policy is further implausible considering that such a policy is unworkable and unenforceable, given that there is no way to determine what a customer's genitals are from an individual's outward appearance. Pl.'s Additional Facts, ¶¶ 26-30. As Ms. Freeman's expert has attested, given that transgender individuals can and do develop secondary sex characteristics without genital surgery (e.g. a transgender man who takes male hormones and develops facial hair), there is no way to tell from a transgender person's outward appearance whether s/he has had such surgery, leaving physical inspection as the only way to verify a person's anatomy. Id. Even Defendant itself has admitted that it would not seek to verify customers' self-representations as to their anatomy, making its purported policy entirely unenforceable. Pl.'s Additional Facts, ¶ 31.

Even if there exists some sort of policy, Defendant has not enforced its purported policy in a consistent and/or non-discriminatory fashion. Defendant's own officers and employers have offered inconsistent and often contradictory understandings of how to enforce its purported policy, including how and when to make a determination as to what a customer's genitals are. Pl.'s Additional Facts, ¶¶ 31-36. Even Mr. Labree, supposedly the architect of Defendant's purported policy, has made contradictory statements about how to enforce Defendant's purported policy. For example, he has stated both that: (1) employees "would have to" rely upon a customer's representation without further verification as to what their genitals are, and (2) employees may take into account a customer's "[g]eneral impression and appearance" in determining the customer's anatomy. Pl.'s Additional Facts, ¶¶ 32 & 56. Unable to explain how Defendant's employees are to identify a customer's genitals in order to enforce its purported policy, Mr. Labree ultimately admits that he didn't actually create a "method of identification,"

Pl.'s Additional Facts, ¶ 33, and that instead enforcement of Defendant's purported policy was "totally" within the "judgment by a manager." Pl.'s Additional Facts, ¶ 36.

Yet, in exercising their judgment, Defendant's own managers have demonstrated equally inconsistent and contradictory understandings of how to enforce the purported policy. Pl.'s Additional Facts, ¶¶ 31-36. Again, Defendant's managers have made inconsistent and contradictory statements regarding whether they would determine a person's anatomy by self-representation only or by also taking into account a customer's general, outward appearance. Pl.'s Additional Facts, ¶¶ 31 & 32. In addition, Defendant's managers have made inconsistent and contradictory statements regarding how they could enforce the purported policy. Pl.'s Additional Facts, ¶¶ 34-35. For example, Defendant's regional manager has stated that under its purported policy, managers should not seek confirmatory facts that a customer is complying with the purported policy unless there is a customer complaint. Pl.'s Additional Facts, ¶ 34. In contrast, a different manager stated that if he were to "observe someone that [he] think[s] is another gender than the restroom that they're using," then he might "direct them to the correct one." Pl.'s Additional Facts, ¶ 35.

Most tellingly, the different experiences of two, separate transgender individuals at Defendant's restaurants reveal Defendant's inconsistent enforcement of its purported policy. On January 7, 2011, Portland resident Jamie-Lynn Kane, a transgender woman (i.e. she was assigned the sex of male at birth but has a female gender identity) who has not had genital surgery, went to Defendant's restaurant in Westbrook, Maine for a meal.[9] Pl.'s Additional Facts, ¶¶ 22 & 23. After her meal, she told the manager on duty that she is a transgender woman who has not had

[9] A recent and accurate photograph of Ms. Kane is also attached to Exhibit 1 of her affidavit, which is attached as Exhibit L to Plaintiff's Opposition to Defendant's Statement Material Facts.

genital surgery and asked if she could use the women's restroom. Id. The manager allowed her to use the women's restroom despite Defendant's purported policy. Id.

Similarly, Dorn McMahon, an Auburn resident, is a transgender man (i.e. he was assigned the sex of female at birth but has a male gender identity) who has not had genital surgery.[10] Pl.'s Additional Facts, ¶ 25. Mr. McMahon went to eat at Defendant's restaurant in Auburn on January 6, 2011. Pl.'s Additional Facts, ¶ 24. After his meal, Mr. McMahon told his server, "I have to use the restroom but I am transgender, it is still okay if use the men's restroom?" Id. Mr. Mahon's server responded, "It is okay. Yes, you are fine. We just have problems with men dressing as women. But you are fine sweetie." "[S]uch weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence" can lead to an inference that "the employer did not act for the asserted non-discriminatory reasons." Billings v. Town of Grafton, 515 F.3d 39, 55-56 (1st Cir. 2008).

Finally, the fact that Defendant's justifications for its purported policy – i.e., customer comfort and safety – not only are not advanced by its purported policy but have been explicitly rejected by its own officers, gives further rise to an inference that its purported policy is simply pretext for discrimination. See, e.g., Domínguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000) (finding that an employer's "different and arguably inconsistent explanations" for its challenged action can serve as evidence of pretext). In its Motion, Defendant cites concerns of "customer comfort and safety" in justifying its purported policy. Def.'s Mot., at 6. Yet, Defendant has more than undermined the legitimacy of such concerns; it has actually denied that

[10] A recent and accurate photograph of Mr. McMahon is also attached as Exhibit 1 to his affidavit, which is attached as Exhibit M to Plaintiff's Opposition to Defendant's Statement of Material Facts.

such concerns factored into its decision. For example, Joseph Cloutier, president of Realty Resources Hospitality, has admitted that concerns about customer comfort would have no affect on its determination of who may access the women's restroom. Pl.'s Additional Facts, ¶ 46 (Joseph Cloutier, president of Realty Resources Hospitality, LLC, responding as follows in his deposition: "Q: In the case that I just suggested where there's a female customer questioning whether somebody should be in the women's room, but you determine that that person has female genitalia, that customer uses the women's room; is that correct? A: That's our policy. Q: And that would be correct even if another customer is upset about that, isn't that correct? A: That's correct. That's correct. That's correct."). See also Pl.'s Additional Facts, ¶¶ 37-55. Additionally, Mr. Labree's statement that Defendant would allow a "customer dressed as a woman but had . . . some male characteristics like facial hair, but told Denny's management that they had genital surgery and had female genitalia" to use the women's restroom under its purported policy similarly undermines Defendant's credibility that it is concerned about the safety of its female customers in the restroom. Pl.'s Additional Facts, ¶ 56.

"Because a demonstration that the circumstances proffered by the employer were not the actual reason" for Defendant's action "*allows* the inference at trial that the true reason was discriminatory animus . . . the generation of an issue of fact regarding the veracity of the employer's explanation is sufficient to repel a motion for summary judgment." Cookson v. Brewer School Dept., 2008 ME 57, ¶17, 974 A.2d 276, 282 n.3 (internal citation omitted). See also Cookson, 974 A.2d at 282 ("trial courts should exercise caution in resolving issues of pretext on summary judgment in employment discrimination cases"); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998) ("where a plaintiff in a discrimination case makes out a prima facie case and the issue becomes whether the employer's stated

nondiscriminatory reason is a pretext for discrimination, courts must be 'particularly cautious' about granting the employer's motion for summary judgment."). Accordingly, in light of these numerous disputed issues of fact regarding the legitimacy of Defendant's purported policy, if this Court rejects Ms. Freeman's argument that Denny's own rationale is direct evidence of unlawful discrimination, this Court must deny summary judgment for Defendant and allow this case to go to trial.

III. DEFENDANT PRESENTS RHETORIC, NOT EVIDENCE, TO CONJURE UP FEARS AND STEREOTYPES ABOUT TRANSGENDER PEOPLE.

Antidiscrimination laws, such as Maine's 2005 law banning sexual orientation discrimination, ensure that individuals are not denied equal opportunity based on "prejudice, stereotypes, or unfounded fear." See Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 (1987). Defendant here invokes the very stereotypes and fears the Maine law is intended to eradicate by framing its argument with inflammatory rhetorical questions rather than facts and evidence. Without presenting a single fact relevant to the issue in its Statement of Material Facts, Defendant raises the specter of harm to young girls in women's rooms,[11] lost business "from a man (claiming to be a woman) sharing restrooms with little girls,"[12] and "the interests of its customers comfort and safety" as justifications for its refusal to allow a transgender woman to use the women's restroom.[13]

Importantly, however, Defendant has no evidence to support the bogeymen it creates. It has retained no expert witness nor has it proffered any evidence whatsoever about safety, the risk

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[11] See Def.'s Mot., at 2 ("Who amongst us wants young girls to utilize restrooms that may also be used by men with less than altruistic intentions?").

[12] See Def.'s Mot., at 2 ("How does a business protect itself from the liabilities and loss of business that will ultimately result from a man (claiming to be a woman) sharing restrooms with little girls?"

[13] See Def.'s Mot., at 6.

of harm to others, or lost business. The Court will search in vain through Defendant's mere 25 asserted facts to find any in the least bit related to the questions it rhetorically raises. Notably, Defendant does not even itself answer these questions, a tacit admission that its real goal is to play to unsubstantiated fears.

It is hardly surprising that Defendant's attorneys prefer rhetoric to putting on a case. Defendant's own witnesses put the lie to its own case by universally proclaiming that they would enforce their so-called policy even were it to result in customer complaints, outrage, and loss of business. Pl.'s Additional Facts, ¶¶ 37-55. Regardless, courts have long rejected justifications for discrimination based on customer preferences or complaints or loss of business. This is true because the courts charged with enforcing our civil rights laws understand and appreciate that the very purpose of such laws is to ensure that people are able to enjoy the full rights of citizenship notwithstanding the unfounded bias and prejudice of others. See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (1971) (rejecting policy of female-only flight attendants in claim by male applicant and noting: "While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.").[14]

[14] See also Sarni Dry Orignial Cleaners, Inc. v. Cooke, 447 N.E.2d 1228, 1233 n.7 (Mass. 1983) (dry cleaner terminated black delivery truck driver after he was subjected to a racially based attack; in doubting whether the prejudices of third parties could justify termination, the Court noted that the State's antidiscrimination agency had stated that " 'to allow such flagrant criminality to serve as the justification for a racial termination … would reward and encourage the very lawlessness and racism which it is the purpose of [the antidiscrimination law] to eliminate.'"); Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 260 (1964) (denial of challenge by hotel owner that public accommodations provision of civil rights act of 1964 was

In the end, the lack of even a patina of evidence to support the rhetorical fearmongering Defendant introduces in its Motion reveals that it is simply repeating a pattern common in our nation's history to resist new civil rights protections for groups who have been subject to cultural biases and misunderstanding. See, e.g., Eileen Boris, "You Wouldn't Want One of 'Em Dancing With Your Wife": Racialized Bodies on the Job in World War II, 50.1 American Quarterly 77, 96 (March 1998) (describing how an attorney for Western Electric plant union members argued in 1943 that in spite of an Executive Order signed by President Roosevelt, toilet facilities at a war production plant should not be racially integrated because it would undermine production goals "since white workers refused to accept them"; attorney relied upon a stereotyped scare tactic by arguing: "It goes without saying that among the colored race venereal disease is greater than among whites"). Ms. Freeman asks this Court to deny Denny's Motion for Summary Judgment, grant her own, and, in so doing, protect her basic right of access to a public restaurant that most other persons regularly enjoy without question or disruption. While "private biases may be outside the reach of the law, [ ] the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 466 (1984).

CONCLUSION

Accordingly, Ms. Freeman respectfully requests that this Court deny Defendant's Motion for Summary Judgment and grant her Motion for Summary Judgment.

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unconstitutional, specifically rejecting hypothesis that being forced to cater to black customers would cause business economic harm).

Dated: January 12, 2011

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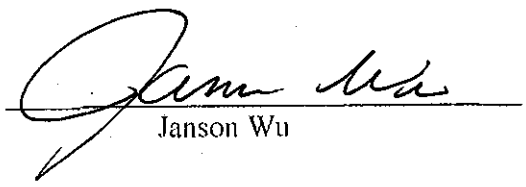
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January 2011, a copy of the foregoing Plaintiff's Opposition to Defendant's Motion for Summary Judgment was served by overnight mail on the following attorneys for Defendant at the address listed below:

Chad A. Cloutier
Cloutier & Associates, P.A.
58 Park Street, Suite 202
Rockland, ME 04841

Patrick Mellor, Esq.
Law Offices of Strout & Payson, P.A.
P.O. Box 248
Rockland, ME 04841-0248



Janson Wu

Amend the bill by inserting after section 17 the following:

'**Sec. 18. 5 MRSA §4594-G** is enacted to read:

§4594-G. Locker room or bathroom facilities

This chapter may not be construed to permit a person to use a locker room or the bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth. If a person undergoes a medical procedure in which that person's gender is changed, that person may use a locker room or the bathroom facilities of a public rest room designated for use for the person's new gender.'

Further amend the bill by relettering or renumbering any nonconsecutive Part letter or section number to read consecutively.

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Attachment A

SUMMARY

This amendment provides that the Maine Human Rights Act may not be construed to permit a person to use a locker room or the bathroom facilities of a public rest room designated for use for a gender other than the gender of that person at birth unless the person has undergone a medical procedure to change the person's gender.

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LD 1196 (SP 413)

"An Act To Extend Civil Rights Protections to All People Regardless of Sexual Orientation"

(Governor's Bill)

Sponsored by **Senator Karl Turner**

Senate Roll-calls

RC #	Date	Motion	Outcome	# Yeas	# Nays
RC #28	March 28, 2005	Accept Rpt 'A' OTP	PREVAILS	25	10
RC #29	March 29, 2005	Indef Post SAS-44	PREVAILS	22	13
RC #30	March 29, 2005	Indef Post SBS-48	PREVAILS	27	8
RC #33	March 30, 2005	Recede and Concur	PREVAILS	24	10
RC #51	March 30, 2005	ENACTMENT (HIH-92)	PREVAILS	25	10

House Roll-calls

RC #	Date	Motion	Outcome	# Yeas	# Nays
RC #38	March 29, 2005	Commit to Com. on Judiciary	FAILS	72	75
RC #39	March 29, 2005	ACC REPORT 'A' OTP	PREVAILS	88	62
RC #40	March 29, 2005	INDEF POSTPONE H "C" H-84	PREVAILS	76	74
RC #41	March 29, 2005	INDEF POST H 'B' H-83	PREVAILS	81	68
RC #42	March 29, 2005	INDEF POST H 'E' H-86	PREVAILS	83	67
RC #43	March 29, 2005	INDEF POST H 'F' H-87	PREVAILS	95	55
RC #44	March 29, 2005	INDEF POST H 'G' H-88	PREVAILS	98	51
RC	March 29,	INDEF POST H 'J' H-94	PREVAILS	82	68

#45	2005				
RC	March 29,	ADOPT HOUSE AMEND 'I'	PREVAILS	122	28
#46	2005	H-92			
RC	March 30,	Enactment	PREVAILS	91	58
#63	2005				

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LD 1196 (SP 413)

"An Act To Extend Civil Rights Protections to All People Regardless of Sexual Orientation"

(Governor's Bill)

Sponsored by **Senator Karl Turner**

Date	Chamber	Action
3/8/2005	Senate	Under suspension of the Rules Committee on Judiciary suggested and ordered printed. On motion by Senator Hobbins of York **REFERRED** to the Committee on **JUDICIARY** Ordered sent down forthwith for concurrence
3/8/2005	House	Bill **REFERRED** to the Committee on **JUDICIARY**. In concurrence. ORDERED SENT FORTHWITH.
3/28/2005	Senate	Reports **READ** On motion by Senator HOBBINS of York Report A Ought to Pass (Remarks Made) Roll Call Ordered Roll Call Number 28 Yeas 25 - Nays 10 - Excused 0 - Absent 0 **ACCEPTED** **READ ONCE** Assigned for Second Reading next Legislative Day
3/29/2005	Senate	COMMITTEE ON BILLS IN THE SECOND READING REPORTS NO FURTHER VERBAL AMENDMENTS NECESSARY Senator Rotundo, Senate Chair. REPORT ACCEPTED. **READ A SECOND TIME** On motion by Senator HOBBINS of York **TABLED** until Later in Today's Session, pending **PASSAGE TO BE ENGROSSED** Taken from the table by the President On motion of Senator PLOWMAN of Penobscot Senate Amendment "A" (S-44) **READ** (Remarks Made) On motion by Senator HOBBINS of York Senate Amendment "A" (S-44) **INDFINITELY POSTPONED** Roll Call Number 29 Yeas 22 - Nays 13 - Excused 0 - Absent 0 **PREVAILED**

		On motion of Senator PLOWMAN of Penobscot Senate Amendment "B" (S-48) **READ** Senator HOBBINS of York moved to **INDFINITELY POSTPONED** Senate Amendment "B" (S-48) Tabled pending Ruling of the Chair Taken from the table by the President Senate Amendment "B" (S-48) Ruled Germain. Subsequently Motion by Senator HOBBINS of York to **INDEFINITELY POSTPONE** Senate Amendment "B" (S-48) Roll Call Ordered Roll Call Number 30 Yeas 27 - Nays 8 - Excused 0 - Absent 0 **PREVAILED** **PASSED TO BE ENGROSSED** Ordered sent down forthwith for concurrence
3/29/2005	House	Reports **READ**. Representative SIMPSON of Androscoggin moved to **ACCEPT** REPORT A **Ought to Pass** Motion of Representative SHERMAN of Hodgdon to **COMMIT** the Bill and accompanying papers to the Committee on **JUDICIARY FAILED**. **ROLL CALL NO. 38** (Yeas 72 - Nays 75 - Absent 4 - Excused 0)
3/29/2005	House	Subsequently, REPORT A **Ought to Pass** was **ACCEPTED**. **ROLL CALL NO. 39** (Yeas 88 - Nays 62 - Absent 1 - Excused 0) The Bill was **READ ONCE**. Under suspension of the rules, the Bill was given its **SECOND READING** without **REFERENCE** to the Committee on **Bills in the Second Reading**.
3/29/2005	House	On motion of Representative BRYANT-DESCHENES of Turner, **House Amendment "C" (H-84)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "C" (H-84)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 40** (Yeas 76 - Nays 74 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative SHERMAN of Hodgdon, **House Amendment "B" (H-83)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "B" (H-83)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 41**

		(Yeas 81 - Nays 68 - Absent 2 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "E" (H-86)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "E" (H-86)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 42** (Yeas 83 - Nays 67 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "F" (H-87)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "F" (H-87)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 43** (Yeas 95 - Nays 55 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative FISCHER of Presque Isle, **House Amendment "I" (H-92)** was **READ** and **ADOPTED**.
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "G" (H-88)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "G" (H-88)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 44** (Yeas 98 - Nays 51 - Absent 2 - Excused 0)
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "H" (H-89)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "H" (H-89)** was **INDEFINITELY POSTPONED**.
3/29/2005	House	On motion of Representative DUPREY of Hampden, **House Amendment "J" (H-94)** was **READ**. On motion of Representative SIMPSON of Androscoggin **House Amendment "J" (H-94)** was **INDEFINITELY POSTPONED**. **ROLL CALL NO. 45** (Yeas 82 - Nays 68 - Absent 1 - Excused 0)
3/29/2005	House	On motion of Representative DUDLEY of Portland the House **RECONSIDERED** its action whereby **House Amendment "I" (H-92)** was **ADOPTED**. Subsequently, **House Amendment "I" (H-92)** was **ADOPTED**. **ROLL CALL NO. 46**

		(Yeas 122 - Nays 28 - Absent 1 - Excused 0)
	3/29/2005 House	The Bill was **PASSED TO BE ENGROSSED as Amended by House Amendment "I" (H-92)**. In **NON-CONCURRENCE** and sent for concurrence. ORDERED SENT FORTHWITH.
	3/30/2005 Senate	Under suspension of the Rules On motion by Senator HOBBINS of York The Senate **RECEDED** and **CONCURRED** (Remarks Made) Roll Call Ordered Roll Call Number 33 Yeas 24 - Nays 10 - Excused 1 - Absent 0 **PREVAILED**
		PASSED TO BE ENGROSSED AS AMENDED BY House Amendment "I" (H-92) In concurrence
	3/30/2005 House	**PASSED TO BE ENACTED**. **ROLL CALL NO. 63** (Yeas 91 - Nays 58 - Absent 2 - Excused 0) Sent for concurrence. ORDERED SENT FORTHWITH.
	3/30/2005 Senate	Under suspension of the Rules **PASSED TO BE ENACTED** Roll Call Ordered Roll Call Number 51 Yeas 25 - Nays 10 - Excused 0 - Absent 0 In concurrence

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An Act To Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §4594-G is enacted to read:

§ 4594-G. Locker room, changing room or rest room facilities

1. Use of facilities designated for the opposite gender. Notwithstanding the other provisions of this chapter, a person may not use a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth. If a person completely undergoes a medical procedure in which that person's gender is changed, that person must use a public locker room, changing room or bathroom facility designated for use by the person's new gender. A violation of this subsection is a Class E crime.

2. Changing appearance. A person who is convicted of a crime requiring registration under Title 34-A, chapter 15 and alters or attempts to alter the person's appearance to enter a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth commits a Class C crime.

SUMMARY

This bill makes it a Class E crime when a person enters a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth, except for a person who has undergone a medical procedure to change that person's gender, who then is required to use the facilities for the person's new gender. This bill also makes it a Class C crime when a person required to register under the Sex Offender Registration and Notification Act of 1999 alters or attempts to alter that person's appearance to enter a public locker room, changing room or bathroom facility designated for use by a gender other than the gender of that person at birth.

Attachment B

Reported out 5/3

VOTING TALLY SHEET

For LD's

LD #: 1589

Committee: Joint Standing Committee on Criminal Justice & Public Safety

Date: 5/2/07

Motion: ONTP

Motion by: Hanley

Seconded by: Tibbets

	Those Voting In Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
		ONTP	OTP	OTP-AM	New Draft	Re-Refer		
Senators								
1. Bill Diamond	X							
2. Earle McCormick	X							
3. Roger Sherman	A							
Representatives								
1. Stan Gerzofsky	X							
2. Pat Blanchette	X PAB							
3. Chris Greeley	X							
4. Dawn Hill	X							
5. Stephen Hanley	X							
6. Gary Plummer	X							
7. Joseph Tibbets	X							
8. Bryan Kaenrath	X							
9. Anne Haskell	X AMH							
10. Rick Sykes	X							
TOTALS	13							

SENATE

BILL DIAMOND, DISTRICT 12, CHAIR
EARLE L. MCCORMICK, DISTRICT 21
ROGER L. SHERMAN, DISTRICT 34

MARION HYLAN BARR, LEGISLATIVE ANALYST
FERN NEILSON, COMMITTEE CLERK

STATE OF MAINE

HOUSE

STAN GERZOFSKY, BRUNSWICK, CHAIR
PATRICIA A. BLANCHETTE, BANGOR
ANNE M. HASKELL, PORTLAND
STEPHEN P. HANLEY, GARDINER
DAWN HILL, YORK
BRYAN T. KAENRATH, SOUTH PORTLAND
RICHARD M. SYKES, HARRISON
CHRISTIAN D. GREELEY, LEVANT
GARY E. PLUMMER, WINDHAM
JOSEPH L. TIBBETTS, COLUMBIA

ONE HUNDRED AND TWENTY-THIRD LEGISLATURE

COMMITTEE ON CRIMINAL JUSTICE AND PUBLIC SAFETY

May 7, 2007

Honorable Beth Edmonds, President of the Senate
Honorable Glenn Cummings, Speaker of the House
123rd Maine Legislature
State House
Augusta, Maine 04333

Dear President Edmonds and Speaker Cummings:

Pursuant to Joint Rule 310, we are writing to notify you that the Joint Standing Committee on Criminal Justice and Public Safety has voted unanimously to report the following bills out "Ought Not to Pass":

L.D. 1332 An Act Regarding Tobacco Products in Jails

L.D. 1384 An Act To Rename and Specifically Identify Sex Crimes

L.D. 1589 An Act To Prohibit the Use of Opposite-gender Bathrooms, Changing Rooms and Locker Rooms

L.D. 1612 An Act To Reduce the Incidence of Incarceration for People with Mental Illness

We have also notified the sponsors and cosponsors of each bill listed of the Committee's action.

Sincerely,

Sen. Bill Diamond
Senate Chair

Rep. Stanley J. Gerzofsky
House Chair

100 STATE HOUSE STATION, AUGUSTA, MAINE 04333-0100 TELEPHONE 207-287-1122