
GENDER EQUITY IN THE 21ST CENTURY: KEYNOTE
ADDRESS
DELIVERED SEPTEMBER 18, 2014

*Chai Feldblum**

* Chai Feldblum is a Commissioner at the Equal Employment Opportunity Commission (EEOC). Her remarks at this symposium, now included in this volume with minor clarifying edits, reflect Commissioner Feldblum's personal opinions and do not reflect official positions of the EEOC. In light of the informal nature of Commissioner Feldblum's remarks, there are no citations in this piece. Commissioner Feldblum would like to make clear, therefore, that any mistakes or omissions in these remarks are hers alone. There is one update included in this piece, in footnote 2. Commissioner Feldblum has modified sentences from the verbatim transcript for purposes of clarity.

INTRODUCTION

Thank you so much, Dean Perdue, and for all the students who have worked so hard to pull this event together. And thank you, Dean Perdue, for that introduction. Dean Perdue knew me for over 18 years while I was teaching at Georgetown Law School and I am so glad she didn't tell any embarrassing stories about me -- because, I assure you, she could have.

You have heard a lot this morning about the need in 1964 for Congress to enact prohibitions against discrimination on the basis of race, national origin and religion. I am going to use my time, therefore, to talk about gender equity: the addition of the sex discrimination prohibition in Title VII, the advances that have occurred since passage of that law, and the miles that we still have to go to achieve full gender equity.

The first panel we heard this morning set up marvelously the framework I want to use for my remarks. Under this framework, achievement of any social justice goal requires three variables operating in concert -- law, policies in practice and social norms.

By "law," I mean words. Lots of words. This includes the words of a statute that has been passed by a legislature, either Congress or a state or a local legislature. It includes the words of regulations and guidances that are issued by agencies that are charged with implementing the law, like the EEOC was charged with implementing the employment provisions of the Civil Rights Act. And it includes the words of court cases in which courts are interpreting specific provisions of a law. All of these words make up "the law."

By "policies in practice," I mean whether the words in the statutes, regulations, guidances, and court decisions are reflected in the daily policies and practices of organizations that are governed by the law. Has the social goal the law is seeking to achieve actually been absorbed into the sinews of those organizations? For example, is a law which states, "you may not discriminate based on certain characteristics in employment decisions" -- is that prohibition actually reflected in the daily policies of employers? Or is the prohibition simply just words?

By "social norms," I mean what ordinary people believe should be the right rules to govern society. A government can have lots of laws, and organizations can have lots concrete policies implementing those laws, and it will still not be enough until people across society, in their hearts and minds, believe the social justice goal that is trying to be achieved by those laws and policies is a *good* thing -- there will never be a full achievement of

that goal. There will be always be ways for people to stop change that they don't believe in.

There is an interesting synergism and dynamic between these three variables. They are not static or linear. A society often has to start off with enacting a law to require a certain social goal because many people will not conform their actions to that goal unless they are legally required to do so. But social norms with regard to that goal have to be sufficiently evolved such that – in our democratic system -- enough people believe the government should enact that goal. If a law is passed and effectively enforced, then organizations governed by the law will begin to put into place policies to comply with the law. This will begin to transform the words of the law into actual change on the ground. As people then begin to conform their actions to these required policies that may help them accept the appropriateness of the social goal. After complying with employment non-discrimination requirements, it may not seem unimaginable to an individual to work alongside a person of color or a woman. And as the social goal becomes more accepted and “normal,” that further helps organizations to comply with the law (because the legal requirement does not seem as foreign) and it helps people comply with the required policy (because they agree with the policy now). So there is a synergistic, dialectical effect constantly in play among these three variables.

THE SEX DISCRIMINATION PROHIBITION IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 – SOME HISTORY

Let's use this framework to discuss the evolution of the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964. Title VII prohibits private employers and unions from discriminating on the basis of race, color, national origin, religion and sex. As you heard this morning, when Title VII was first introduced, it did not include sex. In fact, as many people noted this morning, one of the reasons why many members of the House of Representatives voted to add sex to the list of prohibited categories of discrimination was to make it a “poison pill” for the bill because they didn't want the bill to pass.

When people tell this story, they often add the assertion that Congress never even *thought* about the issue of sex discrimination before it added the sex discrimination prohibition to Title VII as a poison pill. That is not a completely accurate rendition of the story. Indeed, for those of you working at the law review that will publish papers from this symposium, here is an interesting fact. I think Prof. Cary Franklin tracked down what was one of the first times (if not the first time) this mythical story was set forth in a

document following passage of Title VII. It was *one* paragraph written by law students at the Harvard Law Review, in the early seventies, with just *one* citation. (The citation was to a statement by Representative Edith Green on the House floor, the one woman Member of Congress who opposed adding the sex discrimination provision because she *was* afraid that it would bring down the whole bill.) Relying on Representative Green's statement, the paragraph stated – in a conclusory fashion – that Congress had never thought about the issue of sex discrimination prior to passage of the Civil Rights Act, that the sudden addition of sex on the House floor was designed simply to kill the bill, and that the implications of the sex discrimination provision had therefore never been understood or thought-through by Congress.

This simplistic view of how sex got added to Title VII was picked up and used repeatedly by the courts – particularly whenever a court was restricted the scope of the sex discrimination and justified that restriction on the grounds that Congress could never have imagined the broader scope of the provision being argued for in the case before it.

So the lesson of this story is that Law Review articles sometimes *do* matter – at least in creating false information.

The more complete story about the addition of sex to Title VII is as follows. Congress had, in fact, been debating and grappling with the issue of sex discrimination for forty years prior to passage of the Civil Rights Act of 1964. But that Congressional debate was not in the context of an employment non-discrimination law applying to private employers and to unions. Rather, it was in the context of the Equal Rights Amendment (the “ERA”) to the federal Constitution.

The National Women's Party, the key advocate for the ERA, had been fighting since the 1920's for Congress to add an equal rights amendment to the federal Constitution. In the 1940s and early 1950s, there had been a fair amount of activity around the ERA. At that time, the ERA said: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." If that amendment had passed and been ratified by the states, no federal or state law could have been enacted that denied or abridged rights on account of sex.

As you know, Congress did not pass the ERA in the 1940s or 1950s. Congress did ultimately pass the ERA many years later and sent it to the states for ratification. And as you all know, ultimately, the states did not ratify the ERA.

The reason the ERA did not pass Congress in the 1940s or 1950s, despite extensive debate in Congress, was that, in 1950, the unions and various women's groups other than the National Women's Party, prevailed on Congress to add a *second* sentence to the ERA. That sentence read as follows: "The provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex." So the first sentence of the ERA said, "No law may take sex into account," and the second sentence said, "Yes, laws may take sex into account if they confer rights, benefits, or exemptions just on women."

What was going on here? It was a combination of practical politics and social norms.

As a matter of social norms, in 1950, the assumption was that women *were* really different from men. Their true jobs were to be wives and mothers. Some women might have to go into the workforce because of financial necessity, but that was not their true job.

As a matter of practical politics, the unions and women's groups had successfully gotten labor laws enacted in various states, and upheld against federal constitutional challenges, by having those laws protect *only* women -- on the grounds that women were inherently *different* than men. They managed to get laws that put a limit on the maximum amount of hours that women could work in a job or that prohibited women from working in jobs considered too hazardous -- on the grounds that women were inherently different than men. Women were wives and mothers first, so they needed laws that enabled them to do their real jobs.

For that reason, the unions and women's groups were wary of a blanket ERA that would not allow any law to "take sex into account." And the members of the National Women's Party did not want an ERA with the second sentence because they felt that undermined their entire goal of complete equality for women. So there was an impasse on the ERA.

Now, thirteen years later, in 1963, Title VII is introduced prohibiting discrimination in employment, but not including sex as a prohibited characteristic for making employment decisions. The National Women's Party sees this as a perfect opportunity to have, at least, *some* provision in law prohibiting sex discrimination. A number of the leaders of the National Women's Party were not supportive of the bill itself. They were fine about placing a prohibition against taking sex into account in laws that were enacted on states or the federal government. But many of them did not support a law that would prohibit private employers from discriminating on the basis of race. But they figured, as a practical matter, that if such a law was going to be enacted anyway, at a minimum they wanted sex to be included as well.

So members of the National Women's Party asked conservative Congressman Howard Smith to introduce an amendment to Title VII, on the House floor, that would add sex as a prohibited ground for discrimination. As has been correctly noted, Congressman Smith was a staunch opponent of the Civil Rights Act and he voted against the final bill in the House. But what is often not understood is that Congressman Smith was also one of the chief supporters of the ERA. Indeed, he had been the Congressman who had introduced the ERA in every Congress for a number of years. So he himself, like the National Women's Party members, was a strong supporter of the ERA, although not of the Civil Rights Act.

There were twelve women members of the House at that point. Can you imagine – just twelve. Eleven out of those twelve members supported adding sex to Title VII. They also supported having Congressman Smith introduce the amendment because, as a matter of practical politics, they hoped he would help get the amendment passed. They assumed some number of people would vote for the amendment as a poison pill, that others would vote for it because they thought it was unlikely to pass anyway, and finally, there would be people like themselves who would vote for it because they thought it was the right thing to do. And indeed, the combination of those groups became the majority that was mustered to pass the amendment in the House, much to the surprise and chagrin of the leaders of the bill (including Representative Edith Green, the only woman Member of the House who voted against the amendment).

There is a very interesting part of this story about how sex managed to *stay* in Title VII in the bill that was ultimately passed by the Senate. Much of the credit for that belongs to a lawyer named Pauli Murray, an African American lawyer, who was part of the group working for passage of the Civil Rights Act. In the 1940s, Murray was part of a small cadre of people who engaged in the direct action of sitting in segregated restaurants and buses. The actions of that small group of people did not have the same impact as similar actions did a decade later, because, as you heard this morning, one needed the massive direct action that ultimately came into play during that later time. In any event, Pauli Murray played an incredible role in the development of civil rights in this country. I urge you to read her autobiography: *The Autobiography of a Black Activist, Feminist, Lawyer, Priest and Poet*. I am on a personal mission to get Murray's autobiography available on Kindle. So if you do go to Amazon to buy her book in print, please also click on "I would like to see this on Kindle." Maybe that will help get her amazing story out in the public more. If you read that book, you will get a sense of some of the work it took to retain the sex discrimination provision in Title VII as the bill moved through the Senate.

But here is the interesting fact. The *words* – “no sex discrimination in employment” -- became part of Title VII. But because *social norms* were not yet at a place where men and women were actually perceived to be the same for purposes of employment, the EEOC, the agency created to implement Title VII, and subsequently the courts, found it hard to accept the words of the law at face value. They found it hard to imagine and accept that the law’s prohibition on sex discrimination was just like the law’s prohibition on discrimination based on race, national origin, and religion.

Here is an example that encapsulates this resistance and lack of understanding. In July 1965, about a year after the Civil Rights Act was passed, the EEOC opened its doors for business. The Commission quickly ruled that it was illegal to have “help wanted” ads in newspapers that said: “For Negroes” or “for Whites.” There used to be these things called newspapers, they had help wanted ads, and people read them. The EEOC ruled that those ads discriminated on the basis of race and therefore violated Title VII.

But newspapers also ran “help wanted” ads that said “Men wanted” or “Women wanted.” The EEOC ruled, in September 1965, that this practice did *not* violate the sex discrimination prohibition of Title VII. The Commission’s reasoning was that because the personal inclinations of women and men were such that many job categories were of *interest* only to women or only to men, segregating these ads by sex was not discrimination. Rather, these ads were simply helping applicants find the jobs they wanted anyway. Of course, if a woman applied for a job in the “men wanted” column, or if a man applied for a job in the “women wanted” column, Title VII prohibited an employer from not hiring the person based on sex. But the ads themselves were fine.

This decision by the EEOC so outraged women’s rights advocates that it became the catalyst for the founding of the National Organization of Women. If you go onto NOW’s website and look under the “history” tab, you will see that it describes the EEOC’s decision to allow sex-segregated ads as one of the reasons NOW was created. That was because women’s advocates were told (by a few feminists inside the EEOC) that women’s advocates needed an organization like the NAACP in order to pressure the EEOC to do the right thing in implementing the law. And, in fact, one of the first victories that NOW won was to get the EEOC to change its position and rule that sex-segregated ads violated Title VII.

THE SEX DISCRIMINATION PROHIBITION IN TITLE VII OF THE CIVIL RIGHTS
ACT OF 1964 – THE EARLY DECADES

After its inauspicious start, the EEOC emerged as a leader in shaping the law of sex discrimination. The EEOC had various mechanisms in which it was able to do so. First, when the EEOC found there was reasonable cause to believe that discrimination had occurred in the context of a charge that had been brought by an individual against a private employer or a union, the Commission often issued a Commission decision explaining its legal reasoning for “finding cause.” Second, after a few years, the Commission began to issue guidelines to implement Title VII, which brought together many of the legal conclusions the Commission had put forward in its decisions. Finally, once the EEOC was permitted to bring litigation against employers and unions (which happened through amendments to Title VII that Congress passed in 1972), the EEOC also set forth its view of the law through cases that it brought.

Through these different mechanisms, the EEOC set forth various propositions that explained its view of sex discrimination. For example, the EEOC issued such radical statements as: If an employer hires married men, it may not refuse to hire married women. And: If an employer hires a man who has young children, the employer may not refuse to hire a woman who has young children.

Those really were radical propositions at the time. That is because the social norms at the time were such that those were natural things that many employers did and were expected to do. So it was hard for many employers – and often courts -- to believe that the law would prohibit these practices.

The Commission also concluded that if an employer fired a woman because she was pregnant, that was a form of sex discrimination. And it concluded that if a woman needed time off after childbirth — which, by the way, women *do* need — the disability benefits that employers paid to other workers who needed time off would have to be paid to women as well. Failing to do so, said the EEOC, was a form of sex discrimination.

The development of law is actually a dance between the three actors that create law: a legislature, an agency and the courts. After a legislature enacts a law, an agency charged with implementing the law sets forth its understanding of the words of a law. A court will then consider whether it agrees with the agency’s interpretation in the context of a specific case that comes before the court. And then, full circle, the legislature can decide if it agrees with the court.

In the case of the EEOC's interpretation that pregnancy discrimination was a form of sex discrimination, the Supreme Court, in its wisdom, concluded that it was not sex discrimination. The Court explained that there are many women who do not get pregnant. Therefore, if an employer discriminates against pregnant women, it is simply discriminating between men and women who are not pregnant and women who are pregnant. So it is not sex discrimination because there are many women workers who are not being discriminated against.

In this dance that creates law, Congress can always respond to a court's interpretation of the law with which it disagrees. It can't do that when the Supreme Court construes the federal Constitution, because in that arena, the Supreme Court is the last word. But when the Supreme Court interprets a federal statute, Congress can always respond and correct that interpretation.

As you all know, Congress can be a very slow institution. But it did manage to pass the Pregnancy Discrimination Act of 1978 (the "PDA") to overturn the Supreme Court's interpretation of Title VII. That PDA had two provisions. First, it said that sex includes pregnancy and childbirth and its related medical conditions. Second, it said that an employer must treat a pregnant worker who is unable to work the same as the employer treats other employees who are similar in their ability or inability to work. This second sentence directly addressed the problem of employers providing disability benefits for workers who had to leave a job for a period of time, while not providing the same benefits to women who had to leave the job for a period of time following childbirth.

I've described a number of interpretations of the sex discrimination provision of Title VII in which the Commission put forth very positive and progressive views of what that provision prohibited. But not all the Commission's decisions interpreting the sex discrimination provision were positive. For example, a few years after Title VII was passed, transgender employees brought charges saying they had been discriminated against for transitioning from one sex to another and that was a form of sex discrimination. And gay employees brought charges saying they had been discriminated against because of the sex of the person they were attracted to and that was a form of sex discrimination.

The EEOC just blew those claims away. In various Commission decisions, the agency concluded that these were not forms of sex discrimination. The Commission did not really explain why these were not forms of sex discrimination, other than to say that Congress did not intend to cover these types of situations when it passed Title VII.

The EEOC was, however, a leader in arguing that sex *stereotyping* was a form of sex discrimination. That is, the Commission concluded that if an employer acted on an *assumption* about how men and women would act in a job, or should act in a job, in order to justify hiring men for certain jobs and women for others -- that was not legitimate under Title VII.

Again, it took a while for employers to accept these restrictions in terms of the policies they put into place. And it took a while for social norms to change so that ordinary people began to accept that such assumptions were, in fact, assumptions and not legitimate grounds for restricting men and women to different jobs. And finally, the Supreme Court, in a 1989 case called *Price Waterhouse v. Hopkins*, agreed that acting on the basis of a gender stereotype was a form of sex discrimination.

In that case, Ann Hopkins had applied to be a partner in Price Waterhouse. The decision on whether to admit her to partnership was deferred for one year, and then the following year, she was denied partnership. This was at a time where there were very few female partners at the Price Waterhouse accounting firm. According to the evidence that came out in the case, it appeared that several of the other partners in the firm viewed Hopkins as too macho and too aggressive. In fact, she was told by one of the partners -- after her partnership decision was deferred for the year -- that she should act in a more feminine manner (wear more makeup, etc.) in order to increase her chances of becoming a partner when the decision came up again.

The Supreme Court ruled that it is a form of sex discrimination for an employer to make employment decisions on the basis of a gender stereotype about how women should act. As the Court explained, acting on the basis of a gender stereotype meant that an employer was inappropriately taking sex into account in its employment decision. So unless being male or female fit into a very narrow exception of a "bona fide occupational qualification" for a particular job, gender had to be irrelevant to employment decisions -- just as race, national origin and religion had to be irrelevant in employment decisions.

This pronouncement by the Court -- that gender must be treated just like any other prohibited characteristic in the law -- might seem like a simple application of the words of the statute. But it was actually a momentous statement on the part of the Supreme Court. And that is because, for two decades, the courts had been twisting themselves into pretzels in order *not* to apply the plain words of the statute in a simple, straight-forward fashion.

THE SEX DISCRIMINATION PROHIBITION IN TITLE VII OF THE CIVIL RIGHTS
ACT OF 1964 – WHERE ARE WE NOW

So where are we now? Is it all over? Have sex and gender become irrelevant in the workplaces across our country?

Newsflash -- NOT!

In fact, it is somewhat mind blowing how much it is not over. We are not yet where we need to be in terms of gender equity. I want to highlight a few areas where we are not where we should be and offer some ideas for moving forward to achieve full gender equality in the workplace.

SEXUAL HARASSMENT

I have been amazed, since becoming a Commissioner of the EEOC, how much sexual harassment is still prevalent in workplaces across the country. I think, as professional women, we assume there are still some cases of sexual harassment in the workplace, but we don't view sexual harassment as an epidemic in the workplace. At least, I did not view it in that way before I joined the Commission.

But since I have been a Commissioner, and I see the countless stories that cross my desk, I feel there is an epidemic of sexual harassment in some specific areas in our workplaces. These areas include women in low wage jobs, teenagers who are working in their first jobs (often in food service or retail), immigrant women, and women who are working in non-traditional, male-dominated jobs where there are very few other women in that workplace.

Going back to the framework with which I started my remarks, law can serve as one critical variable in stopping this sexual harassment. It often forces top management to take notice if harassment is occurring in their workplaces and to try to put policies in place to stop that.

But law on its own will never be enough to stop harassment in the workplace. Instead, we need a multi-prong strategy that will include changing social norms in order for harassment in the workplace to stop. This strategy requires government to work in partnership with advocacy groups, employers, and women and men on the ground in the workplace. I think using social media can also be a really useful and important tool in this effort. I happen to be a Twitter fiend. You can follow me @chaifeldblum where I tweet on civil rights and social justice issues. I spend time posting on Twitter, Facebook, and Tumblr -- and I appreciate others who spend time on

those platforms as well, talking about civil rights issues – because I believe that using social media can be an important tool for changing social norms.

PREGNANCY ACCOMMODATIONS

The second area I want to talk about is that of accommodations for pregnant workers on the job.

We still deal today with many blatant cases of pregnancy discrimination in which an employer fires a worker because she is pregnant (and tells her that is the reason) or does not hire an applicant who is pregnant (and again tells her that is the reason!). But there is also a pervasive discriminatory policy that occurs in many workplaces that many employers do not perceive as discriminatory. Many employers have written policies that give male or female employees who have been injured on the job, or who have a disability under the ADA, reasonable accommodations that will enable those employees to stay employed while they have some physical restrictions. These accommodations can include modified job duties or light duty if, for example, an employee has lifting restrictions. But these written policies also explicitly state that similar accommodations will not be given to pregnant workers who have similar physical limitations.

Employers maintain these policies despite the plain language of the Pregnancy Discrimination Act that says that pregnant workers must be treated the same as other workers who are similar in their ability or inability to work. This is an issue I have personally been working on steadily for over two years at the Commission. For that reason, I was very pleased that, two months ago in June, the EEOC finally issued guidance interpreting the Pregnancy Discrimination Act as requiring equal accommodations for pregnant workers in such situations.

By the way, the guidance we issued was contrary to interpretations of the PDA that had been issued by four Circuit Courts of Appeals previous to our guidance. I remember that when I first read those appellate cases, they seemed flatly wrong to me in terms of basic rules of statutory interpretation. (I guess that's what happens when a law professor who has taught Legislation for over a decade becomes a Commissioner at the EEOC.) Because of that, for over two years inside the agency, I pushed for the Commission to issue guidance explaining our view of the PDA's requirements with regard to accommodations for pregnant workers – much as the EEOC had put forth its views of the sex discrimination provision in the early years through guidance that it issued.

Next term the Supreme Court will decide a case raising this precise issue,

Young v. UPS. So we will see if the Court agrees with the EEOC that the circuit courts below were wrong.¹

PAY EQUITY

The third issue I want to address is pay equity for women. This is obviously a huge issue and I am not going to go into extensive details in these remarks. But I do want to highlight a few key points.

Some of the pay disparity that exists today between men and women derives from straightforward discrimination against women. We need to fight

¹ *Addendum*: On March 25, 2015, the Supreme Court handed down its decision in *Young v. UPS* that rejected the approach of the four circuit courts of appeals and affirmed the result that the EEOC's approach was seeking. *Young v. United Parcel Serv., Inc.*, No. 12-1226, 2015 WL 1310745 (U.S. Mar. 25, 2015). The Court disagreed with the Commission's legal theory that it was a case of direct discrimination when an employer's policy did not provide accommodations to pregnant workers if the employers provided accommodations to other workers. The Court thought that approach went too far, because it might be applied to mean that all pregnant workers would get accommodations even if only a few other workers got accommodations for some very specific reasons. However, the Court did agree with the EEOC's approach that a case of indirect discrimination could be successfully proved under the *McDonnell-Douglas* framework of indirect discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the EEOC's guidance, we had also disagreed with the four circuit courts in their application of the *McDonnell-Douglas* framework. *Id.* We stated that a prima facie case of discrimination could be proven by a pregnant worker by showing that other classes of employees – such as those injured on the job or who had disabilities under the ADA – received accommodations while pregnant workers did not. The circuit courts had concluded that a prima facie case could not be made out in such circumstances because those other classes were not “similar to” the pregnant workers. In *Young v. UPS*, the Court agreed with the EEOC's view of how to apply the *McDonnell-Douglas* framework and moreover, provided additional and useful guidelines for how to apply that framework. *See Young*, No. 12-1226, 2015 WL 1310745, at *15–17. I look forward to the EEOC issuing a revised guidance that follows the Supreme Court's interpretation of the PDA. As a practical matter, either theory of the PDA results in pregnant workers getting the accommodations they need once employers provide such accommodations to other classes of workers. The day that the *Young* case was issued was a good day for gender equity in the workplace.

that discrimination through an aggressive use of the first variable of social change – law. Both the EEOC and private plaintiff lawyers need to continue bringing litigation to fight these cases of discrimination and to stop this pay inequity.

But a fair amount of the pay disparity that exists today between men and women is due to the significant gender job segregation that still exists. The research shows that female-dominated occupations pay less than male-dominated occupations at the same skill levels. That is, if a man and a woman have similar education and level of skills, but the woman enters a female-dominated job (such as being a waitress or a nurse) and the man enters a male-dominated occupation (such as being a welder or a plumber), the male-dominated occupation will pay more.

You may be surprised by the extent of gender job segregation that still exists. I certainly was. As lawyers, I think we do not personally see extensive gender job segregation because there is significant gender integration in professional occupations such as law, medicine and accounting. But if we look at our country's workplaces overall, there is a stunning amount of gender job segregation. According to research conducted by the Institute for Women's Policy Research (IWPR), almost 40% of women in this country work in female-dominated occupations. That is, they work in jobs in which at least 75% of the workers in that occupation are female. And slightly more than 40% of men in this country work in male-dominated occupations – that is, in jobs where there is only 5% of women in those occupations. Obviously, given the reality that male-dominated occupations pay more than female-dominated occupations, this significant gender job segregation will skew the overall wages that are paid to men and women in this country.

Changing this type of occupational segregation requires an overall, multi-pronged, strategic campaign. Law is a critical component of this strategy. EEOC and private plaintiff lawyers need to continue bringing litigation against employers that are denying jobs to female applicants who seek entry to male-dominated occupations, simply because those applicants are women. But litigation will never be sufficient. This strategic campaign must be multi-faceted. It has to include making sure that the American Job Centers funded by the federal government are not steering women into waitressing jobs and men into welding jobs -- and then getting credit simply for finding each person a job, even if the job is in a gender segregated occupation. And it requires changing social norms so that women in male-dominated occupations are not harassed and effectively chased out of those jobs. And, the most difficult change in social norms, we need to get to a place where

women and men feel that *all* occupations are equally open to them and should be considered equally realistic occupations.

These are just a few issues that we are working on at the EEOC today. Thinking of making change in these areas is what gives me the passion to wake up every day and go into the office – or, as is often the case, to wake up in the morning and go to my computer and telecommute to the office -- because of all the work we can thankfully now do via email and phone calls.

I want to end with a final issue that I think has more unqualified good news than the three areas I have just described. Don't get me wrong -- I believe we will achieve the necessary changes in those three areas as well as many others. But achieving those changes will take both significant time and effective multi-pronged strategies.

COVERAGE OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE UNDER TITLE VII

Achieving full protection for LGBT people under existing sex discrimination law will also take time, as courts begin to grapple with the legal theories I am about to discuss. But I don't think achieving this goal will require the same type of multi-pronged strategies that I described above. That is because a fair amount of the movement needed in the two other variables for social change -- policies in practice and social norms -- has *already* occurred. Indeed, it is precisely because of such change that the first variable – that of law – is now being applied in a different way.

As you heard, I was one of the main drafters of the Employment Non-Discrimination Act (ENDA) that was first introduced in 1994. The students in the room may be interested to know that the first draft of ENDA was based on a law school exam. In 1992, I wrote a law school exam for my statutory interpretation class in which I created a bill for the students interpret. The bill prohibited discrimination on the basis of sexual orientation in employment and other areas. I patterned that bill on the Americans with Disabilities Act, which was also on my computer since I had been active in drafting that bill as well. Obviously, I put in a few statutory drafting mud-dles in the bill, so I would have a basis for asking some tough questions in the exam. I then got hired as a consultant to a gay rights group to help work on creating a bill that would prohibit sexual orientation discrimination in a range of areas, including employment. I had only two days' notice before the first meeting I would be attending of the drafting group. I did not know if the group had already come up with a proposed draft of a bill. But I

knew that words are important. So I figured I would come with a draft of my own. I pulled up the exam, fixed the mistakes, and that became the first draft of the bill. That first draft covered not just employment, but also public accommodation and state and local services. But after the debacle of the gays in the military effort in 1993, which I was also involved in, we decided to cut the bill down to employment only because that is where the polls showed the strongest support. And, as you know, Congress has yet to pass ENDA, despite the fact that it has been introduced in every consecutive Congress since 1994.

But, as I like to say: “A funny thing happened on the way to non-passage” of ENDA. The gender stereotyping prohibition of the existing law, Title VII, began to be applied in a different way to LGBT people who were experiencing discrimination. This new way of applying Title VII arose, I think, because of changes in social norms. That is, the societal changes of the last few decades enabled agencies and courts to *logically* apply the gender stereotyping prohibition of Title VII in a way that it should have always been applied to LGBT people.

Transgender people who experienced discrimination based on their gender identity were the first to get traction under the gender stereotyping protection of Title VII. Perhaps this was because it was easy for courts to understand that employers were acting on the basis of a gender stereotype -- that is, the gender assumption that women should not transition to being men and men should not transition to being women -- when employers discriminated against someone for being transgender. So a number of courts began to extend protection for transgender people under Title VII based on a theory of prohibited gender stereotyping.

I am proud that the EEOC, in April 2012, issued a decision called *Macy v. DOJ* in which the agency reversed its previous rulings to the contrary and took the position that discrimination on the basis of gender identity is always a form of sex discrimination. We made that determination both on the gender stereotyping theory, as well as on a simple straightforward reading of the plain text of the law. Under that latter analysis, if an employer was ready to hire an applicant when the applicant was male, but was not ready to hire that same person if she planned to start work as a female -- then that employer was clearly “taking sex into account.” And that is precisely what the plain words of Title VII prohibit.

And so the word has gone out to our investigators in all fifty-three EEOC offices around the country. They now know that if a person comes in claiming to have been discriminated against because he or she is transgender, our investigators know to accept that as a sex discrimination

charge and to code that charge in our computer system as a charge of sex discrimination/gender identity. There is actually now a separate code in our computer system for gender identity charges, so we can track how many of these charges we are receiving.

And, starting in 2011, and continuing until now, the EEOC has also ruled that LGB employees and applicants can use the sex discrimination prohibition of Title VII to challenge discrimination based on sexual orientation. The agency has done this based on a robust application of the gender stereotyping theory. That is, we have explained that if an employer discriminates against an individual because that individual does not conform to the most basic of gender stereotypes – the assumption that men and women should be sexually attracted to people of the opposite sex (including marrying people of the opposite sex) – that employer has engaged in a form of impermissible sex discrimination by acting on the basis of that gender stereotype.

So the word has gone out to our investigators in our fifty-three EEOC offices across the country that if a gay man, lesbian, or bisexual person comes in claiming discrimination on the basis of sexual orientation, they are to accept that as a sex discrimination charge and code that charge in our system as a sex/sexual orientation charge.

It is amazing to me what codes can do. After the codes were put into in our computer system, whenever I felt depressed about some issue or another at work, I would say, “but there are now *codes* for sexual orientation and gender identity in our system. Wow.”

As I noted earlier, there is always an ongoing dance between the various actors responsible for the creation and interpretation of law -- the legislature, the agency and the courts. I expect to see that dance continue, in terms of whether the EEOC’s interpretation of sex discrimination will be adopted by the courts. There was a D.C. district court decision in March 2014, *Teveer v. Library of Congress*, that adopted the robust gender stereotyping theory that the EEOC has been using. In that case, the plaintiff was an individual who did not meet the appearance stereotype of being a gay man, in the sense of being too effeminate in his dress or gestures. A number of courts over the years had protected lesbians who were harassed because they were “too macho” or gay men who were harassed because they were “too femme.” But the DC federal district court in 2014 adopted the more robust gender stereotyping theory that the EEOC has adopted in many of its rulings – that if an employer takes an adverse employment action against someone because that person does not meet the stereotype that a man or a woman should be sexually attracted to someone of the opposite sex – that is

a form of sex discrimination. So, I look forward to seeing what other courts will decide, as they get this issue before them.

CONCLUSION

Let me conclude with this thought. Fifty years ago, Congress passed Title VII of the Civil Rights Act of 1964 and set us off on a journey in which sex would not be taken into account in the workplace, just as race, color, national origin and religion would not be taken into account in the workplace. The journey has not been a simple one, and it is not over yet. But over time, the law has been understood and interpreted to cover many forms of discrimination that the 1964 Congress could not have even anticipated. The law has generated policies and practice that have helped advance gender equity, as well as equity on the basis of race, color, national origin, and religion. And the law has both shaped social norms and been shaped by changing social norms in return. We all need to remain part of this great journey, and to do our bit in bringing about complete equity in our workplaces.

Thank you so much for your attention, and for your engagement in this important journey. Thank you so much. [Applause].

I'm happy to take questions, not only on the gender equity issues that I have been talking about, but on any other issue. The EEOC has been actively working on so many other issues as well – for example, the guidance we issued regarding how an employer may and may not use criminal background checks if they have a disparate impact based on race. So I am happy to take questions on a range of subjects.

QUESTION AND ANSWER SESSION:

Question: Well, my actual question is, I understand, from what I have learned about the Civil Rights movement, litigation in the whole law process was a huge part in changing general sentiment. But, I figure, from my own experience, the law process is pretty long, and drawn out, and expensive. How are people able to fund this large-scale litigation, getting into high court, and getting these cases on a big stage, if they were not really in support of it? If the general consensus was a certain belief, how do they get it to be at a high court level, and actually be viable in a court case?

Answer: Well, as you heard from the first panel, some of this was done on the sweat and equity of individual people. I think it is going to be great that we will be able to hear, after lunch, reflections from Senator Marsh on

this. But, to me, that is why we need a partnership between advocacy groups and the government. This is the point about democracy -- that we can associate with each other and create advocacy groups that will not only fund litigation, but also push for legislation. As I hope I've explained in this talk, change often has to start with the legislation, before you even get to the courts. Unless you are bringing litigation under the federal Constitution, you first have to pass the law.

You have to affect Congress in order to pass the law, you have to affect the agencies who are implementing the law so that they implement it effectively, and then you also have to bring litigation. And that requires individual people standing up for their rights; it means individual people bringing charges to the EEOC. It means having groups that will support these individual people.

That is why, to me, this needs to be a real synergistic effort between advocacy groups, individuals, and government agencies. It has taken a long time to get to where we are on race equality, and we're still not where we need to be. So, yes, there's been money and support, and sweat and blood and tears of individuals, but there is still more to do.

Question: What role do you think the activist organizations like CORE (Congress on Race Equality), SNCC (Student Nonviolent Coordinating Committee) and others had on the Supreme Court and the EEOC in bringing about more justice?

Answer: I think the impact of those groups were huge, just huge. Some of the groups were active in terms of getting the law passed in the first place. So that was huge in terms of being involved in the legislation itself. And then that carried over to the EEOC. The five EEOC Commissioners -- there are always five commissioners, and no more than three of us can be of the same political party, so there is always built-in bipartisanship in the Commission -- these five Commissioners knew they were on the hot seat in terms of race discrimination because there were people on the outside who were watching them and pushing them. This is what the women's advocates realized that they needed to have as well. No matter how good the people who go into government are, they need people on the outside to be pushing them. (By the way, I have now been in government for four years and, let me tell you, it is like a different country. I feel I should have gotten a passport and a dictionary before I entered the federal government.) But anyway, no matter how good and well-meaning you are, you need the pressure from outside to move anything. You are not going to do it on your own. So, my answer is: groups like that are hugely important.

Question: More specifically, was the fear of riots and disturbances in the north a motivating factor in the passage of the act, and in the way the act was enforced?

Answer: This is not my area of expertise and I am glad I was here this morning and could listen to the first panel. Because based on those presentations, I think we can say quite unequivocally: yes. I am going to be interested in going back and looking at some of the history in the EEOC to see if there were references to that in some way. I imagine that there might be because again, people do not move unless they feel there is some interest in moving, some self-interest in moving. And I think the EEOC probably felt it did not want to be charged with having encouraged these riots because it was deficient in what it was doing.

Question: Good Morning. I am a disabled veteran who was serving in the Marine Corp at the time that the National Defense Authorization Act for fiscal year 2012 was passed in Congress that gave authority to the respective secretaries to recognize openly gay individuals and did allow them to get married in the states that authorized it. But because of the federal definition and the DOMA, the second section that stated that marriage was between a man and a woman, they did not extend to them the rights given to heterosexual marriages, basically the increased financial benefits you would get with housing allowances. Given that *Windsor* struck that down, do you foresee changes and how long do you think that would take?

Answer: First, to give some background to others -- the *Windsor* case was brought by Edie Windsor. She and her long-time female partner owned a New York City apartment together and it had significantly appreciated in value. When Edie's partner died, Edie discovered she had to pay a tax to the federal government that was in the thousands of dollars, which if she had been married to a spouse she would not have had to pay. Well, in fact she *was* married to her partner. So she argued that her marriage should be recognized by the federal government and that the section of the Defense of Marriage Act that says -- regardless of whether a same-sex couple is legally married in a state, the federal government will not recognize that marriage -- was unconstitutional. And in the *Windsor* case, a year ago, the Supreme Court agreed that the challenged section of DOMA was unconstitutional.

Shortly afterward the Office of Personnel Management, which is basically the big human resources agency for the whole federal government said, "Okay, if you are a federal employee who got married in a state that recognizes marriage between same-sex couples, we will treat you as married for purposes of all federal benefits." Several months later, the federal govern-

ment also decided that even if you lived in a state that did not recognize marriage between same-sex couples, but you had gone to another state that did recognize marriages between same sex couples and had gotten married in that state – then again, the federal government would treat you as married for purposes of federal benefits. That was huge.

But how far the federal government could go with this rule also depended on the particular statute that provided the benefits. So they were able to apply that rule to basically everything, except I think, for Social Security benefits, because of the way the Social Security Act is written. So, I do not know in terms of the question you are asking. It sounds from what you are saying the VA has not applying this rule? I thought there was another agency besides SSA that had a problem with the statute and perhaps it was the VA. But I don't know that so I would want to go back and check. But if that is the problem, what would be necessary is a change made by Congress with regard to the Social Security law or the VA law and then we are back to the problem that Congress does not move quickly.

Question: I am right now taking a class, called Sex, Mindfulness and the Law, and it is all about Title IX. You resonate something that I said on my first day of class, is this issue is so complex, and the law alone will not solve it. We need the cultural input in it. Despite that fact, after the promulgation of the 'Dear Colleague' letter, in 2011, disciplinary action against the sex offenders has been taken from the judiciary, to private institutions and the standard has been lowered from, 'beyond reasonable doubt' to something really close to 'preponderance of the evidence'. I'm just a little bit worried that, a 19 or 18 year old, student who is also privileged, probably, in a private institution, is afforded less constitutional protection than a sex offender, who is violent, and who has the 'beyond a reasonable doubt' standard that could protect him. Now, each school has its own standards, each school has its tribunals. And, you mention that it is always a dance between the EEOC, the judiciary, and the legislature, and now we get these private institutions doing all what courts generally do, because in many articles, people say that the judiciary actually failed to solve this problem. Do you believe that such, I would not call it defects, but concerns in Title IX would hinder the movement to solve the sexual harassment cultures within campuses?

Answer: There are various pieces in your question, so let me unpack it a bit. First, again, as background for the audience about Title IX that you referenced. Title IX of the Education Amendments of 1972 says that any educational institution that receives federal financial assistance may not dis-

criminate on the basis of sex. Part of why that law was necessary was that when the Civil Rights Act of 1964 passed, as you heard this morning, Title VI of that statute was very important because it said that any recipient of federal financial assistance could not discriminate based on race, color or religion. But Title VI did not include sex. So in 1972, there was the effort to include the sex discrimination prohibition at least for educational institutions that were receiving federal financial assistance.

Then, in this dance of law that happens, the Supreme Court narrowed the law. In a sex discrimination case brought against a university, the Court ruled that the only entity within the university that was bound by the sex discrimination provision was the entity that actually received the federal financial assistance. And for private schools, what do you think is the federal financial assistance that they get? The students in this room should know it. Student loans. Student loans were how the federal government interacted with private schools in terms of providing funds. And so the Supreme Court ruled that the *financial aid office* of a college could not discriminate based on sex, but the rest of the college could.

So, in this dance of law, Congress then passed the Civil Rights Restoration Act of 1987 to say – no, if a university gets federal funds through the student loans, then the entire entity is covered. By the way, this was when I first entered the Washington political world. The Civil Rights Restoration Act of 1987 amended not only Title IX of the Education Amendments, but also three other laws that covered recipients of federal funds, including Section 504 of the Rehabilitation Act that prohibited discrimination based on disability. I was working at the time for the ACLU’s AIDS project, and some people in Congress wanted to use the Civil Rights Restoration Act to exclude people with AIDS and HIV infection from the protection of Section 504.

With that background, let me get to the question you raised – which, by the way, is not directly in my area of expertise, so maybe that’s why I provided so much background! But I will just say what I can about your question. There is a huge concern with what is called “the school to prison pipeline.” This pipeline disproportionately affects young kids who are of color and young kids with disabilities. When these kids misbehave, it used to be that in order for those kids to have a criminal record, they had to be adjudicated in a court. But what has happened is that more adjudications have been taken into the school system itself under its disciplinary system and it turns out that these systems disproportionately discipline kids of color and kids with disabilities. Ultimately many of these kids end up in prison, creating this “pipeline” of school to prison.

How do we break this? Again, let me note that this is not in the jurisdiction of the EEOC, since we cover only employment. This issue is in the jurisdiction of the Department of Education. But through the efforts there of people who care about race and disability, the Department of Education issued guidance recently to govern some of the activities on the part of schools that engage in these disciplinary systems.

Personally, I am not sure that any guidance will be enough. This problem definitely requires a multi-pronged strategy and it poses a really tough challenge. We have to deal with the basic social conditions in this country that affect race in such a disproportionate way. This is not an easy issue. Those of us who are social progressives have been trying for years to address these issues. In fact, right after lunch, you are going to be hearing from a person who has been at this for decades.

But I do not want to end on a pessimistic note. So let me just say – thank goodness, that there are people who understand that these are problems in our country. The fact that there are people across this country who worry about social justice issues is a good thing. Our job now is to join forces and try to make an impact. That is certainly my goal in life and I am thrilled to be talking to an audience that I know has either already engaged in these same efforts or who are preparing themselves now to be the next generation of leaders. I am really happy to have the next generation address some of these challenges, because you all will be the ones coming up with new ideas and thoughts that we had never even considered. And how wonderful is that!

