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July 10, 2006
By Hand Delivery

Cornelius R. Alexander, Esquire
District of Columbia Commission on Human Rights
441 4th Street, NW, Suite 290
Washington, D.C., 20001

Re: Proposed Rulemaking: Compliance Rules and Regulations Regarding Gender Identity or Expression

Dear Mr. Alexander:

The ACLU of the National Capital Area submits the following comments in response to the Notice of Proposed Rulemaking published in the *D.C. Register* of June 9, 2006.

Section 801.1

As written, the introductory paragraph to this section is quite awkward, and could be read to mean that the only DC agencies that are covered are those of educational institutions. We know that was not the intent. We suggest that the paragraph be revised as follows:

> It shall be unlawful for any person or entity, including agencies of the District of Columbia government and its contractors, to discriminate against a person in employment, housing, public accommodations, or educational institutions on the basis of that person's actual or perceived gender identity or expression. Such unlawful discriminatory practices shall include but not be limited to the following in:

Section 801.1 (a) - Employment

> We suggest that the concluding clause be amended to read:
>
> and denying access to restrooms and other gender specific facilities that are consistent with the employee's gender identity or expression.

Only the preference of the transgender person should determine access to a restroom. The notion of "appropriate" might suggest that others have a role in that decision. The clause should prohibit denying access to "other gender specific facilities" such as dressing rooms.

Section 801.1 (c) - Public Accommodations

We suggest that the concluding clause be revised for the same reasons given in § 801.1 (a). It would then read:

> and denying access to restrooms and other gender specific facilities that are consistent with a customer's or client's gender identity or expression.

Section 801.1 (d) - Educational Institutions

We suggest that the concluding clause be revised for the same reasons given in § 801.1 (a). It would then read:

> and denying access to restrooms and other gender specific facilities that are consistent with a student's gender identity or expression.

Section 801.1 (e) - District of Columbia Government

The government's obligations should not be less than anyone else's. This section should be expanded to read:

> (e) District of Columbia Government: refusing to provide any facility, service, program, or benefit of the Government of the District of Columbia; engaging in verbal or physical harassment; creating a hostile environment; and denying access to restroom facilities and other gender specific facilities that are consistent with a person's gender identity or expression.

Section 801.2

The requirement to communicate the laws concerning gender identity or expression should include a reference to the posting requirements of the Human Rights Act. Add to the end of the section: "as required by D.C. Code § 2-1402.51."

Section 802

Expand the title to read: "Restrooms and Other Gender Specific Facilities."

Section 802.1

Revise the section to give content to the expanded title of § 802:

> All entities covered under this Act, as amended, shall allow individuals the right to use gender-specific restrooms and other gender-specific facilities such as dressing rooms, homeless shelters, and group homes that are consistent with their gender expression or identity.

Section 802.2

At the end of the section, add: "as on commercial airplanes" to make clear the feasibility of this requirement.

Section 804.3

The full citation to the DCMR was omitted; it should read "§ 512 of Title 4, DCMR."

Section 805

We suggest changing the title of this section to "Gender-Specific Facilities Where Nudity in the Presence of Others is Customary."

As we understand the purpose of this section, it is not to require covered establishments to permit nudity between people of different genital configurations, but to require accommodation that would avoid such nudity. If nudity is actually "unavoidable," as now appears in the title, no reasonable accommodation would be possible. Changing the title to "customary" better describes the nature of the facilities (such as locker rooms) to which this section is intended to apply.

Section 805.1

Delete "typically" which adds nothing to "segregated by gender."

Section 805.2

For the reason explained above, the first sentence should be amended to read, "In gender-specific facilities where nudity in the presence of other people is customary . . . ," rather than "is unavoidable." We also suggest this section be revised by deleting "appropriate to and" under the same rationale as in § 801.1 (a).

Section 806.3

We suggest adding at the end this additional sentence: 'However, where use of a person's legal name is required by law or for a reasonable business purpose, the applicant may be required to disclose it."

This change is needed to provide for cases such as an employer's having to run a public records check on an applicant.

We also suggest adding the word "adverse" before "action" in § 806.3, which we assume was the intent of the drafter. We note that the phrase "adverse action" is used in § 806.2 and § 806.4.

Section 807.1

We suggest adding at the end of the sentence: ", and shall take reasonable reassures to preserve the confidentiality of that information."

Section 808.1

We suggest adding the following as a concluding clause: "; provided however, that a person's peaceful expression of views on any subject that does not substantially interfere with another's terms and conditions of employment; housing; educational opportunities, benefits or performance; or his or her ability to access a public accommodation shall not be considered to be harassment or the creation of a hostile environment."

This additional language is required to ensure that the law is not applied in a manner that infringes speech protected by the First Amendment. As the courts have made clear, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area School District*, 240 F.3d 200, 204 (3rd Cir. 2001) (Alito, J.).

Section 808.2

We oppose singling out certain behaviors, especially speech, as *presumptive* evidence of unlawful harassment or hostile environment. Three of the four behaviors singled out in this section are pure speech, and we believe that the regulations, as drafted, would likely be held unconstitutional by the courts. For example, the *Saxe* case, cited above, struck down as unconstitutional a college anti-harassment policy that prohibited specific examples of harassment such as "nicknames emphasizing stereotypes, racial slurs, comments on manner of speaking, and negative references to racial customs" (racial and color harassment); "derogatory comments regarding surnames, religious tradition, or religious clothing, or religious slurs or graffiti" (religious harassment); "negative comments regarding surnames, manner of speaking, customs, language, or ethnic slurs" (national origin harassment); "negative name calling and degrading behavior" (sexual orientation harassment); and "imitating manner of speech or movement" (disability harassment). *See id*. at 202.

Furthermore, the sort of presumption contained in the proposed regulation has no counterpart in regulations regarding other kinds of discrimination, either in D.C. or federal law. It is not presumptively unlawful for a person to use a "bad word" or to send an "offensive" e-mail when it comes to race, religion, national origin, and the like. *See*, for example, 4 DCMR § 199, which defines "sexual harassment" in general terms and which does not create any presumptions of the sort that would be created by proposed section 808.2. Transgender people are entitled to only the same protection against harassment and hostile environment discrimination as other protected groups.

Supreme Court decisions concerning both racial and sexual harassment make it clear that the totality of the circumstances must be examined to determine whether there is harassment or a hostile environment. For example, the Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) said:

> "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Id.* at 21 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)).
>
> . . .
>
> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 23.

The Court reaffirmed this position in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998):

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Id.* at 81 (citing *Harris*).

And in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court emphasized that the same standard applied in cases of "discriminatory harassment based on race and national origin," noting that the "'[m]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment to violate Title VII,'" and that incidents of harassment "'must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'" *Id.* at 786-87 & n.1 (quoting *Rogers v. EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972) and *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989)).

In its most recent relevant decision, the Supreme Court summarily reversed a lower court on the ground that "no one could reasonably believe" that a single sexually explicit remark constituted actionable harassment. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam), Reviewing its prior decisions, the Court reiterated that:

> Workplace conduct is not measured in isolation; instead, whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

> Hence, a recurring point in our opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.

Id. at 270-71 (internal quotations, citations and alterations omitted).

The federal EEOC's regulations regarding sexual harassment recognize that this is the law. Rather than singling out any specific conduct or creating any presumptions, the regulations provide that "[I]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis." 289 C.F.R. § 1604.11(b).

We therefore suggest the following reformulation of § 808.2:

> In determining whether there is unlawful harassment or a hostile environment, the totality of the circumstances surrounding the alleged violation of the Act must be considered, including the nature, frequency, and severity of the behavior, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the alleged victim. Ultimately the standard is an objective one, focusing on whether the behavior was sufficiently severe or pervasive to alter the conditions of the victim's employment, housing, education, access to or use of public accommodations, or relations with a District of Columbia agency or contractor, and to create an abusive environment.

Thank you for your consideration of these comments. We would be pleased to answer any questions that you may have and to continue to work with you on this matter.

Sincerely yours,

/s/

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Johnny Barnes
Executive Director

/s/

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Arthur B. Spitzer
Legal Director

/s/

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Stephen M. Block
Legislative Counsel