

October 4, 2007

The Honorable Barney Frank
2252 Rayburn H.O.B.
Washington, D.C. 20515
Fax No. (202) 225-0182

Re: Your press release dated October 3, 2007 responding to our statement of October 1, 2007

Dear Congressman Frank:

It is not pleasant to have to disagree with a Congressman who has done so much that we admire and who has been such a stalwart leader for our community, but your recent response to our organization's legal analysis of the failings of H.R. 3685 (the weakened version of the Employment Non-Discrimination Act [ENDA] introduced into Congress last week) forces us to reply. This is a difference of opinion over legal analysis, not over goals. We all share the goal of enacting a strong and effective law to protect the LGBT community against employment discrimination.

On October 1, 2007, Lambda Legal issued a preliminary analysis of the differences between H.R. 2015 (the version of ENDA that was introduced into Congress in April of this year) and the new, less protective version of ENDA recently introduced to replace it. In your press release issued late Wednesday in response to our comments, you asserted that our analysis was flawed and that the new version of ENDA only omits reference to people who are transgender but "makes no other change in the wording on this point." Unfortunately, that is not true, because the definition of "gender identity" that was removed from the originally proposed bill included "...gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual."

These words are critically important. This year's original version of ENDA would protect against discrimination not only on the basis of sexual orientation or transgender identity. Unlike the more recent version, the original version *also* would prohibit discrimination on the grounds that a person does not have an appearance, mannerisms or other characteristics that may be perceived by some people as different from those traditionally associated with that person's sex.

This is a very important protection, one that many LGBT organizations have been advocating to have expressly enacted into law for a number of years. Earlier today we released a joint statement with four other LGBT legal organizations to further explain our concerns about this to the community. After much negotiation with members of Congress, this protection was included in the version of ENDA introduced in April, only to have it cut out of the version introduced last week.

There can be no debating that this cut weakened the bill. As our prior analysis indicated, this cut diminished the bill not only by excluding transgender people – a consequence we strongly oppose in

itself. The cut also made the more recent bill far weaker by denying the protection that would have been provided by the earlier version to those who may not identify as transgender but who are discriminated against because they are perceived as gender nonconforming. Lesbians, gay men and bisexuals frequently are perceived that way.

As our original analysis indicated, a version of ENDA that does not prohibit discrimination based on gender nonconformity is inadequate. In cases brought under Title VII (the federal law that prohibits sex discrimination and sexual harassment), employers often try to argue that employees who have been discriminated against or sexually harassed were *really* discriminated against or harassed based on their sexual orientation, not their sex. Because Title VII does not prohibit sexual orientation discrimination, many lesbians, gay men and bisexuals have been denied relief when increasingly conservative federal courts have agreed with those employers. In just the same way, we are very concerned that employers may argue that a law that prohibits sexual orientation discrimination but that intentionally *eliminated* the protections against discrimination based on gender nonconformity would provide no protection to employees judged by an employer to be non-conforming – that is, men who were judged too effeminate or women judged too masculine. We have no doubt that, were the weaker version of ENDA to pass, some employers will claim they have nothing against lesbians, gay men and bisexuals per se, but that they do not want men whom they see as unmanly or women who they believe are not feminine enough, and that that loophole would be invoked against almost any lesbian, gay man or bisexual who sought protection against discrimination under ENDA.

You stated that you were not aware of any instances where state laws that prohibit only sexual orientation discrimination and not gender identity discrimination have proven inadequate. Unfortunately, such cases exist. For example, just two years ago, a federal court of appeal ruled that a lesbian who claimed that she was discriminated against because she did not conform to stereotypical expectations of femininity did not to have a viable claim under New York state’s Sexual Orientation Non-Discrimination Act (SONDA), which fails to include an express prohibition on discrimination based on gender identity and expression.

Lambda Legal appreciates the confidence you expressed in our organization by stating that we could “easily defeat such an end run around the sexual orientation language.” If this weaker version of ENDA were to become law, we certainly would try and hope that we would be able to do so. But without an express prohibition on discrimination based on gender nonconformity, there is a real risk that we might not succeed. That is a risk that we and our colleagues at other legal organizations repeatedly have seen play out in other anti-discrimination laws, and it is a risk to which we believe members of our community should not be exposed.

It is beside the point that earlier versions of ENDA, many of which were the result of cumulative compromises made in Washington, D.C., may not have guarded against this danger. The version of ENDA originally introduced this year did, and the new version, introduced last week, did not. The more recent version is a law that provides inadequate protection to LGBT people. Lambda Legal and many other LGBT groups therefore oppose it.

In your press release, you further assert that it was appropriate for the more recent version of ENDA to delete the previously included provision that state and local governments could require domestic partner benefits and to permit a blanket exemption for all religious organizations that exists in

no other federal antidiscrimination laws. You argued that contrary provisions in the earlier, stronger version of ENDA were a mistake or would have drawn strong opposition and that you are not aware of anyone involved in the drafting of the bill that raised objections to these changes. In our view, these arguments also are beside the point. Our analysis showed that the more recent version of ENDA provides significantly less protection to LGBT people in numerous respects than the version introduced earlier this year. This really cannot be contested. The new version of ENDA is less protective. Whether or not these stronger provisions might have survived amendments when the matter was voted on, the undeniable fact is that the new version of ENDA deleted them without there even being a debate or a vote.

Finally, we want to emphasize the *main* point we and other LGBT groups have been trying to make. It simply is wrong for lesbians, gay men and bisexuals to seek protection for themselves and leave transgender people in the dust. Transgender individuals have fought against discrimination along with gay people years before Stonewall and were prime actors at that epic moment in our joint civil rights history. Imagine if the proponents of the 1964 Civil Rights Act had decided that the prohibition against race discrimination included only some racial groups but not others. For gay people to sacrifice transgender people to get protection only for themselves would be wrong.

We stand by that position and our further concern that a sexual orientation antidiscrimination law that has eliminated protections against discrimination based on gender nonconformity will provide less secure protection for everyone, including lesbians, gay men and bisexuals. Unfortunately, as you said yourself, “bigots [will] try to get around the law.” We need a law that will make that as hard as possible. That is why we continue to support H.R. 2015, the version of ENDA introduced in April, and to oppose H.R. 3685, the version of ENDA introduced last week.

Respectfully yours,



Kevin M. Cathcart
Executive Director
Lambda Legal