WHITMAN-WALKER HEALTH

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MEMORANDUM

TO: Naomi Barry-Perez, Director, Civil Rights Center, U.S. Department of Labor

FROM: Daniel Bruner, JD, MPP, Senior Director of Policy, Whitman-Walker Health

DATE: March 25, 2016

RE: Comments of Whitman-Walker Health in Response to the Notice of Proposed Rulemaking, *Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act*, RIN 1291-AA36

I. Introduction and Summary

Whitman-Walker Health (WWH or Whitman-Walker) is pleased to submit these comments on the Notice or Proposed Rulemaking in RIN 1291-AA36 to implement the nondiscrimination mandate in Section 188 of the workforce Innovation and Opportunity Act (WIOA). Specifically, we address the applicability of Section 188's prohibition of discrimination based on sex to discrimination against lesbian, gay, bisexual and transgender (LGBT) individuals. We recognize the Department's longstanding commitment to ensuring that LGBT individuals have equal access to critical Department-funded programs that provide them with the training and skills fundamental to economic mobility and financial security. We applaud the Department's leadership on these issues and the opportunity to provide comments that we hope will further strengthen the proposed rule.

We are offering these comments to:

- Support the proposal to include discrimination based on gender identity as a form of prohibited sex discrimination, and suggest several improvements to the new regulatory language to strengthen protections for transgender and gender-nonconforming persons.

- Urge the Department to clarify that discrimination based on sexual orientation is always and necessarily discrimination based on sex.

II. Interest of Whitman-Walker Health

Whitman-Walker Health is a community-based, nonprofit clinic offering primary medical care and HIV specialty care, mental health and addiction treatment services, dental care, medical adherence case management, and legal services to residents of the greater Washington metropolitan area. WWH has a special mission to the LGBT community. In calendar year 2014, Whitman-Walker provided health services to more than 14,700 unique persons. Approximately 6,500 of those individuals are our medical patients – WWH is their medical home.

Whitman-Walker's Legal Services Program was established in 1986 to provide *pro bono* legal assistance to people living with HIV on matters related to their diagnosis. In more recent years our work has expanded to include legal counsel and representation to LGBT individuals and families in the Washington, DC metropolitan area. Over the past three decades, WWH Legal Services has provided *pro bono* assistance to tens of thousands of individuals and families on a wide range of issues, including HIV and LGBT discrimination in health care, employment and public accommodations. In calendar year 2015 our legal staff and volunteers provided counsel and representation to more than 2,600 new clients.

Whitman-Walker's patient populations, and our legal clients, reflect the diversity of the Washington, DC metropolitan area, and our special commitment to the LGBT and HIV-affected communities. Of the more than 14,700 individuals receiving health services in 2014, 48% of those who reported their sexual orientation identified as gay, lesbian or bisexual; 6% identified as transgender; 44% identified as black and 14% as Hispanic. Of our medical patients, approximately one-half – 3,400 individuals – were living with HIV. Of our legal clients, approximately 40% identified as gay, lesbian or bisexual; 20% identified as transgender; 45% identified as black; 19% listed their ethnicity as Hispanic; and 50% were living with HIV.

Transgender and gender nonconforming individuals comprise a substantial and growing part of our patient and client base: approximately 6% of all those receiving health services; 13% of medical patients; 20% of persons receiving mental health services; 8% of those receiving substance abuse treatment services; and 20% of our legal clients.

Because of Whitman-Walker's holistic commitment to the health and wellness of our community, we are acutely aware of the social determinants of health. In particular, stigma and discrimination against LGBT individuals and families undermines their physical and mental health in multiple ways. Combatting employment discrimination, and ensuring that LGBT

people understand their workplace rights, is critical to our mission. Employment is a major source of dignity and sense of well-being, as well as critical to one's ability to obtain the necessities of life and to thrive. Employment also is a major source of health insurance, and therefore, access to medical care. Therefore, we have a strong interest in this rulemaking proceeding, and in strengthening the legal protections for LGBT people in the workplace in in job training programs.

III. Comments on Gender Identity Discrimination as Sex Discrimination

We strongly support the Department's clarification, in proposed §§ 38.7(a) and 38.7(b)(8)-(9), that that gender identity discrimination is a form of prohibited sex discrimination. As the Notice documents, this conclusion is supported by numerous court decisions and rulings of the Equal Employment Opportunity Commission (EEOC), However, to strengthen protections for transgender and gender-nonconforming people, we suggest several minor changes in the regulation's language.

- It may not be clear to all WIOA-funded program staff that deliberately refusing to treat an individual in a manner consistent with their gender identity – for instance, by refusing to address them by their correct name or referring to them by incorrect pronouns – is prohibited by the Department's proposed regulation. Therefore, we urge the Department to add an additional subsection to § 38.7(b) to clarify that refusing to treat an individual according to their gender identity constitutes sex discrimination, and include specific examples of prohibited conduct.

- In addition, the Department should modify § 38.7(b)(9) to clarify that WIOA-funded programs cannot deny individuals access to gender-specific facilities and activities other than bathrooms, including changing facilities, when those facilities are consistent with their gender identity. Sex nondiscrimination laws provide no basis for distinguishing between different types or layouts of gender-specific facilities or restricting transgender individuals' access to certain facilities.

- We also recommend that the Department modify § 38.7(b)(9) to permit individuals to access facilities that are "consistent with" their gender identity, rather than the facilities "used by the gender with which they identify." The final rule should clarify in the preamble that WIOA-funded programs are required to ensure that individuals whose genders are non-binary can access facilities that are most consistent with their gender identity; many individuals with non-binary genders can commonly identify which is more consistent with their gender when faced with a choice between male- and female-specific programs or facilities.

- Finally, we encourage the Department to modify § 38.7(b)(8) to provide that while programs are authorized to provide sex-segregated locker rooms and bathrooms, they are not required to do so. While most programs likely will continue to segregate their multi-user facilities by gender, requiring them to do so unnecessarily eliminates their control

and flexibility in determining the best layout for each facility on a case-by-case basis and offering unisex facilities in appropriate contexts.

Therefore, we recommend the following modifications to § 38.7(b):

(8) Making any facilities associated with WIOA Title I-financially assisted program or activities available only to members of one sex, except that if the recipient provides restrooms or changing facilities, the recipient ~~must~~ **may** provide separate or single-user restrooms or changing facilities;

(9) Denying individuals access to the bathrooms **and other workplace facilities** ~~used by~~ **consistent with** the gender with which they identify.

(10) Refusing to treat individuals consistent with their gender identity, such as by deliberately and repeatedly using names and gender-related pronouns and titles that are inconsistent with their gender identity.

IV. Adoption of Gender-Neutral Language in the Final Rule

We welcome the Department's recognition that nondiscrimination principles protect individuals of all genders, including individuals who do not identify as either male or female and its decision to adopt gender-neutral language in the updated regulations. 81 Fed. Reg. at 4495. The gender identity of individuals is a deeply-rooted aspect of who they are, and that is no different for those who identify with a gender other than male or female. While perhaps less familiar to many WIOA-funded program staff, this vulnerable sub-group within the transgender population is entitled to the same protections as are others. Such individuals, however, face pervasive bias and misunderstanding, and often are unable to access benefits and services, including those of WIOA-funded programs. Regulatory language associated with the gender binary may exacerbate these barriers by suggesting that individuals with non-binary identities are excluded from many of the protections under WIOA. The adoption of gender-neutral language is a simple way to remove this barrier to nondiscrimination protections while signaling the Department's commitment to equal treatment for individuals with non-binary gender identities. To ensure consistency, we encourage the Department to revise the following gender-specific language remaining in the proposed rule:

§ 38.4(q)(5)(iii)(C) …because of the additional time or effort ~~he or she~~ **the individual** must spend to read, write, speak, or learn compared to most people in the general population….

(ii)(A) That disease or infection prevents ~~him or her~~ **the individual** from performing the essential functions of the job in question….

§ 38.16(h) *Surcharges.* A recipient must not ask or require an individual with a disability to pay a surcharge because of ~~his or her~~ **the individual's** service animal…. If a recipient normally charges individuals for the damage they cause,

an individual with a disability may be charged for damage caused by ~~his or her~~ **the individual's** service animal.

§ 38.30 …However, ~~he or she~~ **the EO Officer** must not have other responsibilities or activities that create a conflict or appearance of conflict with ~~the responsibilities of an EO Officer~~ **their responsibilities.**

§ 38.64(a) Where, as a result of a post-approval review, the Director has made a finding of noncompliance, ~~he or she~~ **the Director** must issue a Letter of Findings….

§ 38.81(d) Where the Director makes a referral under this section, ~~he or she~~ **they** must notify the complainant and the respondent about the referral.

§ 38.83 If the Director accepts the complaint for resolution, ~~he or she~~ **they** must notify in writing the complainant, the respondent, and the grantmaking agency.

§ 38.91(b)(3) If the Governor is able to secure voluntary compliance under paragraph (b)(1) of this section, ~~he or she~~ **the Governor** must submit to the Director for approval....

§ 38.115(c)(1) If the Director determines that the grant applicant or recipient has not brought itself into compliance, ~~he or she~~ **the Director** must issue a decision denying the petition.

V. Sexual Orientation Discrimination as Sex Discrimination

The NPRM states: "As a matter of policy, we support banning discrimination on the basis of sexual orientation in the administration of, or in connection with, any programs and activities funded or otherwise financially assisted in whole or in part under Title I of WIOA." 81 Fed. Reg. at 4509, but notes that the case law is mixed, *id.,* and concludes, *id.* at 4509-10:

> The final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination. We seek comment on the best way of ensuring that this rule includes the most robust set of protections supported by the courts on an ongoing basis.

There exists ample legal support for the Department to become a leader in this rapidly changing area of the law, and we urge it to exercise that leadership. Notwithstanding a long line of cases, stretching back to the 1970s, holding that Congress did not have sexual orientation discrimination in mind when it enacted statues to ban sex discrimination in employment in 1964 (Title VII) and in education in 1972 (Title IX), a number or recent decisions under Title IX and under Title VII recognize that discrimination against lesbian, gay, and bisexual individuals is sex discrimination, because such discrimination is based on: (1) the sex of the individual subjected to discrimination; (2) the sex of a person or persons with whom the individual associates; and/or (3)

the individual's non-conformance with sex stereotypes – including the stereotype that men should be sexually attracted to women and vice versa.

These recent decisions recognize the far-reaching implications of the Supreme Court's decisions in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) and *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989). In *Oncale,* the Court held that same-sex sexual harassment in the workplace could constitute sex discrimination under Title VII. Brushing aside extensive precedents in the lower courts, the Court declared (523 U.S. at 79-80):

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Similarly, that the legislators who enacted Title IX and Title VII may not have had discrimination against lesbians, gay men and bisexual people in mind does not determine the logic of the statutory language.

In *Price Waterhouse,* the defendants discriminated against the female plaintiff, not because she was a woman rather than a man, but because she was not sufficiently "ladylike". The Supreme Court endorsed a broad understanding of Title VII's prohibition "discrimination because of sex," declaring:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

490 U.S. at 251 (citations omitted). In the wake of *Price Waterhouse,* the courts – and the EEOC and Department of Education in their enforcement of Title VII and Title IX, respectively – have adopted an increasingly broad and deep appreciation of discriminatory sex stereotypes, including stereotypes about sexual attraction and sexual behavior.

In contrast to the careful analysis by the EEOC and in recent court decisions expanding the interpretation of sex discrimination, recent decisions rejecting sexual orientation discrimination claims under Title IX and Title VII for the most part have cited older precedents without analysis, and failed to take account of the teachings of *Oncale* and *Price Waterhouse.*

Therefore, we urge that the final regulations be amended as follows.

We recommend that proposed § 38.7(a) be revised to state:

> (a)…The term sex includes, but is not limited to, pregnancy, childbirth, and related medical conditions, **sexual orientation,** transgender status, and gender identity.

We recommend that § 38.7(d) include the following additional example of unlawful discrimination based on sex stereotyping:

> **(10) Adverse treatment of an individual because he or she does not conform to sex-role expectations by being in a relationship with a person of the same sex.**

We recommend that § 38.10(b) be revised as follows:

> (b) Harassment because of sex includes harassment based on gender identity, **sexual orientation**, and failure to comport with sex stereotypes; harassment based on pregnancy, childbirth, or related medical conditions; and sex-based harassment that is not sexual in nature but that is because of sex or where one sex is targeted for harassment.

Finally, we recommend that § 38.35 be revised as follows:

> The notice must contain the following specific wording:
>
> Equal Opportunity Is the Law
>
> It is against the law for this recipient of Federal financial assistance to discriminate on the following bases: Against any individual in the United States, on the basis of race, color, religion, sex (including pregnancy and childbirth and related medical conditions, sex stereotyping, transgender status, gender identity, **and sexual orientation**), national origin (including limited English proficiency), age, disability, political affiliation or belief; and against any beneficiary of programs financially assisted under Title I of the Workforce Innovation and Opportunity Act, on the basis of the beneficiary's citizenship status or his or her participation in any WIOA Title I-financially assisted program or activity.".

A. Recent Developments in Title IX Jurisprudence

Section 188 of WIOA expressly incorporates the prohibition on sex discrimination in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. Courts and the Departments of Education and Justice have recognized, for many years, that harassment or other discrimination against a student based on the student's failure to conform to gender stereotypes implicates Title IX. Although older cases distinguish between discrimination based on, for instance, a male student's "effeminate" mannerisms, from discrimination based on the student's (actual or perceived) homosexuality, the courts are beginning to understand that the latter as well as the former constitutes discrimination based on sex.

In cases upholding Title IX claims for sex stereotyping on behalf of young people subjected to anti-gay harassment, a number of courts have recognized that the motivation for the harassment was not only the plaintiff's non-conforming mannerisms and presentation, but his or

her actual or presumed attraction to the same sex. *E.g.*, *Estate of Brown v. Ogletree,* No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, *49-50 (S.D. Tex. Feb. 21, 2012), *modified on other grounds, Estate of Brown v. Cypress Fairbanks Ind. School Dist.*, 863 F.Supp.2d 632; *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006); *Schroeder v. Maumee Bd. Of Educ.*, 296 F.Supp.2d 869, 879-80 (N.D. Ohio 2003); *Ray v. Antioch Unified School Dist.*, 107 F.Supp.2d 1165, 1170 (N.D. Calif. 2000). As these cases and many others document, such harassment usually consists not only of slurs and taunts about the student's mannerisms, but also (and primarily) slurs and taunts about his attraction to other males or her attraction to other females. Harassment based on the student's *sexuality* was harassment based on her or his *sex. Estate of Brown,* 2012 U.S. Dist. LEXIS 21968, at *49-50; *Riccio,* 467 F. Supp. 2d at 226; *Schroeder,* 296 F. Supp. 2d at 880; *Ray,* 107 F.Supp.2d at 1170.

The recent case of *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP (JCx), 2015 U.S. Dist. LEXIS 167672 (C.D. Cal. Dec. 15, 2015), is particularly instructive. The case was brought by two members of the Pepperdine women's basketball team, who alleged that they had been harassed and forced off the team, in violation of Title IX, because of their lesbian relationship. The coaching staff had questioned them repeatedly about their relationship and about lesbianism, and their coach "held a team leadership meeting where he … stated that lesbianism was a big concern for him and for women's basketball, that it was a reason why teams lose, and that it would not be tolerated on the team." *Id.* at *4.

The court denied Pepperdine's motion to dismiss the plaintiffs' Title IX counts, and held (*id.*at **15-19):

> This Court, in its prior order dismissing in part Plaintiffs' [first amended complaint], stated that "the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best." [*Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, ___ (C.D. Calif. 2015).] After further briefing and argument, the Court concludes that the distinction is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.
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> … Simply put, the line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct.
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> Pepperdine cites to opinions from various federal courts that state categorically that sexual orientation discrimination in not covered under Title IX. … The Court rejects the reasoning of these cases, which do not fully evaluate the nature of claims based on sexual orientation discrimination.
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> … Simply put, to allege discrimination on the basis of sexuality is to state a Title IX claim on the basis of sex or gender.

The court further held that discrimination based on the plaintiffs' assumed lesbianism was discrimination based on sex stereotyping (*id.* at *20):

> The type of sexual orientation discrimination Plaintiffs allege falls under the broader umbrella of gender stereotype discrimination. Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women – and the relationships between them. Discrimination based on a perceived failure to conform to a stereotype constitutes actionable discrimination under Title IX.

The court also concluded that discrimination against a person because they have a relationship with a person of the same sex rather than a different sex is logically discrimination because of sex (*id.* at 22, citations omitted):

> In addition to stating a claim based on gender stereotyping discrimination, Plaintiffs have stated a claim that they were discriminated against because of their sex. Discrimination on the basis of sex can be defined as treating someone differently simply because that person's sex is different from a similarly situated person of the opposite sex. …
>
> Here, Plaintiffs allege that they were told that "lesbianism" would not be tolerated on the team. If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment. Plaintiffs have stated a straightforward claim of sex discrimination under Title IX. …

B. Recent Title VII Cases

1. The *Baldwin case.*

The Notice observes that "the Department generally defers to the EEOC's interpretations of Title VII law as it applies to applicants and employees of employers receiving WIOA Title I financial assistance." 81 Fed. Reg. at 4497. As the Notice also acknowledges, the EEOC concluded in 2015 that discrimination based on an individual's sexual orientation is necessarily sex-based discrimination under Title VII. *Baldwin v. Foxx*, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03, 2015 EEOPUB LEXIS 1905 (July 16, 2015). In a detailed, careful analysis, the EEOC first noted that its conclusion follows logically from the very notion of disparate treatment because of an individual's sex:

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. …
>
> Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her

> female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action.

2015 EEOCPUB LEXIS 1905, at **13-15. Secondly, the EEOC noted:

> Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. …
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> In applying Title VII's prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee's association with a person of another race, such as an interracial marriage or friendship.

Id. at *17 (citations omitted). Lastly, the EEOC observed:

> Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed--based on their appearance, mannerisms, or conduct--as insufficiently "masculine" or "feminine." But as the Commission and a number of federal courts have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.
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> Sexual orientation discrimination and harassment "[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).* The Centola court continued:
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> > In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker

> that he perceives to be gay, whether effeminate or not, because he thinks, "real" men should date women, and not other men.

Id.

Baldwin, 2015 EEOCPUB LEXIS 1905, at ** 20-22 (citations and footnotes omitted).

We submit that the EEOC's analysis in *Baldwin* should be followed by the Department in its final rule here. All three strands of the *Baldwin* analysis find support in a growing number of federal court decisions under Title VII.

2. Court cases treating discrimination against gay, lesbian or bisexual persons as *per se* sex discrimination.

One way in which courts analyze whether sex discrimination has occurred in Title VII cases is by asking, "would the complaining [plaintiff] have suffered the harassment [or adverse action] had he or she been of a different gender?" *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (*citing Barnes v. Costle*, 561 F.2d 983, 990 n.55 (DC Cir. 1977)). *See also Jennings v. Univ. of N.C.*, 482 F.3d 686, 723 (4th Cir. 2007) (observing that the same test is applied in Title IX sex discrimination cases). "So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination." *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999). Applying this rule, discrimination by a health care provider against, e.g., a male patient because the patient has male sexual partners or a male romantic partner would be sex discrimination for the simple reason that the patient "would not have been treated the same way," *Bundy*, 641 F.2d at 942 n.7, had he been a female doing the same thing, *Shepherd*, 168 F.3d at 1009.

In *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002), the plaintiff's supervisor "allegedly became increasingly obsessed with the fact that" the plaintiff, a female employee, "was having an intimate relationship with a woman, and otherwise failing to comport with [the supervisor's] notions of how a woman ought to behave." *Id.* at 1217. The court denied the employer's motion for summary judgment, because terminating the employee on this basis violated Title VII's bar against sex discrimination. *Id.* at 1223-24. The court held that a "jury could find that [the supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender." *Id.* at 1223.

In *Hall v. BNSF Ry. Co.*, 124 Fair Empl. Prac. Cas. (BNA) 1419, 2014 U.S. Dist. LEXIS 132878 (W.D. Wash. Sept. 22, 2014), the employer had a policy of denying employee benefits to legally married same-sex spouses. "When Mr. Hall married his partner, Elijah Uber, he (Hall) sought health benefits for him (Uber) under his employer's health plan." *Id.* at *2. The "[d]efendant denied coverage on the basis that its plan defined marriage as between one man and one woman and therefore provided coverage only for spouses of the opposite sex." *Id.* at *3. The plaintiff alleged that the employer denied benefits "based solely on the fact [its employee] Michael is male." *Id.* at *7. The plaintiff further alleged that, "[i]f [employee] Michael Hall were female, married to a male, [employer] BNSF would pay him the spousal health coverage

benefits as it does to all employees who are female married to male spouses, or males married to female spouses." *Id.*

The defendant moved to dismiss this claim "as a matter of law because Mr. Hall [was] really alleging a claim of discrimination based on his "sexual orientation, not his sex, which cannot be maintained under Title VII." *Id.* at *6. The court denied the defendant's motion, because the "[p]laintiff allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at 9 (*citing In re Levenson*, 587 F.3d 925, 929 (9th Cir. 2009) (holding that it was impermissible sex discrimination to deny a federal employee benefits for his same-sex spouse); *Heller v. Columbia Edgewater Country Club*, *supra; Foray v. Bell Atlantic*, 56 F. Supp.2d 327, 329 (S.D.N.Y. 1999) (accepting that a claim of disparate treatment based on benefits to same-sex couples constituted discrimination based on sex)).

3. **Court decisions supporting sexual orientation discrimination as associational sex discrimination.**

In concluding that sexual orientation discrimination is a form of prohibited associational discrimination, the EEOC relied on a well-established line of cases holding that Title VII is violated when an employee is subjected to discriminatory treatment because of the race, national origin or sex of a person with whom he or she is associated. Courts first used this principle in Title VII in cases where an employee was subjected to discrimination because of the race of someone with whom the employee had a relationship. For example, in *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975), the court held that an employer who fired a white employee for having an African-American friend violated Title VII's prohibition against discrimination based on race. In *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986), the Eleventh Circuit held that a white plaintiff had been discriminated against because of race when he was fired for having an African-American wife. Such discrimination is impermissible regardless of the "degree of association," because the test focuses on whether or not discrimination happened due to race, not the nature of the relationship between the plaintiff and the third party. *Drake v. 3M Co.*, 134 F.3d 878, 884 (7th Cir. 1997). Courts have applied the same principle to discrimination based on an associate's national origin. *See, e.g., Reiter v. Ctr. Consol. Sch. Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985) (holding that discrimination based on a woman's association with Latino persons in general was prohibited by Title VII under the relational discrimination theory). This principle applies even if one is discriminated against because of his or her association with a broad class of people rather than with a particular individual. *See id.* People who are discriminated against because of the race of someone with whom they associate are themselves considered to be a protected class. *See Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2nd Cir. 2008).

This principle also applies to sex discrimination. In *Ventimiglia v. Hustedt Chevrolet*, Civ. No. 05-4149 (DRH) (MLO), 2009 U.S. Dist. LEXIS 24834 (E.D.N.Y. 2009), the court held that firing a man because of his association with a female coworker – which the employer suspected was an intimate relationship – amounted to discrimination because of sex. The firing constituted discrimination under Title VII because, "but for [the employee's] sex, male, his relationship with his co-worker, female, … would not have been an issue." *Id.* at *33.

Very recently, the EEOC's analysis of sexual orientation discrimination as associational sex discrimination was adopted by a federal court in *Isaacs v. Felder Services, LLC,* No. 2:13cv693-MHT, 2015 U.S. Dist. LEXIS 146663 (M.D. Ala. Oct. 29, 2015). The plaintiff in that case alleged that he had been fired (among other reasons) because he was gay and married to another man. Although the court ruled against the plaintiff because of a lack of evidence that discrimination had actually occurred, it declared:

> This court agrees … with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII. In [Baldwin v. Foxx], the Commission explains persuasively why "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Particularly compelling is its reliance on Eleventh Circuit precedent:
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> > "Title VII ... prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the employee or applicant's sex. Cf. *Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986)* ('Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].')."
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> See also Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," *69 N.Y.U. L. Rev. 197, 208 (1994)* ("If a business fires Ricky ... because of his sexual activities with Fred, while th[is] action[] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.").

Isaacs v. Felder Services, 2015 U.S. Dist. LEXIS 146663, **8-10. [1]

4. Court decisions allowing Title VII claims for same-sex discrimination based on a gender stereotype theory.

In the very recent case of *Isaacs v. Felder Services, supra,* the District Court also endorsed the EEOC's sex-stereotyping theory of sexual orientation discrimination:

[1] For a detailed discussion of the Title VII relationship cases, and their applicability to discrimination based on sexual orientation, *see* Victoria Schwartz, TITLE VII: A SHIFT FROM SEX TO RELATIONSHIPS, 35 Harv. J. Law & Gender 209, 246-58 (2012).

> To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from "heterosexually defined gender norms," this, too, is sex discrimination, of the gender-stereotyping variety. [*Baldwin*]; see also *Latta v. Otter, 771 F.3d 456, 486 (9th Cir. 2014)* (Berzon, J., concurring) ("The notion underlying the Supreme Court's anti-stereotyping doctrine in both *Fourteenth Amendment* and Title VII cases is simple, but compelling: '[n]obody should be forced into a predetermined role on account of sex,' or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. See Ruth Bader Ginsburg, 'Gender and the Constitution,' 44 U. Cin. L. Rev. 1, 1 (1975). In other words, laws [and employment practices] that give effect to 'pervasive sex-role stereotype[s]' about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. *Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003)*.").

Isaacs v. Felder Services, 2015 U.S. Dist. LEXIS 146663, at *10.

In *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 U.S. Dist. LEXIS 62019 (D. Colo. May 11, 2015), the plaintiff alleged that he did not fit his colleagues' stereotype of a male because: "(1) he did not take part in male braggodicio about sexual exploits with women as the other male pilots did; (2) he did not joke about gays as other male pilots did, (3) he submitted paperwork to SkyWest designating his male domestic partner for flight privileges, a benefit offered only for family members and domestic partners; and (4) he traveled on SkyWest flights with his domestic partner." 2015 U.S. Dist. LEXIS 62019, at *15-16. He alleged that he suffered persistent harassment and an adverse job reference as a result. Though it was simply homosexual behavior that allegedly motivated the adverse treatment – not his appearance or physical mannerisms – the court held that he had stated a claim under Title VII of discrimination for "failure to conform to male stereotypes." *Id.* (*citing E.E.O.C. v. Boh Bros. Constr. Co.*, L.L.C., 731 F.3d 444, 456 (5th Cir. 2013) (permitting the plaintiff to rely on evidence that a supervisor viewed the claimant as "insufficiently masculine" to prove a Title VII claim). This case illustrates how some federal courts have found that the "line between discrimination based upon sexual orientation [and sex stereotyping] is difficult to draw and … some of the complained of conduct [may fit] within both rubrics." *Stewart v. Keystone Real Estate Grp. LP*, No. 4:14-CV-1050, 2015 U.S. Dist. LEXIS 40912, at *7-8 (M.D. Pa. Mar. 31, 2015) (*quoting Kay v. Independence Blue Cross*, 142 Fed. App'x 48, 51 (3d Cir. 2005) (Rendell, J., concurring).

Similarly, in *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014), the plaintiff "alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles,' . . . that his 'status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [his supervisor]'s supervision or at the [place of employment,' . . . and that 'his orientation as homosexual had removed him from [his supervisor's preconceived definition of male.' " 34 F. Supp. 3d at 116 (*quoting* the plaintiff's complaint). The employer moved to dismiss on grounds that "courts have generally required plaintiffs [alleging sex stereotyping] to set forth specific allegations regarding the particular ways in which an employee failed to conform to such stereotypes," stating how a

"supervisor's conduct was motivated by judgments about plaintiff's behavior, demeanor or appearance." *Id.* at 115. The court denied the defendant's motion, holding that even though the plaintiff did not claim discrimination based on his "demeanor or appearance," *id.*, he had sufficiently "alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes," *id.* at 116, i.e., his homosexuality.

The court in *Boutillier v. Hartford Pub. Sch.*, No. 3:13cv1303 (WWE), 2014 U.S. Dist. LEXIS 134919, at *4 (D. Conn. Sept. 25, 2014), also applied the sex stereotype theory broadly to encompass "non-conforming gender behavior" beyond simply a plaintiff's physical presentation or mannerisms. In that case, the plaintiff claimed "that … discriminatory conduct commenced after certain individuals [on the job] became aware of her sexual orientation and that she was subjected to sexual stereotyping during her employment on the basis of her sexual orientation." *Id.* at *3-4. The court denied the defendant's motion to dismiss, holding that, "[c]onstrued most broadly, [the plaintiff] has set forth a plausible claim [under Title VII that] she was discriminated against based on her non-conforming gender behavior." *Id.* at *4. *See also Heller*, 195 F. Supp. 2d at 1224 ("a jury could find that [the supervisor] repeatedly harassed (and ultimately discharged) [the employee] because [the employee] did not conform to [the supervisor's] stereotype of how a woman ought to behave," i.e., that "a woman should be attracted to and date only men"); *Koren v. Ohio Bell Telephone Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (holding that discrimination against employee because of behavior arising out of his same-sex marriage constituted impermissible gender stereotype discrimination); *Roadcloud v. City of Phila.*, No. 121 Fair Empl. Prac. Cas. (BNA) 550, 2014 U.S. Dist. LEXIS 769, at *10 (E.D. Pa. Jan. 6, 2014) (holding that harassment of lesbian employee for "signs of sexual conduct" off the job constituted impermissible sex discrimination based on gender stereotyping).

C. Court Rulings that Sexual Orientation Discrimination is Not Sex Discrimination are Conclusory or Based on Unsound Reasoning

The NPRM expresses concern that "[t]o date, no Federal appellate court has concluded that Title IX's prohibition of discrimination 'on the basis of sex' – or Federal laws prohibiting sex discrimination more generally – prohibits sexual orientation discrimination, and some appellate courts previously reached the opposite conclusion." 80 Fed. Reg. at 54176 (footnote omitted). We respectfully submit that none of the adverse rulings of the Courts of Appeals are persuasively reasoned.

As the EEOC recently observed, many cases in which the courts have declared that sexual orientation discrimination is not sex discrimination under title VII, or Title IX, simply are conclusory, or rely on a tautology:

> [M]any courts have gone to great lengths to distinguish adverse employment actions based on "sex" from adverse employment actions based on "sexual orientation." The stated justification for such intricate parsing of language has been the bare conclusion that "Title VII does not prohibit . . . discrimination because of sexual orientation." *Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005)* (quoting *Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)).*

Baldwin, 2015 EEOPUB LEXIS 1905, at *24. Some adverse decisions by Courts of Appeals relied on circular reasoning. They rejected arguments by gay plaintiffs that discrimination against homosexuals was sex discrimination within the meaning of *Price Waterhouse,* because the discrimination was based on the fact that same-sex attraction and sexual activity violated sex stereotypes. The courts' reasoning was that such an argument, if accepted, would "bootstrap" sexual orientation discrimination into Title VII. *Vickers v. Fairfield Medical Center,* 453 F.3d 757, 763-65 (6th Cir. 2006), *cert. denied,* 551 U.S. 1104 (2007); *Kiley v. American Soc. for the Prev. of the Cruelty to Animals,* 296 F. Appx. 107, 110 (2d Cir. 2008), *cert. denied,* 558 U.S. 934 (2009). In other words, the plaintiffs could not succeed because Title VII does not cover anti-gay discrimination.

Some if not most of the adverse precedents reason that when the statutes were enacted decades ago, Congress was intending to outlaw "discrimination against women because they are women and against men because they are men …. In other words, Congress intended the term 'sex' to mean 'biological male or biological female,' not one's sexuality or sexual orientation." *Spearman v. Ford Motor Co.,* 231 F.3d 1080, 1084 (7th Cir. 2000), *cert. denied,* 532 U.S. 995 (2001), *citing and quoting Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081, 1085 (7th Cir. 1984). As the EEOC notes in *Baldwin,* 2015 EEOPUB LEXIS 1905, at *25, this reasoning does not survive the Supreme Court's ruling in *Oncale* that although Congress very likely was not thinking of male-on-male sexual harassment when Title VII was enacted, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79-80.

The *Spearman/Ulane* analysis of Title VII also is inconsistent with *Price Waterhouse.* If Title VII's prohibition against sex discrimination went no further than "discrimination against women because they are women and against men because they are men," *Spearman,* 231 F.3d at 1084, there would have been no basis for the plaintiff's claim in *Price Waterhouse:* she was discriminated against not because she was a woman, but because she was a woman who did not meet the stereotypes in the firm's partners' minds of how a woman should act. Just as *Oncale* teaches that the meaning of Title VII (and Title IX) lies in the actual words of the statute, not in the minds of the members of Congress when they voted for the law, so *Price Waterhouse* teaches that sex discrimination extends much further than simply preferring "biological men" over "biological women."

Finally, several of the Courts of Appeals have reasoned that Congress has, to date, rejected attempts to amend Title VII to include sexual orientation as an express protected group. *Kiley v. American Soc. for the Prev. of the Cruelty to Animals,* 296 F. Appx. At 109; *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001), *cert. denied,* 534 U.S. 1155 (2002). The EEOC's response to this argument is particularly instructive (2015 EEOPUB LEXIS 1905, at **27-29):

> [T]he Supreme Court has ruled that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered

change." *Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)* (citation omitted) (internal quotation marks omitted). The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of "people in interracial relationships." See, e.g., *Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998),* reinstated in relevant part, *Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999)* (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of "masculine women." See *Price Waterhouse, 490 U.S. at 239-40* (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of "non-believers." See, e.g., *EEOC v. Townley Eng'g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988).* These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word "mothers" in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See *Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971)* (per curiam). The courts have gone where the principles of Title VII have directed.

VI. Conclusion

We appreciate the Department of Labor's commitment to full equality in job training and job opportunities, and respectfully urge you to make the changes in the final rule outlined above to ensure that LGBT people are fully protected, in the manner provided by sex discrimination laws, properly interpreted. If we can be of further assistance, please feel free to contact me at dbruner@whitman-walker.org or (202) 939-7628.