



U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

May 4, 2016

Via electronic and overnight mail

Governor Pat McCrory
State of North Carolina
North Carolina Office of the Governor
116 West Jones Street
Raleigh, NC 27603-8001

Dear Governor McCrory:

This letter is to inform you that the Department of Justice has determined that, as a result of compliance with and implementation of North Carolina House Bill 2 ("H.B. 2"), both you and the State of North Carolina (the "State") are in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). Specifically, the State is engaging in a pattern or practice of discrimination against transgender state employees and both you, in your official capacity, and the State are engaging in a pattern or practice of resistance to the full enjoyment of Title VII rights by transgender employees of public agencies.

Title VII prohibits an employer from discriminating against an individual on the basis of sex and from otherwise resisting the full enjoyment of Title VII rights. *See* 42 U.S.C. § 2000e-2. The Supreme Court made clear in *Price Waterhouse v. Hopkins* that discrimination on the basis of "sex" includes differential treatment based on any "sex-based consideration[]." 490 U.S. 228, 242 (1989) (plurality). Federal courts and administrative agencies have applied Title VII to discrimination against transgender individuals based on sex, including gender identity. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1315-20 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008); *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *4-11 (EEOC Apr. 20, 2012).

Access to sex-segregated restrooms and other workplace facilities consistent with gender identity is a term, condition, or privilege of employment. Denying such access to transgender individuals, whose gender identity is different from their gender assigned at birth, while affording it to similarly situated non-transgender employees, violates Title VII. Significantly, the U.S. Equal Employment Opportunity Commission ("EEOC") recently addressed this very issue and held that "[e]qual access to restrooms is a significant, basic condition of employment," and that denying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex in violation of Title VII." *Lusardi v. Dep't of the Army*, No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015). And, in interpreting the analogous

sex discrimination provision of Title IX of the Education Amendments of 1972,¹ the United States Court of Appeals for the Fourth Circuit held in *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 at *11 (4th Cir. Apr. 19, 2016), that the Department of Education's guidance that educational institutions "generally must treat transgender students consistent with their gender identity" is entitled to "controlling weight" under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

H.B. 2, which took effect on March 23, 2016, is facially discriminatory against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their "biological sex," as defined by H.B. 2,² differently from similarly situated non-transgender employees. Under H.B. 2, non-transgender state employees may access restrooms and changing facilities that are consistent with their gender identity in public buildings, while transgender state employees may not.

H.B. 2 places similar restrictions on access to restrooms and changing facilities for all public agencies³ in North Carolina, including, for example, all political subdivisions of the State. On April 12, 2016, you issued Executive Order 93, reaffirming the applicability of this provision of H.B. 2 to all cabinet agencies. By requiring compliance with H.B. 2, you and the State are therefore resisting the full enjoyment of Title VII rights and discriminating against transgender employees of public agencies by requiring those public agencies to comply with H.B. 2.

Based upon the above, we have concluded that, in violation of Title VII, the State is engaged in a pattern or practice of discrimination against its employees and both you and the State are engaged in a pattern or practice of resistance to the full enjoyment of Title VII rights by employees of public agencies. When the Attorney General of the United States has a reasonable basis to believe that a state or person has engaged in a pattern or practice of discrimination in violation of Title VII, she may apply to the appropriate court for an order that will ensure compliance with Title VII. *See* 42 U.S.C. § 2000e-6(a). This responsibility has been delegated to the Principal Deputy Assistant Attorney General of the Civil Rights Division.

Please advise the Department, therefore, no later than close of business on May 9, 2016 whether you will remedy these violations of Title VII, including by confirming that the State will not comply with or implement H.B. 2, and that it has notified employees of the State and public agencies that, consistent with federal law, they are permitted to access bathrooms and other facilities consistent with their gender identity.

We further inform you that today the Department sent letters addressed to the North Carolina Department of Public Safety and the University of North Carolina similarly notifying

¹ Courts consider often Title VII and Title IX precedent together when analyzing discrimination claims. *See, e.g., Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

² H.B. 2 defines "biological sex" as the "physical condition of being male or female, which is stated on a person's birth certificate." N.C. Gen. Stat. 143-760(a)(1).

³ "Public Agencies" are defined by the Act as including: executive branch agencies; all agencies, boards, offices, and departments under the direction and control of a member of the Council of State; units, as defined in N.C. Gen. Stat. 159-7(b)(15); public authorities, as defined in N.C. Gen. Stat. 159-7(b)(10); local boards of education, the judicial and legislative branches, and any other political subdivision of the States. N.C. Gen. Stat. 143-760(a)(4).

them of our conclusion that they have engaged in violations of Title VII, as well as violations of Title IX and its implementing regulations, and the Violence Against Women Reauthorization Act of 2013 ("VAWA"). Courtesy copies of those letters are enclosed.

If you have questions about this letter, please contact Delora Kennebrew at (202) 514-3831/ Delora.Kennebrew@usdoj.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Vanita Gupta", with a long horizontal flourish extending to the right.

Vanita Gupta
Principal Deputy Assistant Attorney General