



June 4, 2015

The Honorable Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
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**Re: ACLU Request for AG Memo on Title VII and Sexual Orientation
Discrimination**

Dear Attorney General Lynch,

On behalf of the American Civil Liberties Union, we write to request that the Department formally announce that it will take the position in litigation that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 – which bars employment discrimination on the basis of sex – extends to claims of discrimination based on an individual’s sexual orientation because it constitutes sex stereotyping and because it is sex discrimination per se. This position would build on the historic December 2014 memorandum regarding the treatment of transgender employment discrimination claims under Title VII.

For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law.

This request is fully consistent with case law development. Federal district courts have begun to recognize that discrimination against lesbians and gay men is a form of sex stereotyping precisely because being gay (or being in a relationship with a person of the same sex) is inconsistent with traditional gender norms, at times without requiring additional evidence of gender nonconformity.¹

Similarly, the Equal Employment Opportunity Commission (EEOC) has recognized since 2011 that discrimination against lesbians and gay men is unlawful to the extent that it turns on the sex-role expectation that women should be attracted to and date only men and not women, and that men should be attracted to and date only women and not men.ⁱⁱ

Finally, it is worth noting that in numerous marriage cases and a challenge to the Defense of Marriage Act, courts have rejected marriage bans for same-sex couples and the denial of federal benefits for individuals in same-sex marriages on the theory that the bans classify on the basis of gender because “[o]nly women may marry men, and only men may marry women.”ⁱⁱⁱ These constitutional decisions lend support to the idea that discrimination on the basis of sexual orientation is literally sex discrimination because sexual orientation turns on one’s sex in relation to the sex of one’s partner.

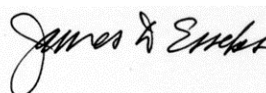
Your predecessor did a tremendous amount to advance equality under the law for LGBT Americans during his tenure as Attorney General. While we have seen remarkable progress in recent years, there is still much work that remains. We hope you will act with the same decisive boldness as the previous Attorney General to advance the dignity and equality of LGBT Americans. Without question, having the Department take the position in litigation that the prohibition on sex discrimination in Title VII – consistent with numerous federal court rulings and EEOC decisions – extends to claims of discrimination based on an individual’s sexual orientation would be one of the most significant actions you could take during your tenure as Attorney General to advance the equal treatment of LGBT Americans.

While the fight for explicit nondiscrimination protections at the local, state, and federal levels continues, the reality is that discrimination against individuals based on the sexual orientation and gender identity is just another form of sex discrimination. You now have an opportunity to advance that understanding in a critically important way. We urge you to act to do so.

Sincerely,



Michael W. Macleod-Ball
Acting Director, Washington Legislative Office



James D. Esseks
Director, LGBT & HIV Project



Ian S. Thompson
Legislative Representative

ⁱ See, e.g., *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying motion to dismiss where plaintiff alleged that he failed to conform to male stereotypes by designating his same-sex partner as beneficiary); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept.

22, 2014) (denying motion to dismiss where plaintiff alleged that “he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males”); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where “Plaintiff has alleged that he is ‘a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles’”); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse’s surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men).

ⁱⁱ See *Complainant v. Johnson*, EEOC Doc. 0120110576, 2014 WL 4407422, at *7 (EEOC Aug. 20, 2014) (collecting cases); *Sayyad v. Johnson*, EEOC Doc. 0120110377, 2012 WL 3614539, at *4 (EEOC Aug. 17, 2012) (Title VII prohibits adverse employment actions based on “sex-stereotype that women should only have sexual relationships with men”); *Castello v. Donahoe*, EEOC Doc. 0520110649, 2011 WL 6960810, at *3 (EEOC Dec. 20, 2011) (Title VII prohibits adverse employment action “motivated by the sexual stereotype that having relationships with men is an essential part of being a woman”); *Veretto v. Donahoe*, EEOC Doc. 0120110843, 2011 WL 2663401, at *3 (EEOC July 1, 2011) (Title VII prohibits adverse employment action “motivated by the sexual stereotype that marrying a woman is an essential part of being a man”); see also Memorandum from Director, Office of Field Programs to District Directors on Update on Intake and Charge Processing of Title VII Claims of Sex Discrimination Related to LGBT Status (Feb. 3, 2015), available at <http://www.buzzfeed.com/chrisgeidner/the-growing-effort-to-protect-lgbt-people-from-discriminatio#.wap1YY5kO>.

ⁱⁱⁱ See *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, No. 4:13-cv-00410 KGB, 2014 WL 6685391, at *23-24 (E.D. Ark. Nov. 25, 2014); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2014 WL 6386903, at *10-11 (D.S.D. Nov. 14, 2014); *Lawson v. Kelly*, No. 14-0622-CV-W-ODS, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (same), *aff’d on other grounds*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *appeal dismissed sub nom.*, *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); cf. *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (“Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski’s access to federal benefits because of her sex.”), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012) and *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013).