

Transsexuals Not Covered In Hate Crimes Bill

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Abstract

Back on February 25, 2009 Kathy Padilla wrote a post over at Pam's House Blend titled "Hate Crimes & ENDA: Bad Bills Come and Bad Bills Go". When it came out I really thought it would be one of those explosive posts that rocked the community down to the bone. She said: "The new definitions [...]"

Article

Back on February 25, 2009 Kathy Padilla wrote a post over at Pam's House Blend titled "Hate Crimes & ENDA: Bad Bills Come and Bad Bills Go". When it came out I really thought it would be one of those explosive posts that rocked the community down to the bone. She said:

"The new definitions can generally be said to cover gender expression but not gender identity. Which in the real world would present the likelihood that gender variant gay, straight and transgender people who don't medically transition would be covered by the Hate Crimes Bill (and ENDA if it imports the language). Transsexuals would not be covered."

and

"The redefining of identity to mean characteristics (in this case gender expression) is something that case law has already addressed in Title VII cases holding that expression does not equal identity; in those cases racial and ethnic identity. These were expressions that the plaintiffs associated with their racial and ethnic identities; such as hair styles and the use of their native languages but that might not be considered exclusively associated with those identities. The obverse would be applicable here - expression being covered, but identity being excluded. The history indicates that if expression only is covered in the legislation; unless one can concretely associate an expression with an identity, the identity wouldn't be covered. It should be obvious - but the definition of gender expression discrimination is that it is based upon gender expression that isn't associated with one's identity."

In the interest of disclosure, the Title VII cases Padilla speaks of are *Rogers v. American Airlines* (which said that the "Airline rule prohibiting employees in certain employment categories from wearing all-braided hairstyle did not discriminate on basis of race, since policy applied equally to members of all races and plaintiff did not allege that all-braided hairstyle was one used exclusively or even predominantly by black people") and *Bivens v. Albuquerque Public Schools* (which said that "Sagging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States")

Padilla wrote a follow up post at Bilerico called Bulletproof saying:

"I followed up and asked if these groups had raised objections to the language in previous meetings and she confirmed that they had. The language hasn't changed since they raised these objections. And no one from these groups has stated that they were convinced their previous objections were groundless. It could just be that they maintain these objections, but won't voice them going forward out of process & political considerations. It would be helpful for those groups having the greatest credibility with the trans communities to speak to the issue. Process shouldn't trump product where our rights and possibly our lives are concerned. It's precisely because we're not bulletproof that the language must be.

One of the reasons given by some in DC for the differing definitions in ENDA & Hate Crimes of gender identity & expression is that the bills come from two distinct areas of law - employment & criminal. We discussed this and Ms. Falo confirmed that there are no differences in these two spheres or in case law that would require different language or make one definition preferable in the criminal arena but less adequate in the employment sphere. She noted though that the legislative processes differed as the bills originated in separate committees."

The "Ms. Falo" that Padilla speaks of is a legislative lawyer working for Congressman Barney Frank. You'd think with such a bombshell of a post, that there would be some kind of response. But the silence has been deafening.

The importance of the language in HR. 1913 can't be overstated. The Task Force wrote in their PDF titled "Transgender Equality"

"Drafting legislation is a highly skilled art. To be useful, civil rights statutes must be worded carefully. Sloppy or ambiguous language can create unintended loopholes or exclusions that may defeat the purpose of passing a law in the first place. Once a nondiscrimination statute is passed, courts will scrutinize the language very closely. Lawyers representing employers (landlords, businesses, etc.) will do their best to find loopholes and to persuade courts to interpret the law as narrowly as possible. In the context of federal laws that prohibit sex discrimination, for example, literally hundreds of pages of court decisions have been devoted to interpreting the three little words "because of sex." Individual litigants have won or lost cases depending on how narrowly or broadly a particular court has interpreted this single phrase. To avoid these problems as much as possible, it is a good idea to enlist the help of supportive attorneys and/or legislators who are skilled at drafting legislation, and who can help you anticipate criticisms, misunderstandings, and unintended consequences of language that is confusing, weak, or just poorly drafted. This doesn't mean that you have to relinquish all control to legal 'experts.' But it does suggest that once you know what you want your statute to accomplish, it makes sense to consult or collaborate with folks who have the knowledge and the skills to draft a strong, carefully worded law that will afford as much protection as possible.

A PDF put out by NCTE states:

"Lawyers experienced with writing and enforcing laws that protect transgender people have worked to ensure that the language in this bill includes people of all gender expressions and identities. Crimes against people across the gender spectrum would be addressed by this bill."

But Arizona attorney Abigail Jensen echoes my concerns with her remarks concerning H.R. 1913 on the EQualityGiving blog:

"I recognize that the language in the Hate Crimes Bill was approved by both Houses of Congress in 2007. However, having separate definitions of the same term in federal law invites unnecessary litigation over whether that term is intended to have a different meaning in the Hate Crimes Bill than everywhere else. In addition, there is some concern that the definition in the Hate Crimes Bill is intentionally more narrow than the definition in HR2015 and that it excludes those who have physically transitioned to their affirmed gender. In light of these concerns, the political advantages of using the definition approved in 2007 do not justify the use of different definitions."

The murders of Angie Zapata, Gwen Araujo, Chanel Pickett, and Deborah Forte would likely not be considered hate crimes today, under this legislation. Defined narrowly, these women were not murdered for their "characteristics", but their genitals or genital history. The murderers used (or in the case of Zapata, is using) the trans-panic defense, not the victims characteristics.

Using the sloppy wording of this legislation, a reasonably smart defense attorney will use this crack to promote the use of the trans-panic defense. While NCTE states that "Lawyers experienced with writing and enforcing laws" helped write this bill, I've yet to see of any of these "experts" come out publicly to correct "errors" by me or Padilla in this post. I welcome that because I'd love to be wrong. But the consequences of this bill will have long term effects on the ability to prosecute hate crimes against transgender people. A bad hate crimes bill is worse than no bill at all. Well, except if you're running a non-profit business and are looking for a win at all costs. Then it's a win/win. You can claim victory and ask for more money because of the good work you do. The losers will be the victims and their families... and justice.

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