



Testimony

Submitted on behalf of the
Pennsylvania Chamber of Business and Industry

Public Hearing on Senate Bill 1306

Before the:
Pennsylvania Senate Labor and Industry Committee

Presented by:

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Chairwoman Baker, Chairwoman Tartaglione and members of the Committee, my name is Alex Halper and I am Director of Government Affairs for the Pennsylvania Chamber of Business and Industry. The PA Chamber is the largest, broad-based business advocacy association in Pennsylvania. We represent employers of all sizes, crossing all industry sectors throughout the Commonwealth. Thank you for the opportunity to testify regarding legislation to expand the employment provisions of the Pennsylvania Human Relations Act to include the LGBT community as a protected class.

The PA Chamber generally agrees with the stated intent of this legislation: no individual should be fired, denied employment or treated unfairly simply because they belong to the LGBT community. However, it also important to recognize that this area of employment law is complicated; as are, often times, the workplace situations that may trigger a claim of discrimination – certainly more complicated than public discourse on the subject often suggests. Like virtually any workplace law, the PHRA has had an impact on employers operating fairly and lawfully. While it is impossible to prevent these impacts entirely, good public policy can and should deter, prohibit and root out discrimination while acknowledging and attempting to limit these inherent unintended consequences.

The United States Senate in the 113th Congress provides a notable example of striking this balance during their consideration of anti-LGBT discrimination legislation. The U.S. Senate in 2013 considered S. 815, the Employment Nondiscrimination Act (ENDA). The bill was introduced by Oregon Senator Jeff Merkley and was cosponsored by 56 other Senators at the time it came up for a vote – including then-Majority Leader Harry Reid, future Presidential candidate Senator Bernie Sanders and our own senior senator Bob Casey. In addition to prohibiting employment discrimination based on LGBT, S. 815 addressed a number of concerns and incorporated several suggestions from the business community, including attempting to protect employers not engaged in discrimination but still at risk of being impacted. For example, the bill stated that only claims based on “disparate treatment” may be brought under the Act. This provision focused the bill on its intended purpose of combating discrimination; as opposed to opening up the Act to so-called “disparate impact” claims in which a plaintiff alleges that a completely unrelated, facially-neutral office policy or practice somehow disproportionately impacted members of a protected class.

S. 815 also limited the ability of plaintiffs to file a claim based on the same set of facts under multiple anti-discrimination laws and limited the relief that could be granted for a claim in which impermissible discrimination was not the

motivating factor (*i.e.*, when the employer demonstrated that it still would have taken the same employment action for other reasons). With respect to the latter, ENDA provided that claimants could be eligible for declaratory relief, injunctive relief and possibly legal costs, but would not be eligible for other damages; nor would the employer be required to reinstate, promote, etc. the individual if the adverse employment action would have been taken anyway, even absent any impermissible discrimination.

The Employment Nondiscrimination Act, with the aforementioned language, passed the U.S. Senate with a bipartisan vote of 64-32. The Human Rights Campaign, “the nation’s largest LGBT advocacy organization”, praised the bill and vote, stating in a press release: “This broad Senate coalition has sent a vital message that civil rights legislation should never be tied up by partisan political games.” Equality Pennsylvania, the Commonwealth’s “leading organization advancing equality and opportunity for lesbian, gay, bisexual, and transgender Pennsylvanians”, organized a letter-writing campaign to thank our junior senator Pat Toomey for his affirmative vote and said to supporters: “After hearing from over 4,000 individual Pennsylvanians, more than 300 small business owners, and faith leaders from around the commonwealth, Senator Toomey stood on the right side of history and against workplace discrimination.”

S. 815, the Employment Nondiscrimination Act of 2013, represented a compromise and could provide a blueprint for how legislation can combat discrimination while providing reasonable employer-protections. And clearly, given the enthusiastic support among advocates that S. 815 enjoyed upon passage by the Senate, and the bipartisan nature of its consideration, it seems a similar compromise ought to be acceptable in Pennsylvania.

We do recognize that the current version of S.B. 1306 does include a number of suggestions the PA Chamber proposed based on language included in the U.S. Senate- passed Employment Nondiscrimination Act. The bill protects the right of an employer to require employees to adhere to reasonable dress and grooming standards. S.B. 1306, like ENDA, also states that, unless otherwise required by law, it shall not be considered unlawful discrimination for an employer to fail or refuse to construct new or additional facilities. While we appreciate the inclusion of these employer protections, we certainly hope they represent a first step in crafting a Pennsylvania Human Relations Act amendment that combats discrimination while recognizing and attempting to address the extent to which these well-intended laws adversely affect a much broader segment of the business community beyond just those who may actually be engaging in discrimination.

While we firmly believe amending S.B. 1306 with additional employer-protections will improve the legislation, it is important to recognize the most common concerns and grievances we hear from employers, which typically relate to challenges they experience responding to claims and with the Pennsylvania Human Relations Commission itself.

Many of these issues were elucidated at a Senate State Government Committee hearing on June 7, 2016 that focused on management of the PHRC and administration of claims. Karen Young, a human resources professional with over 30 years in the industry, outlined a number of areas in which employers experience undue difficulty, including the length of time for cases to be adjudicated, failure to notify employers of complaints in a timely fashion and continued failure to respond once charges are opened. Ms. Young described the significant time, resources and costs employers often incur responding to claims and ongoing requests for information. Ms. Young further lamented the regularity of so-called nuisance claims, which in reality have no merit but must be treated the same as any claim with often virtually no accountability on the claimant.

PHRC claims data may, to a certain extent, validate Ms. Young's and many other employers' frustrations. According to the PHRC 2013-2014 Annual Report (the most recent data retrievable on the Commission's website), the average age of pending cases was 487 days – an unacceptably drawn out timeframe for employers to not only await their fate, but also continually meet with investigators, comply with requests for information, etc. PHRC statistics also show that 1,643 cases, or 63 percent of cases, were closed after a finding of no probable cause; while probable cause was found for only 40 cases. Certainly not all cases found to not have probable cause would be considered “nuisance cases” – but this information from the Commission does help illustrate the overall nature of claims submitted and why it would be wrong for lawmakers to craft policy with the view that legislation only targets employers who actually discriminate against job applicants and employees.

Officials from the PHRC also testified at the June 7th hearing and described an operation that is under-funded and short-staffed. The Executive Director at the PHRC urged Senators at the hearing to support a 20 percent funding increase in the 2016-17 budget.

While it is difficult predict the extent to which S.B. 1306, if enacted into law, would substantially increase the Commission's workload, it is clear the

Commission already struggles to move cases in a timely manner, which is unfair to both employer and to legitimate plaintiffs seeking justice. Accordingly, we believe no expansion to the PA Human Relations Act ought to be considered without a concurrent legislative effort to improve management of the PA Human Relations Commission and administration of claims.

Again, I thank you for the opportunity to testify and would be happy to answer any questions.