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Equality Act Testimony: LGBT Discrimination in the Judicial System

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The Honorable Richard Durbin  
Chair, Committee on the Judiciary  
U.S. Senate

The Honorable Charles Grassley  
Ranking Member, Committee on the Judiciary  
U.S. Senate

Dear Chair Durbin, Ranking Member Grassley, and Members:

I am the Judicial Education Director of Williams Institute on Sexual Orientation Law and Public Policy at UCLA. I am also the current President-Elect of the National Association of State Judicial Educators, the organization for judicial education professionals working in the courts of the United States and internationally. I have trained over 7000 judges, court staff and related court professionals from virtually every state in the United States on sexual orientation and gender identity issues for over 15 years. Additionally, I am a Professor of Law at Western State College of Law in Irvine, California. I have studied the treatment and experiences of Lesbian, Gay, Bisexual, and Transgender [LGBT] people in courts and the judicial system for over twenty-five years and have published several book chapters, law review articles and studies on these topics.

I am writing to you about S. 393, the Equality Act introduced in the 116<sup>th</sup> Congress. As you know, this bill would prohibit discrimination based on sexual orientation and gender identity in public accommodations, including the courts, on juries, and court-related governmental services and facilities. In addition, the judicial system also serves as the employer for court personnel, judges and others. Accordingly, the bill would explicitly confirm the prohibition on sexual orientation and gender identity discrimination in hiring, firing and other employment decisions in those contexts. I have reviewed over two decades of surveys, reports and studies of the experiences of LGBT people in the legal system as both court users and employees. Research findings make two main points that document the need for this legislation.

First, research shows a widespread pattern of disparate and unequal treatment and experiences faced by LGBT court users, witnesses, and parties in courtrooms, jury rooms and other segments of the judicial system. There are two statewide studies of state court systems exclusively focused on sexual orientation; those studies were conducted by the courts of California and New Jersey. The California and New Jersey studies' documentation of discrimination in the courts build upon and confirm the findings of other studies of the judicial system conducted by state or local bar associations, and other groups. In addition, the U.S. Transgender Study contained important findings that, like LGB people, transgender and gender nonconforming persons faced discrimination and unequal treatment in courts and judicial systems across the United States.

- The California Judicial Council, Access and Fairness Committee (2001) conducted a statewide study of the experiences and treatment of sexual orientation minorities in the California courts. That report found significant examples of unequal treatment of lesbians and gay men in the California judicial system. When lesbian and gay court users were involved in sexual orientation issues in court, 25.5% of lesbian and gay court users reported they were treated differently from everyone else, and 29.6% of lesbian and gay respondents felt those who knew their sexual orientation did not treat them with respect. In that same contact, 39% of lesbian and gay court users believed that their sexual orientation was used to devalue their credibility.
- A 2001 study by the New Jersey Supreme Court Task Force on Sexual Orientation Issues found that 45% of lesbian and gay court users reported experiencing or observing litigants or witnesses treated disadvantageously because they were or were perceived to be gay or lesbian. Sixty-one percent of gay or lesbian New Jersey court users believed that sexual orientation bias affected the outcome of a case in which they were involved or which they observed. Compared to all N.J. respondents, sexual minorities reported significantly more incidents in which gay litigants or clients of gay lawyers fared worse in the family or criminal courts because of sexual orientation.
- More recently, the Florida Supreme Court Standing Committee on Fairness and Diversity (2008) found that 14% of litigants in the Florida courts reported that the courts did not show fairness and respect to people without regard to sexual orientation. Nine percent of attorneys, 8% of judges, and 4% of staff reported seeing or experiencing unfair treatment of individuals in the courts based on sexual orientation.
- The State Bar of Arizona Gay and Lesbian Task Force, *Report to the Board of Governors*, (1999) and its findings detail evidence of discrimination typical of that found in the bar association reports. That report demonstrated that lesbians and gay men are substantially disadvantaged as participants in the justice system because of sexual orientation bias. Thirteen percent of the judges and lawyers surveyed observed judges in open court negatively treating those perceived to be lesbians or gay men; 47% heard disparaging remarks about lesbians or gay men in courthouse public areas. Further, 8% percent of court personnel and 4% of litigants, jurors, and witnesses indicated they preferred not to work with lesbian or gay lawyers.
- The 2015 U.S. Transgender Survey found that, when they believed that staff knew or believed they knew about their transgender status, 13% of transgender and gender nonconforming people reported having one or more of the following experiences in courts and courthouses: being denied equal treatment or service (8%), verbally harassed (8%), or physically attacked (<1%) because of being transgender. Legal name changes are an important step in ensuring that identification documents match gender identity. Because name changes in most states take place via court order, transgender people's experiences in those court proceedings are particularly significant. In name change proceedings, when transgender people believed that judges and/or court staff thought or knew they were transgender during their interaction, 22% felt they were only sometimes treated with respect, and 2% felt they were never treated with respect.

Most Americans' experiences with courts and the judicial system come from their being called for or serving on a jury. Studies involving jury service experiences by LGBT people document a significant number of cases and data on disparate or discriminatory treatment during those experiences which affect people throughout the nation. Accordingly, the provisions of S. 393, the Equality Act, that amend 28 U.S.C. Chapter 121 – Juries; Trial by Jury to confirm the prohibition on sexual orientation and gender identity discrimination on juries are particularly needed.

- Shay (2014) collected cases and reports of other documented experiences where jurors and litigation parties were unequally and discriminatorily treated based on sexual orientation and gender identity. These cases and reports ranged from voir dire questioning on sexual orientation matters, attempts to discredit potential witness and party testimony because of their sexuality, to reports of juror prejudice in decision making.
- Brower (2011) reported that over 10% of lesbians and gay men experienced disparate treatment during their jury service experience in court; nearly 20% believed they were not treated respectfully, and over 13% stated that their sexual orientation was used to devalue their credibility. Some study participants reported being dismissed from the venire panel because of their sexual orientation. Brower also collected juror attitude studies in which jurors chronicle being unable to be fair or impartial to sexual minority litigants at a higher rate than reported unfairness toward racial or ethnic minority litigants.

Second, LGBT lawyers and others working in courts are confronted with a far-reaching array of employment decisions evidencing discrimination on the basis of sexual orientation or gender identity. Each study documents numerous experiences of being fired, being denied a job, given disparate work assignments or evaluations, or experiencing some other form of unequal treatment in the workplace that stemmed from these individuals' sexual orientation or gender identity.

- California lesbian and gay court employees were over five times more likely to experience negative actions, discrimination, or hear comments based on sexual orientation than were heterosexual employees: 25% of lesbian and gay employees reported experiencing discrimination (as opposed to only negative comments or actions) at their work place based on their sexual orientation; conversely, a mere 2% of the non-LGBT employees reported being discriminated against based on sexual orientation. If a person is suspected of being lesbian or gay, 17.3% of California court employees stated that it is harder to be hired for a job at the court; 13.4% agreed that sexual orientation is used to devalue the credibility of some gay or lesbian court employees; and 9.8% believed that anti-gay prejudice is widespread in the courts as a workplace.
- Thirty percent of New Jersey judicial branch employees of all sexual orientations and 78% of lesbian and gay employees heard a co-worker, supervisor or judge make a derogatory statement or inappropriate joke about homosexuals. Moreover, lesbian and gay court employees themselves were often the target of that treatment: 14% of all judicial employees and 49% of lesbian and gay workers heard those remarks or jokes about a person in the office because that person was or was perceived to be lesbian or gay.

Finally, research suggests that reported cases and administrative complaints underreport the amount of discrimination experienced by LGBT people. Brower (2014) found that in each of the court employee studies he reviewed, a significant number of sexual minority court employees who experienced discrimination and unequal treatment did not report it for fear of greater, more widespread exposure as gay or lesbian, which would have increased and exacerbated their discriminatory treatment. Sexual minority court workers are reluctant to “out” themselves further by filing complaints and facing state administrators and supervisors who have been hostile to their claims. In addition to documenting underreporting of LGBT discrimination in court, those court studies evidence the fact that LGBT court employees (and court users) often do not at all reveal their sexual orientation or gender identity in court settings because they fear discrimination and unequal treatment. Both of these factors suggest that discrimination against LGBT workers in the judicial system could be even greater than the degree suggested by the studies discussed earlier.

In sum, more than two decades of research finds ample evidence of discrimination against LGBT persons in public accommodations like courts and the judicial system and in those same public institutions as workplaces. These patterns of discrimination demonstrate the need for, and importance of, the Equality Act, S. 393/H.R. 5.

Sincerely,

A handwritten signature in black ink, appearing to read 'TB', is written over a horizontal line.

Todd Brower