U.S. Department of Justice

Civil Rights Division

Washington, D.C. 20530

May 4, 2016

Via electronic and overnight mail

Frank L. Perry
Secretary of Public Safety
North Carolina Department of Public Safety
512 North Salisbury Street
Raleigh, NC 27604

Dear Secretary Perry:

This letter is to inform you that the United States has concluded that, by complying with North Carolina House Bill 2 ("H.B. 2"), the North Carolina Department of Public Safety ("DPS"), as a recipient of federal funds from the Office on Violence Against Women ("OVW"), is in violation of the non-discrimination provision of the Violence Against Women Reauthorization Act of 2013 ("VAWA"), 42 U.S.C. § 13925(b)(13) and, as an employer, is engaged in a pattern or practice of discrimination against its employees in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

On March 23, 2016, H.B. 2 was signed into law and took effect. Part I of H.B. 2 states that "[p]ublic agencies shall require every multiple occupancy bathroom or changing facility to be designed for and only used by persons based on their biological sex," and defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." H.B. 2, Section 1.3, codified at N.C.G.S. 143-760(a)(1) & (b). The North Carolina Department of Public Safety is a "public agency" as defined under H.B. 2. *See* N.C.G.S. 143-760(a)(2) & (4). Because H.B. 2 requires public agencies to facially discriminate on the basis of sex and gender identity, the statute is inconsistent with both VAWA and Title VII.

VAWA provides that "[n]o person in the United States shall, on the basis of actual or perceived * * * sex, gender identity (as defined in paragraph 249(c)(4) of title 18, United States Code) * * *, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [VAWA] * * *." 42 U.S.C. § 13925(b)(13)(A). As a condition of accepting funds from OVW, DPS signed assurances specifically acknowledging this requirement and "that it will comply with this provision."

H.B. 2 requires public agencies to treat transgender individuals, whose gender identity does not match their gender assigned at birth, differently from similarly situated non-transgender individuals. Under H.B. 2, non-transgender individuals, whose gender identity is consistent with

their birth-assigned gender, may access restrooms and changing facilities that are consistent with their gender identity in buildings controlled or managed by DPS or its sub-recipients, while transgender individuals may not. Denying such access to transgender individuals while affording it to similarly situated non-transgender individuals violates VAWA.

Title VII prohibits an employer from discriminating on the basis of sex. *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 issued an opinion in *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 at *11 (4th Cir. Apr. 19, 2016), holding 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). Under H.B. 2, non-transgender DPS employees, whose gender identity is consistent with the birth-assigned sex, may access restrooms and changing facilities that are consistent with their gender identity in public buildings, while transgender DPS employees may not access restrooms and changing facilities that are consistent with their gender identity in public buildings. Based upon the above, we have concluded that DPS is engaged in a pattern or practice of discrimination against its transgender employees in violation of Title VII.

When the Attorney General of the United States has a reasonable basis to believe that a state agency has engaged in a pattern or practice of discrimination in violation of the Civil Rights Act, 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.

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[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).

Likewise, the Attorney General has the authority to enforce VAWA through civil actions. *See* 42 U.S.C. § 13925(b)(13)(C) ("The authority of the Attorney General . . . to enforce [VAWA's discrimination prohibition] shall be the same as it is under section 3789d of this title."); 42 U.S.C. § 3789d(c)(3) ("Whenever the Attorney General has reason to believe that a State government or unit of local government has engaged in or is engaging in a pattern or practice in violation of the provisions of this section, the Attorney General may bring a civil action in an appropriate United States district court.").

Please advise the Department, therefore, no later than close of business on May 9, 2016 whether DPS has remedied these violations to comply fully with Title VII and the non-discrimination mandate of VAWA, including by confirming that DPS will not comply with H.B. 2, and that it has notified individuals and employees at facilities controlled or managed by DPS or its sub-recipients that, consistent with federal law, they are permitted to access bathrooms and other facilities consistent with their gender identity.

If you have questions about this letter, please contact: Shaheena Simons at (202) 305-3364/Shaheena.Simons@usdoj.gov or Delora Kennebrew at (202) 514-3831/ Delora.Kennebrew@usdoj.gov.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General

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