

STATE OF MINNESOTA  
IN SUPREME COURT

Julienne Goins,

*Respondent,*

vs.

West Group,

*Appellant.*

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**BRIEF OF AMICI CURIAE  
NATIONAL CENTER FOR LESBIAN RIGHTS, GAY & LESBIAN ADVOCATES  
& DEFENDERS, EMPLOYMENT LAW CENTER, HARRY BENJAMIN  
INTERNATIONAL GENDER DYSPHORIA ASSOCIATION**

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## **I. Introduction**

### **A. Statement of *Amici Curiae***

As is more fully described in its request to participate in these proceedings as *amici curiae*, the National Center for Lesbian Rights (“NCLR”) is a non-profit national public interest law firm founded in 1977 committed to securing and protecting the civil rights of lesbians, as well as of gay, bisexual and transgender people. Gay and Lesbian Advocates and Defenders (“GLAD”) is a public interest legal organization founded in 1978 whose mission is to secure equal justice and full equality for gay, lesbian, bisexual, and transgender people and people with HIV/AIDS. The Employment Law Center (“ELC”), the principal project of the Legal Aid Society of San Francisco, was established in 1970, and is dedicated to protecting and advancing the rights of workers through litigation. The Harry Benjamin International Gender Dysphoria Association (HBIGDA). HBIGDA is a medical organization devoted to the understanding and treatment of gender dysphoria. *Amici* have a strong interest in promoting the equal treatment of transgender persons and in prohibiting discrimination on the basis of gender and sexual orientation.<sup>1</sup>

### **B. Factual Background**

*Amici* adopt the statement of facts as presented by the plaintiff/respondent Goins (“Goins” or “plaintiff”).

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<sup>1</sup> Pursuant to revised Minn. R. Civ. App. P. 129.03, NCLR, GLAD, ELC, and HBIGDA state that this brief was authored in its entirety by the undersigned counsel for the *amici curiae*, and no person or entity, other than the *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of the brief.

*Amici curiae* state that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a monospaced font. The length of this brief is 4847 words. This brief was prepared using Microsoft Word 7.

## **II. The Minnesota Human Rights Act Prohibits Discrimination Against Transgender People, Including The Plaintiff In This Case.**

### **A. Transgender Persons Are Those For Whom There Is A Conflict Between Anatomy And Self-Image.**

Gender identity is a person's internal identification or self-image as male or female. Suzanne J. Kessler & Wendy McKenna, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 8-11 (1978); John Money, *Gender Role, Gender Identity, Core Gender Identity: Usage and Definition of Terms*, 1 *JOURNAL OF THE AMERICAN ACADEMY OF PSYCHOANALYSIS* 397-403 (1973). For most people, their gender identity – their self-image as male or female – is consistent with their anatomical sex. For transgender persons, however, as this Court long ago recognized, there is a conflict between one's anatomical sex and one's gender identity. See Doe v. State of Minnesota, Dept. of Public Welfare, 257 N.W.2d 816, 818-19 (Minn. 1977) (“Although for most members of society sex and gender are synonymous, it is possible for each to develop independently. In cases when sex and gender do develop independently, the end product is often a transsexual person plagued by the serious problem of ‘gender role disorientation, a painful cross-gender identity.’”). See also C.M. Cole, L.E. Emory, T. Huang, & W.J. Meyer, *Treatment of Gender Dysphoria*, 90 *TEXAS MEDICINE* 68-72 (1994).

This incongruence between anatomical sex and gender identity causes intense feelings of conflict and emotional pain. Gianna E. Israel & Donald E. Tarver, *TRANSGENDER CARE: RECOMMENDED GUIDELINES, PRACTICAL INFORMATION & PERSONAL ACCOUNTS* 7-8 (1997). To alleviate this incongruity and discomfort, some transgender people undergo medical treatment, including hormonal sex-reassignment and, in some cases, surgical sex reassignment. Id. at 14. Others undergo hormonal sex-

reassignment only. Id. And still others live as a member of the opposite sex without undergoing any hormonal or surgical treatment. Id. at 15.

Although what causes a particular individual to be transgender is not currently known, the weight of current scientific evidence suggests a biologically-based, multifactorial causation, including genetic, hormonal and environmental influences. P.T. Cohen-Kettenis & L. J. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 JOURNAL OF PSYCHOSOMATIC RESEARCH 315-33 (1999). See also Louis Gooren, *Gender Transpositions: The Brain Has Not Followed Other Markers of Sexual Differentiation?*, 4 International Journal of Transgenderism (2000) (concluding that there is mounting scientific evidence that transsexualism is caused by biological rather than psychological factors); J.-N. Zhou, M.A. Hoffman, L.J. Gooren & D.F. Swaab, *A Sex Difference in the Human Brain and its Relation to Transsexuality*, NATURE 378 (1995) (concluding that “gender identity alterations may develop as a result of an altered interaction between the development of the brain and sex hormones [in utero]”).

Whatever its precise cause, gender identity is a fundamental aspect of human identity. As this Court has acknowledged in prior cases involving transgender persons, a person’s self-image as male or female is established at an early age and is highly resistant to change. See Doe v. State of Minnesota, Dept. of Public Welfare, 257 N.W.2d at 818. See also Robert J. Stoller, *The Sense of Maleness*, 34 PSYCHOANALYTIC QUARTERLY 207-18 (1965). In the past, some practitioners tried to “cure” transgender people through aversion therapies and other techniques intended to alter cross-gender identification. See, e.g., M.G. Gelder & I.M. Marks, *Aversion Treatment in Transvestism and Transsexualism*, in TRANSSEXUALISM AND SEX REASSIGNMENT (Richard Green & John

Money eds., 1969). Those efforts were not only unsuccessful, but caused severe psychological damage. Gerald Mallon, *Practice with Transgendered Children*, in SOCIAL SERVICES WITH TRANSGENDERED YOUTH 49, 55-58 (Gerald Mallon ed. 1999). Today, efforts to alter a person's core gender identity are viewed as futile and unethical. *Id.* Accordingly, the treatment paradigm has shifted from attempting to "cure" the transgender person "to facilitating acceptance and management of a gender role transition." Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, in GENDER DYSPHORIA: INTERDISCIPLINARY APPROACHES IN CLINICAL MANAGEMENT 131, 131-32 (W.O. Bockting & E. Coleman eds., 1992).

#### **B. The MHRA Protects Transgender People.**

The Minnesota Human Rights Act ("MHRA") is unique in expressly prohibiting discrimination against transgender people, who are included in the statutory definition of sexual orientation.<sup>2</sup> The MHRA defines sexual orientation to include "having or being

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<sup>2</sup> Minnesota was the first state to extend explicit civil rights protections to transgender persons. See Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WILLIAM & MARY J. OF WOMEN & THE LAW 37, 46 (2000). Moreover, the history leading up to the addition of sexual orientation to the statute makes clear that transgender people were intended to be protected. Paisley Currah & Shannon Minter, TRANSGENDER EQUALITY 19-26 (1999), available at <http://www.nglrf.org/downloads/transeq.pdf>.

The language of the MHRA has become a model for other state legislatures and for municipalities outside of Minnesota that have extended non-discrimination protections to transgender people. See, e.g., CAL. PENAL CODE § 422.67 (West 1999); ANN ARBOR, MICH., ORDINANCE 10-99 (Mar. 17, 1999); ATLANTA, GA., ORDINANCE No. 00-1983 (Dec. 4, 2000); BOULDER, COLO., ORDINANCE 7040 (Jan 20, 2000); DEKALB, ILL., MUNICIPAL CODE ch. 49, § 49.02 (2000); EVANSTON, ILL., ORDINANCE 61-0-97 (1997); ITHACA, N.Y., LOCAL LAW No. 2-2000 ch. 215, art. V, § 215-30 (2000); JEFFERSON COUNTY, KY., ORDINANCE 36 (Oct. 12, 1999); LOS ANGELES, CAL., MUNICIPAL CODE § 49.71 (1992); LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, KY., ORDINANCE 201-99 (July 8, 1999); LOUISVILLE, KY., ORDINANCE 9 (Jan. 26, 1999);

perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363.01, subd. 45. As explained above, transgender people fall squarely within this definition because they are defined by an incongruence between their gender identity, or self-image as a man or a woman, and their biological sex.

### **III. This Is A Direct Evidence Case.**

#### **A. This Case Is Based On Direct Evidence Of Facial Discrimination In Violation Of Minn. Stat. § 363.03.**

This is a direct evidence case. West Group ("West" or "Defendant") told Goins she could not use the women's restroom and that she was only allowed to use the unisex bathroom on a different floor and in a different building or the "single-use" bathroom in the lobby on a different floor. West did not permit Goins to use either the men's or the women's restrooms. West did not adopt this policy because Goins had engaged in any misconduct or because it had any reason to fear or suspect any such misconduct. Rather, West adopted it solely because Goins is a transgender woman.

West's policy on bathroom access is discriminatory on its face. It prescribes one rule for transgender people and another rule for everyone else. Under West's policy, Goins was told that because she is transgender, she could not use the women's restroom unless she disclosed intimate details of her medical history, including whether she had

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MADISON, WIS., EQUAL OPPORTUNITIES ORDINANCE (Aug. 1, 2000); MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139, § 139-10 (2000); NEW ORLEANS, LA., ORDINANCE 18794 (July 8, 1998); PORTLAND, ORE., CIVIL RIGHTS ch. 23.01 (2000); ST. PAUL, MINN., CODE ch. 183, § 183.02 (2000); SEATTLE, WASH., ORDINANCE 119628 (Aug. 11, 1999); WEST HOLLYWOOD, CAL., ORDINANCE 98-520 (July 20, 1998).

Currently 3 counties and 29 cities explicitly include transgender people in their non-discrimination laws. See <http://academic.brooklyn.cuny.edu/polisci/pcurrah/genderlaw/index.htm>.

undergone any genital surgeries, and her current genital configuration. In contrast, non-transgender women were not required to disclose medical information or to offer any proof of their genital configuration before doing so. In short, West singled Goins out and created a rule applicable only to her solely because West believed that her self-image was not consistent with her biological sex.

As the Minnesota Court of Appeals rightly noted, the Minnesota Human Rights Act (“MHRA”) expressly prohibits this type of discrimination:

West denied Goins use of the women’s restroom in disregard of her undisputed female self-image. The district court held that Goins can only use the women’s restroom by demonstrating anatomy consistent with self-image. The MHRA, however, does not require an employee to eliminate an inconsistency between self-image and anatomy; it protects the employee from discrimination based on such an inconsistency.

Goins v. West Group, 619 N.W.2d 424, 429 (Minn. App. 2000). Any other conclusion would eviscerate the protections provided by the MHRA to persons whose self-image or identity is not traditionally associated with their biological sex. See Minn. Stat. § 363.01, subd. 45 (defining the class of persons protected under the category of sexual orientation to include those who have or are perceived as having “a self-image or identity not traditionally associated with one’s biological maleness or femaleness”).

This conclusion is reinforced by the provision expressly prohibiting an employer from asking about sexual orientation or any other protected status. See Minn. Stat. § 363.03, subd. 4(a) (providing that it is an unlawful employment practice for an employer to require a person to furnish information pertaining to his or her sexual orientation).

**(i) The “Adverse Employment Action” Standard Does Not Apply To A Facially Discriminatory Policy.**

West erroneously contends that its bathroom policy does not violate the MHRA because it does not rise to the level of an “adverse employment action.” This standard is inapplicable and irrelevant because this case involves a facially discriminatory policy. The inapplicability of this standard is clear if one imagines an analogous hypothetical situation, such as an employer policy requiring people of a certain race or religion or national origin to drink only from a designated drinking fountain, and not from the one for general use. Although being barred from drinking from a water fountain, in and of itself, might not be a “materially adverse change in terms and conditions of employment,” such a policy would clearly be a violation of the MHRA or Title VII. See, e.g., Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D. La. 1976) (holding that policy of segregating bathrooms on the basis of race violated § 1981 and noting that, under the policy, black employees were “humiliated and degraded by being herded into ‘their places’ by white management personnel”).<sup>3</sup>

**(ii) West Trivializes The Harm Of Its Discriminatory Policy**

Every single work day, whether transgender or not, employees need to use the restroom to relieve themselves several times. This is among the most basic of human

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<sup>3</sup> See also Regents of the University of California v. Bakke, 438 U.S. 265, 394 (1978) (Marshall, J., dissenting) (“Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was “not humiliating but a benefit” and that he was “rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against.””).

functions. As was true of racially segregated bathrooms, being singled out and required to use a separate bathroom, located on a separate floor or in a separate building, because of one's transgender status is humiliating and degrading. As one legal scholar has noted, requiring a transgender employee to use a third bathroom "offers a stark example of what outsider status is like: if society is composed only of those who enter the women's room and those who enter the men's room, requiring someone to use a third bathroom tells them they are outside society." Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 368 (1999).

**B. The McDonnell-Douglas Burden-Shifting Analysis Does Not Apply In A Direct Evidence Case.**

In its recitation of the facts, West concedes that it devised the policy in question because of Goins' transgender status,<sup>4</sup> but contends that it need only articulate a "legitimate, nondiscriminatory business reason" for its policy to avoid any liability. This contention is incorrect. As this Court has long made clear, the McDonnell Douglas burden-shifting framework applies only where direct evidence of discrimination is lacking. See Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986) ("For those cases in which such direct evidence is not available, the Supreme Court, in McDonnell

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<sup>4</sup> See Defendant's Brief at 5-6 ("After receiving these complaints, Mr. Freeman researched the issue of transgenderism and sought advise from West's in house counsel about the issue of bathroom usage under Minnesota law. A60-61. Mr. Freeman was advised by counsel that, based on their understanding of Minnesota law, West was not legally obligated to allow a transgender person to use the bathroom of the opposite sex, but rather, could require that person to use the bathroom corresponding to the person's biological sex – in this case, the men's room. A61. Although legally permissible, Mr. Freeman believed that requiring Goins to use the men's restroom would not be appropriate in light of his understanding that Goins dressed and identified as a female. A64.")

Douglas, articulated an alternative means by which discriminatory motive can be indirectly inferred.”). The framework has no application in a direct evidence case.<sup>5</sup>

Where an employer has adopted a facially discriminatory policy, as is the case here, the policy can be upheld only if the employer meets the stringent test for a bona fide occupational qualification (“BFOQ”).<sup>6</sup> Elbers v. Growe, 502 N.W.2d 810, 815 (Minn. App. 1993) (citing International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, 499 U.S. 187 (1991), and noting that Minnesota courts look to federal precedent when interpreting the MHRA’s BFOQ exception); Huisenga v. Opus Corp., 494 N.W.2d 469 (Minn. 1992) (same). See also Healey v. Southwood Psychiatric Hospital, 78 F.3d 128, 131 (3<sup>rd</sup> Cir. 1996) (noting that a BFOQ defense must be distinguished from the McDonnell Douglas test); see also Chambers v.

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<sup>5</sup> Amici for defendant cites LaMott v. Apple Valley Health Care Center, Inc., 465 N.W.2d 585 (Minn. App. 1991), for the proposition that the McDonnell Douglas shifting-burden analysis is applicable even where there is evidence of direct discrimination. See Amici’s Brief at 8 (“In Minnesota, the second and third prongs of the McDonnell-Douglas test apply in all disparate treatment cases brought under the MHRA regardless of whether a plaintiff has satisfied her prima facie burden using direct or indirect evidence).

Contrary to defendant’s reading of LaMott, however, LaMott does not hold that the McDonnell Douglas shifting burden analysis is applicable regardless of whether a plaintiff presents direct evidence of discrimination. Rather, although the court found that plaintiff had presented evidence of direct discrimination, and acknowledged that in this situation a court “need not consider evidence of indirect discrimination,” the court noted that “nonetheless, we note that respondent also established an indirect prima facie case of discrimination.” Id. at 588.

<sup>6</sup> Like Title VII, the MHRA also provides a BFOQ exemption: “Except when based on a bona fide occupational qualification, it is an unfair employment practice . . .” Minn. Stat. § 363.03, subd. 1. Title VII provides: “Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origins is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 200e-2(e)(1).

Oklahoma Girls Club, Inc., 834 F.2d 697, 704 n. 18 (8<sup>th</sup> Cir. 1987) (overt discrimination eliminates the McDonnell Douglas burden-shifting procedure)).<sup>7</sup>

The BFOQ is an affirmative defense, and the burden of proving it rests entirely on the employer. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 414-15, 421-23 (1985); Healey, 78 F.3d at 132. The BFOQ defense is very narrow. “[D]iscrimination is permissible [under the BFOQ defense] only if those aspects of a job that allegedly require discrimination fall within the ‘essence of the particular business.’” Healey, 78 F.3d at 132 (citations and internal quotations omitted). See also Elbers, 502 N.W.2d at 815 (same).

The essence of West’s business is publishing legal materials. Like most employers, West provides bathroom facilities for its employees, but discriminating against a transgender employee in the usage of those facilities has no relevance to the publishing business. It certainly does not meet the strict test of being necessary to preserve the essence of that business.

Here, West cannot plausibly claim that requiring Goins to use a segregated bathroom is justified as a BFOQ.

**C. Bias And Discomfort On The Part Of Other Women Who Do Not Wish To Share A Bathroom With A Transgender Woman Is Not A BFOQ.**

Although some courts have found an employee’s sex to be a BFOQ in certain situations in which a customer’s or a client’s bodily privacy interests might otherwise be compromised, they have done so only when there is unavoidable genital nudity or a

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<sup>7</sup> The BFOQ defense is more stringent than the “business necessity” defense available under a disparate impact theory. See Olsen v. Marriott Int’l, Inc., 75 F. Supp. 2d 1052, 1066 (D. Ariz. 1999) (“Due to financial concerns, the Marriott argues that its sex-based hiring practice is justified by business necessity. However, the defense of business necessity is not available in disparate treatment cases such as this. Only the more stringent BFOQ defense is available.”) (citations omitted).

requirement of intimate physical contact. See Olsen, 75 F. Supp. 2d at 1062 (“Most privacy-based BFOQ requests occur when employees in the position at issue perform legitimate job duties requiring that they intrude upon the privacy interests of a third party by, at minimum, viewing the third party completely naked.”) (emphasis added). See also Foster v. Back Bay Spas, Inc., 1997 Mass. Super. LEXIS 194, at \*11 (1997) (“intimidation and the assumption that all male Healthworks members will harass and leer at their exercise compatriots is . . . an insufficient ground on which to create a privacy exception. Absent the unclothed exposure of intimate body parts, or the touching of body parts by members of the opposite sex, this Court can find no basis for overriding the public accommodations statute’s mandate.”) (emphasis added).<sup>8</sup>

Here, the alleged invasions of privacy occur in the women’s restrooms. There is no forced nudity in the restrooms, and no one is required to watch other persons using the toilets. There is a limited expectation of privacy in a public restroom, and that expectation is not affected or connected in any substantive way by the genitals of those sharing the bathroom, which are not visible.

Because of the activities engaged therein, the bathroom may indeed be a place where one has an expectation of privacy, but then the term “public restroom” is

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<sup>8</sup> In addition, most of the privacy-based BFOQ requests occur in situations where the third parties are particularly vulnerable to exploitation and abuse. For example, most of the privacy-based BFOQ requests involve prisoners, and patients in psychiatric hospitals or rest homes. “Inmates as well as patients involuntarily committed to psychiatric hospitals are not free to leave if and when unwanted contact takes place. Patients in psychiatric hospitals also may be vulnerable due to their mental illnesses. . . . Elderly nursing home patients may be vulnerable due to illness, frailty, or decreased cognitive functioning. Given the increased vulnerability of the resident population, a concern about sexual abuse is frequently one of the real reasons animating a privacy-based BFOQ.” Olsen, 75 F. Supp. 2d at 1070 n. 6.

something of an oxymoron. More realistically, because one is required to share it with others, a public or workplace restroom is someplace where one has a limited expectation of privacy. A transsexual does not seem to invade one's privacy any more than anyone else who shares the public restroom.

Keller, supra, at 370.

In addition, West has not presented any evidence to support its claim that discriminating against Goins was necessary to protect the privacy of other employees. West argues that it “made the decision about which restroom Goins should use only after receiving complaints from female employees that their rights were being violated by having to share the women’s restroom with [Goins].” Defendant’s Brief at 21. The record, however, contains no testimony from these employees. See Appellant’s Brief to the Court of Appeals at 9. In addition, this assertion is undercut by the fact that defendant established its restroom policy with respect to Goins even before Goins arrived at defendant’s facility. See Appellant’s Brief to the Court of Appeals at 9 (“West scheduled a meeting to take place between Freeman, Goins and Joseph for October 6, 1997, Goins[’] first day of work in Egan. Prior to the meeting, Freeman conveyed to Joseph that he had made a decision to forbid Goins access to the women’s and men’s bathrooms. A49.”) (emphasis added).

Furthermore, even if the testimony of these women was in the record, defendant has failed to establish that their concerns constitute legitimate privacy concerns, as opposed to preferences. “Courts have consistently rejected requests for a BFOQ based on customer preference.” Olsen, 75 F. Supp. 2d at 1065. As one court has articulated:

While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers [and co-workers] to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer [and co-worker] preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.

Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5<sup>th</sup> Cir.), cert. denied, 404 U.S. 950 (1971).<sup>9</sup>

**D. Being Forced To Disclose Detailed Information About The Most Private Aspects Of One's Medical Treatment And Medical Status Is Far More Invasive Of Privacy Than Sharing A Workplace Restroom With Another Person.**

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<sup>9</sup> Further, the United States Supreme Court has made clear that the absence of a malicious motive does not convert the policy into a facially-neutral one. Rather, the standard for whether discrimination is justified as a BFOQ is an objective one, and the subjective opinions of the employer, however sincere, are irrelevant if not shown to be objectively reasonable:

Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. . . . The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.

Johnson Controls, 499 U.S. at 199-200.

It is well established that all persons have a privacy interest in not being stripped of one's clothing or forced to display one's nude body. By design, workplace restrooms already recognize and accommodate this interest by having separate stalls.

It is also well established that transsexual persons have a compelling privacy interest in their transsexual status. Even in the context of prisons, where claims based on privacy rarely succeed, courts have recognized that transsexual people have a right to confidentiality. See Powell v. Schriver, 175 F.3d 107, 111 (2<sup>nd</sup> Cir. 1999) (“the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism.”).

As the Minnesota Supreme Court has made clear, “[t]he right to privacy is an integral part of our humanity; one has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.” Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (recognizing a cause of action for invasion of privacy where Wal-Mart employee circulated nude photographs obtained from photograph processing lab). “One's naked body is a very private part of one's person and generally known to others only by choice. This is a type of privacy interest worthy of protection.” Id. at 235. “One of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy.” 3 Privacy Law and Practice 25.02[1] (George B. Trubow ed., 1991).

The privacy interest in one's transsexual status is particularly "compelling" because of the reality of the hostility and intolerance that transsexual face from other persons as a result of this status disclosure. As the Second Circuit explained in Powell:

Individuals who have chosen to abandon one gender in favor of another understandably might desire to conduct their affairs as if such a transition was never necessary. That interest in privacy, like the privacy interest of persons who are HIV positive, is particularly compelling. Like HIV status as described in Doe, transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others. The excruciatingly private and intimate nature transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate. It is similarly obvious that an individual who reveals that she is a transsexual potentially exposes herself to discrimination and intolerance.

Powell, 175 F.3d at 111 (citations and internal citations omitted) (emphasis added). In fact, the right to privacy in one's transsexual status is so compelling that the Second Circuit mused in Powell that it was hard to imagine "circumstances in which the disclosure of an inmate's transsexualism . . . serves legitimate penological interests." Id. at 113.

The court in Doe v. Blue Cross & Blue Shield of Rhode Island, 794 F. Supp. 72 (D.R.I. 1992), also recognized the compelling nature of one's privacy interest in one's transsexual status, when it held that a transsexual plaintiff could proceed under a pseudonym. The court reasoned that the plaintiff did:

have a substantial privacy interest at stake. Unquestionably, one’s sexual practices are among the most intimate parts of one’s life. When those sexual practice fall outside the realm of ‘conventional’ practices which are generally accepted without controversy, ridicule or derision, that interest is enhanced exponentially. As a transsexual, plaintiff’s privacy interest is both precious and fragile, and this Court will not cavalierly permit its invasion.

Id. at 74 (emphasis added).<sup>10</sup>

#### **IV. The Restroom Exemption In Minn. Stat. § 363.02 Is Inapplicable.**

##### **A. The Restroom Exemption Applies Only To Public Accommodations; It Does Not Apply To West Or Other Employers.**

Contrary to West’s assertions, the restroom exemption found in Minn. Stat. § 363.02, subd. 4 applies only to places of “public accommodations.” Employers are covered in a different subdivision, subdivision 1, which does not include a restroom exemption. West has not offered any reason why the restroom exemption for public accommodations should be interpreted to apply to West, and the general canons of statutory construction militate against the application of the restroom exemption to defendant. The canon of expressio unius provides that the mention of one thing implies the exclusion of another. In this case, because the state legislature explicitly included the restroom exemption in the public accommodations provision, the absence of any

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<sup>10</sup> In addition, the Minnesota Patients’ Bill of Rights prohibits the revelation of confidential medical records without the permission of the patient. See Minn. Stat. § 144.651, subd. 16 (“Patients and residents shall be assured confidential treatment of their personal and medical records, and may approve or refuse their release to any individual outside the facility.”).

corresponding exclusion in the employment subdivision is strong, if not conclusive, evidence that the legislature did not intend to have the restroom exemption apply to employers.

**B. Even If The Exemption Applied To Employers, It Would Not Permit West To Discriminate Against Transgender Women.**

West erroneously argues that its bathroom policy is based only on Goins' biological sex and has nothing to do with her sexual orientation as defined under the statute. What this Orwellian position fails to acknowledge, however, is that the definition of sexual orientation in the MHRA explicitly references an individual's sex and explicitly extends protection to individuals whose self-image and identity differs from their biological sex. Accordingly, West's argument that it discriminated against Goins based on her sex rather than on her sexual orientation flies in the face of the plain language of the statute, which specifically contemplates the very situation which is at issue in this case, namely, discrimination against a person whose actual or perceived biological sex is different than her self-image as a man or woman. To hold otherwise would be to create an exception that swallows the rule: employers could discriminate against transgender employees with impunity simply by characterizing the discrimination as based on biological sex rather than on the actual or perceived inconsistency or incongruence described in the statute.

Moreover, if West's policy was based on biological sex, as West erroneously contends it is, the policy would have required Goins, who lives and presents full time as a woman, to use the men's room. Instead, however, West devised a new policy, applicable only to Goins, and setting her apart from all other employees, that she had to use a different restroom than those available to everyone else.

**V. Allowing Transgender Employees To Use The Restroom Corresponding To Their Self-Image Is The Only Alternative That Is Reasonable, Workable, And Consistent With The Law.**

**A. The Rule Proposed By West – Using Genital Conformity As A Pre-Condition For Using the Restroom – Is Unworkable and Untenable.**

In its brief, Defendant asserts that “the Court of Appeals established an unworkable standard.” See Defendant’s Brief at 25. It is defendant, however, who has posited an unworkable and untenable standard. First, there is simply no acceptable manner in which employers can or would enforce a uniform rule requiring all employees to describe their genitals before using the restroom corresponding to their outward appearance and self-image as male or female. Such a requirement is not only offensive and unduly invasive of employee privacy on its face, but enforcing it would be impossible short of requiring employees to submit to unprecedented and untenable measures, such as submitting to visual inspections, that would be so outrageously intrusive as to defy reason.

Second, to apply such a requirement only to employees who are or are suspected of being transgender would violate the law by discriminating against transgender employees as a class. In practice, moreover, enforcement of any such selective “transgender only” rule would lead to innumerable practical problems in determining who is and who is not transgender.

In contrast, the Court of Appeals concluded, and plaintiff asks this Court to affirm, that transgender employees must be treated equally and therefore must be allowed to use the restroom consistent with their self-image. Not only is this rule clear and workable, but, as explained below, it is in accord with the rule asserted by other courts, employers, agencies, and medical experts who have addressed this question.

**B. By Affirming the Court of Appeals Holding That Employers Cannot Discriminate Against Transgender Employees in Bathroom Usage, This Court Will Bring Minnesota In Line With Other Courts, Employers, And Medical Experts Who Have Addressed This Question.**

By holding that the MHRA prohibits an employer from prohibiting a transgender person from using the restroom consistent with that person’s gender identity, this Court will affirm that Minnesota is in line with other jurisdictions and employers who have addressed this question. See Sheridan v. Sanctuary Investments Ltd. et al., Jan. 8, 1999 (B.C. Human Rights Tribunal 1999) (holding British Columbia’s Human Rights Code required defendant to allow female transsexual to use women’s restroom, and noting that “the preference of patrons is not a defense to a complaint of discrimination”);<sup>11</sup> Doe v. McConn, 489 F. Supp. 76 (S.D. Tex. 1980) (ruling, by implication, that it would be unconstitutional to arrest transgender persons, regardless of whether they have undergone genital surgery, for using the restroom designated for the sex consistent with their gender identity). See also Workplace Guidelines for Transgendered Lucent Employees<sup>12</sup> (“In Lucent, transgendered people generally have the right to use the appropriate restroom. Lucent recommends that transgendered people use the restroom matching their current gender presentation.”); San Francisco Human Rights Commission, *Compliance Guidance to Prohibit Gender Identity Discrimination*<sup>13</sup> (“Transgendered people have an equal and binding right to the access and safe use of those facilities which are segregated by sex. Access and use of a sex-specific facility may not be denied to any individual with gender conforming identification.”); Ontario Human Rights Commission, *Policy on*

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<sup>11</sup> This decision is available at <http://www.bchrt.gov.bc.ca/sheridan2.htm>.

<sup>12</sup> This policy is available at <http://www.tgender.net/taw/tggl/rr.html>.

<sup>13</sup> This document is available at [http://www.ci.sf.ca.us/sfhumanrights/tg\\_guide.htm](http://www.ci.sf.ca.us/sfhumanrights/tg_guide.htm).

*Discrimination and Harassment Because of Gender Identity*<sup>14</sup> (citing Sheridan v. Sanctuary Investments Ltd. for the proposition that refusing to let a pre-operative transsexual use the restroom consistent with her gender identity constitutes discrimination); United Kingdom Department of Education and Employment, *A Guide to Sex Discrimination (Gender Reassignment) Regulations 1999*<sup>15</sup> (“It is not acceptable to insist for the long term on a transsexual employee using separate facilities, for example a disabled toilet. . . . Similarly, a transsexual employee should be granted access to “men only” or “women only” areas according to the sex in which they in which they permanently present.”).

In the short run, employees who object to sharing a bathroom with a person who is or is believed to be transgender can alleviate their discomfort by using a different bathroom themselves. In the long run, experience has shown that any short term discomfort felt by a transgender person's colleagues and co-workers dissipates with time, as the absence of any rational basis for the discomfort becomes apparent.

In any case, throughout this history of this country, ensuring a fair and humane society with equal opportunity for all has often required change. And, as in all civil rights struggles, there is a period of time in which some people are made uncomfortable by these changes. But to condone a policy based on this discomfort would be to give in to the very prejudices the MHRA was enacted to overcome.

## **VI. Conclusion**

Minnesota law prohibits employment discrimination against transgender people, who are expressly included in the statutory definition of sexual orientation under the

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<sup>14</sup> This document is available at <http://www.ohrc.on.ca>.

<sup>15</sup> This document is available at <http://www.pfc.org.uk/employ/dfeeguid.htm#part3-q10>.

MHRA. West concedes that it required Goins to use a separate bathroom because of her transgender status. This policy is in direct violation of the statute. None of the asserted arguments West has put forward to justify its discriminatory treatment of Goins are legally sufficient to constitute a BFOQ. This Court should not compromise the integrity of Minnesota's non-discrimination law or lower the usual standards applied to non-discrimination cases under the MHRA solely because the plaintiff in this case is a transgender person. The Court of Appeals correctly held that West's policy violated the express terms of the statute, and this Court should affirm that holding here.

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By:

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