HUMAN RIGHTS CAMPAIGN FOUNDATION

Discrimination Based on Perceived Characteristics

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Executive Summary

At the federal level and in nearly every state, nondiscrimination laws provide employment protection based on characteristics like race, sex, disability, and religion. More than 20 state laws explicitly protect lesbian, gay, bisexual, transgender, and queer (LGBTQ) people on the basis of sexual orientation and gender identity. However, many courts have created a loophole undermining these critical protections.

Court-Created Loophole

Unfortunately, many district courts have ruled that federal nondiscrimination laws like Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, do not prohibit misperception discrimination. This means that, in many jurisdictions, employees may be subject to explicit, clear harassment or discrimination based on an assumed protected characteristic, like race, religion, or national origin, so long as the harassers or the employer are wrong about these assumptions.

Misperception Discrimination

An employer engages in "misperception discrimination" or "perceived as discrimination" when they engage in discriminatory conduct against an employee based on the erroneous belief that the employee is a member of a protected class.

Examples of misperception discrimination include:

- Anti-gay harassment or intimidation by co-workers regardless of the employee's actual sexual orientation;
- Failure to interview a candidate on the basis that the candidate is a member of a certain racial or ethnic class regardless of their actual race or ethnicity;
- Refusal to promote an otherwise qualified employee because of anti-Muslim or anti-Semitic bias, regardless of the actual religion of the employee.

Employment Discrimination is Always Harmful

Courts that exclude misperception discrimination from the protection of nondiscrimination laws often do so assuming that the employee has not been harmed because they are not actually a member of the protected class. But nothing could be further from the truth – the employee is still being harassed or fired regardless of their actual status. Additionally, allowing for this discrimination to continue unchecked undermines these essential laws and sends a harmful message to the vulnerable populations they are designed to protect.

Lawmakers Can and Should Address Misperception Discrimination

State and municipal lawmakers can prevent this misinterpretation by the courts and explicitly cover misperception discrimination by including language such as "actual or perceived" characteristics in nondiscrimination laws. This language does not change the burden of proof or result in additional frivolous cases, but it does close this court-created loophole.

Introduction

Strong, inclusive nondiscrimination laws are essential to promoting equal access to employment, housing, education, public spaces and services, and healthcare. These laws have served as the cornerstone for realizing the dream of the civil rights movement — that everyone, regardless of who they are or who they love, has a fair shot at the American dream.

Since our founding, the Human Rights Campaign (HRC) has vigorously supported the adoption of municipal, state, and federal nondiscrimination laws to protect vulnerable populations, which are frequently subjected to discrimination. The reach of these laws and who they protect, just like discrimination itself, is not always clear cut.

In order to fully prevent discrimination and the dignity harms that accompany it, nondiscrimination laws should explicitly protect individuals on the basis of vulnerable characteristics, like sexual orientation or gender identity, as well as individuals who are perceived to have those characteristics. This ensures that recourse is available for harmful discrimination, even if it is experienced because of misperception.

This report is intended to squarely address the need for explicit nondiscrimination protections on the basis of both "actual or perceived" status and to tackle common concerns regarding this language.

We will look at how the failure to accommodate for misperceptions in nondiscrimination laws can be harmful, assess the current state of the law, and make recommendations to ensure that nondiscrimination laws fulfill the intent of their creators – that everyone is able to work, go to school, and live without facing invidious discrimination.

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Human Rights Campaign

The Human Rights Campaign represents a force of more than 3 million members and supporters nationwide. As the largest national lesbian, gay, bisexual, transgender, and queer civil rights organization, HRC envisions a world where LGBTQ people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

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Perceived Characteristics, Real Discrimination

Discrimination is real, and it hurts regardless of the reasons behind it. Nathaniel Burrage worked as a FedEx driver in Ohio for approximately five years, beginning in 2005. During his first few months, his supervisor began referring to him as "Mexican cheap labor" and repeatedly used Spanish terms to make fun of his work.

This inappropriate behavior spread to other supervisors, and later, to coworkers. They confronted him with graffiti making fun of Mexicans, threw office supplies at him, and hurled racial epithets at him. Due to this continual mistreatment, Nathaniel felt embarrassed, shamed, and degraded, and he lost interest in coming to work. Although Nathaniel repeatedly complained about this behavior, FedEx took no steps to address the harassment. Ultimately, this resulted in Nathaniel taking on a lower paying role away from his harassers. But even the change in role did not allow him to escape this behavior. While passing through the terminal on his way to make a delivery, Nathaniel greeted his old supervisor only to have him respond, "I don't talk to Mexicans." Having faced this hostile environment for too long, Nathaniel sued the company for racial harassment under both the Ohio nondiscrimination law and Title VII of the Civil Rights Act of 1964.

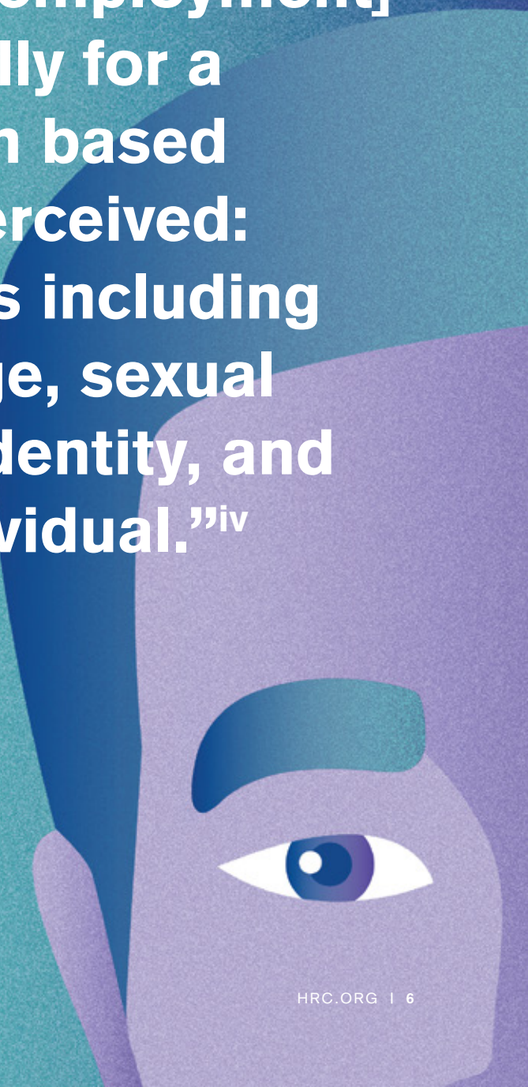
Even to the casual observer, the acts Nathaniel's employer engaged in were discriminatory and he paid an emotional and financial toll because of his supervisor's blatant and unlawful bias towards Mexicans. However, Nathaniel wasn't Mexican. He identified as mixed race. This fact didn't change the impact of the discrimination, but it did rob him of any recourse. The district court dismissed the case because the discrimination he faced was based on the harassers' misperception.[i]

Absurd as this situation is, it is far too common, occurring in courts across the country. Judges continue to dismiss cases of real discrimination based on legally protected characteristics simply because the discriminatory conduct was based on a characteristic the victim was only perceived or assumed to have.[ii]

This type of discrimination is often referred to as "misperception discrimination"[iii] or "perceived as" discrimination, and courts are split on the issue as to whether it is prohibited by state and federal nondiscrimination laws.

Lawmakers can help to address this issue and overcome this absurd misapplication of nondiscrimination laws by crafting such laws, whether at the federal, state, or municipal level, to specifically protect "actual or perceived" characteristics. The District of Columbia's Human Rights Act is a good example of a nondiscrimination law that incorporates this language (see opposite page).

The District of Columbia's Human Rights Act provides that: "It shall be an unlawful discriminatory practice to do any of the following [employment] acts, wholly or partially for a discriminatory reason based upon the actual or perceived: [list of characteristics including race, religion, sex, age, sexual orientation, gender identity, and disability] of any individual."[iv]



Why is it Important to Include Misperception Discrimination?

Nondiscrimination laws are designed to prohibit various forms of discrimination that are damaging to our society and to the various affected populations, based on characteristics such as race and gender.

Although nondiscrimination laws are passed with the goal of protecting populations that frequently face discrimination based on a given characteristic, these laws should apply to everyone. They should not simply protect people of a specific race or sexual orientation. Instead, they are intended to declare that discrimination at its core is wrong and contrary to our shared values. Allowing for discrimination based on misperceived characteristics creates a loophole, which undermines this goal.

This loophole also allows individuals and businesses engaging in prohibited discriminatory practices to evade enforcement of the law. In many jurisdictions, defendants may claim they were discriminating on a slightly different basis to get the case dismissed at summary judgment.

For example, they may claim the discrimination was based on bias against a different country of origin (Brazilian versus Mexican), a different ethnicity (Arab versus Kurd), a different religion (Muslim versus Sikh), a different sexual orientation (bisexual versus gay), etc. Dismissal at such an early stage is likely to prevent the individual facing discrimination from engaging in discovery to determine if the misperception is genuine.

However, misperception can happen with nearly any protected characteristic – people frequently make assumptions about other's race, religion, disability status, ethnicity, and other characteristics.

For example, consider all the ways in which courts could dismiss cases based on other characteristics under this absurd doctrine:

Religion – Dismissal because the victim was fired for being a Muslim, when they are in fact a Sikh, or harassed for being Jewish when they are actually Catholic;

National Origin – Dismissal because the victim faced harassment for being Mexican, when they are actually Spanish, Cuban, or even American;

Sexual Orientation – Dismissal because the victim was harassed for being gay or lesbian, even though they are actually straight or bisexual;

Gender Identity – Dismissal because the victim was fired because they were assumed to be transgender, even though they are not.

As our society grows more complex — as the population of multiracial people increases, as more people identify as gender expansive, as people increasingly do not use specific labels for their sexuality — discrimination based on misperception is likely to increase. And in many ways, all discrimination is based on perception; discriminators rely on stereotypes and assumptions about other's identities in order to discriminate. In order for nondiscrimination laws to have meaning, discriminatory assumptions that result in negative conduct must not be allowed simply because they are wrong.

Finally, misperception itself may be used as a form of discrimination. Consider, for example, a transgender person who continually and repeatedly faces misgendering, misnaming, and wrong pronoun usage as a form of harassment. Or a woman who faces such harassment because coworkers claim that she is a transgender man. This behavior can certainly create a hostile workplace environment, and it would be remarkably unjust to allow employers to use misperception as a defense.

Why Don't Lawmakers Adequately Cover Misperception Discrimination?

Throughout the country, most state nondiscrimination laws trace their roots to the Civil Rights Act of 1964.

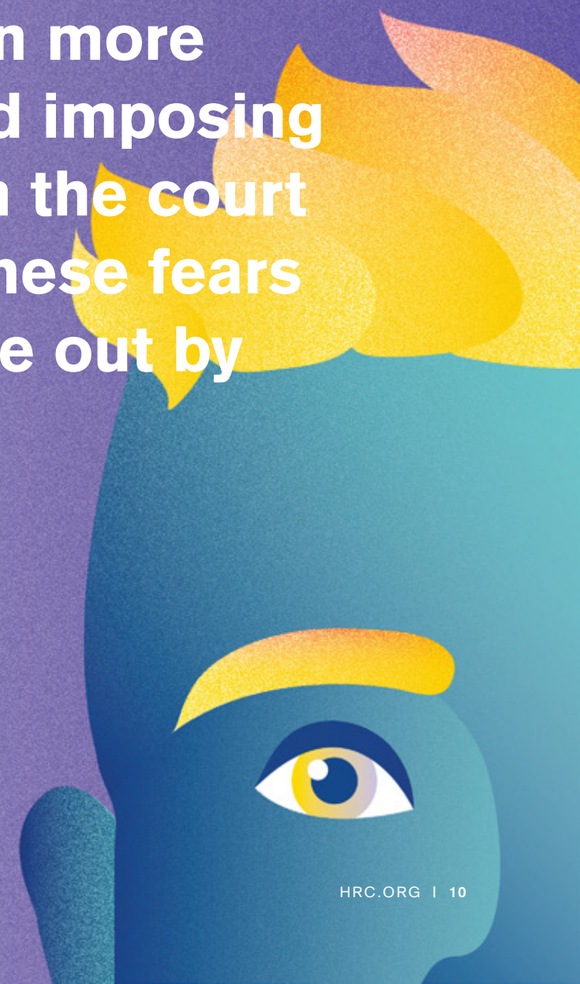
As it will be discussed further in the next section, that federal law does not explicitly include "actual or perceived" language, so most state laws also do not include such language. Similarly, local nondiscrimination ordinances are usually derived from state nondiscrimination laws. It is likely that lawmakers did not foresee the case law that later developed in this area, which created the absurd loophole for discrimination based on misperception. And most state and local lawmakers, unaware of this issue, have not gone back to close this loophole by amending their nondiscrimination laws.

Lawmakers also sometimes question what is meant by "actual or perceived" language in nondiscrimination laws. This language applies only to the list of characteristics – whether an individual is facing discrimination because they actually have a protected characteristic or because they are perceived to have a protected characteristic. The "actual or perceived" language does not apply to the standard of proof for discrimination.

For example, the language does not allow an employee to claim there is discrimination simply because they perceived discrimination without supporting evidence. In order to win a discrimination claim, the plaintiff must prove there was prohibited discrimination by a preponderance of the evidence – this is not affected by "actual or perceived" language.

Finally, some lawmakers are concerned that allowing for discrimination claims based on misperception would greatly increase the number of discrimination claims brought, resulting in more frivolous claims and imposing a greater burden on the court system. However, these fears have not been borne out by the evidence. As described later in this report, a number of the courts that have considered this issue, including several circuit courts covering nine states, have determined that misperception discrimination is inherently included in nondiscrimination laws. There has been no indication that these jurisdictions have seen an increase in the number of nondiscrimination claims brought due to this legal clarification. Lawmakers can help to prevent negative court rulings and clarify the intent of nondiscrimination laws by adding "actual or perceived" language to the list of characteristics.

Some lawmakers are concerned that allowing for discrimination claims based on misperception would greatly increase the number of discrimination claims brought, resulting in more frivolous claims and imposing a greater burden on the court system. However, these fears have not been borne out by the evidence.



Inclusion Of Perceived Characteristics In Nondiscrimination Laws

Federal Nondiscrimination Laws

The most widely known federal prohibitions on discrimination relate to employment discrimination on the basis of various protected characteristics. Statutes providing for such employment non-discrimination protections include Title VII of the Civil Rights Act of 1964 (race, color, religion, sex, and national origin),[v] the Age Discrimination in Employment Act of 1967 (age),[vi] and the Americans with Disabilities Act of 1989 (disability).[vii] Generally, these statutes apply to employers of at least a certain size and prohibit discriminatory employment decisions in compensation or benefits, harassment, and retaliation, based on a protected characteristic. Of these laws, only the ADA explicitly includes language prohibiting discrimination based upon the perception of disability. Specifically, the ADA's definition of disability includes "being regarded as having such an impairment,"[viii] which is defined as follows:

> An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.[ix]

In passing the ADA, Congress noted that people "who have a record of a disability or are regarded as having a disability also have been subjected to discrimination," and that the law was intended to prevent that circumstance. As a result of the specific inclusion of language covering conduct based on misperception of a disability, discrimination based on perceived disabilities has been well established.[x]

However, despite the lack of explicit coverage in Title VII and other federal nondiscrimination laws, there is no reason to believe that Congress did not intend to cover racial or other discrimination based on misperception. Instead, it should be noted that the ADA was passed twenty-five years after Title VII, which allowed Congress to observe and respond to the trends in nondiscrimination case law exempting coverage of misperception discrimination through the new law.

In fact, the Equal Employment Opportunities Commission (EEOC), as the primary enforcement agency for Title VII, has clarified that the law extends to misperception discrimination for at least some categories. In its 2016 guidance on national origin discrimination, the EEOC noted that "Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their real or perceived national origin."[xi] Furthermore, EEOC provided clarifying examples:

> Employment discrimination based on place of origin or national origin (ethnic) group includes discrimination involving:
>
> Perception: Employment discrimination based on the belief that an individual (or her ancestors) is from one or more particular countries, or belongs to one or more particular national origin groups. For example, Title VII prohibits employment discrimination based on the perception that someone is from the Middle East or is of Arab ethnicity, regardless of how she identifies herself or whether she is, in fact, from one or more Middle Eastern countries or ethnically Arab.

This position relies upon a series of cases that recognize misperception discrimination as prohibited under federal nondiscrimination laws, including rulings by the Third Circuit, the Fifth Circuit,[xii] and the Eleventh Circuit Courts of Appeals.[xiii] In *Fogleman v. Mercy Hospital*,[xiv] the Third Circuit Court of Appeals addressed misperception discrimination under the Federal Labor Standards Act.[xv] Although the plaintiff was not actually a protected entity under the law, the employer took retaliatory action against the plaintiff because they perceived him to be engaged in protected activity. The court analogized this outcome to other forms of discrimination, clarifying its position on misperception discrimination:

Imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not, in fact, a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute.

While a number of district courts have similarly found misperception discrimination to be prohibited by existing nondiscrimination statutes,[xvi] the Supreme Court has not ruled on this issue.

Note that sexual orientation and gender identity are not explicitly protected by Title VII. While numerous federal courts[xvii] and the EEOC[xviii] have clarified that Title VII coverage extends to sexual orientation and gender identity, the issue of misperception discrimination has not yet arisen in this context.

On the other hand, district courts that do not recognize misperception discrimination as actionable frequently rely on a rigid view of the elements brought by a discrimination claim, which first requires proving that the plaintiff belongs to a protected class.[xix] For example, in one of the earliest cases holding that misperception discrimination is not covered by Title VII, the court in Butler v. Potter[xx] ruled that the plaintiff lacked a claim for discrimination where a supervisor "periodically screamed obscenities at him and accused him of being Indian or Middle Eastern," because he is White and therefore not a member of a protected class.

Further, the court noted the absence of language in Title VII protecting individuals who are perceived as belonging to a protected class, in comparison to the explicit protection for misperception discrimination in the ADA. Several other district courts have since followed this reasoning,[xxi] and there has been some indication of acceptance by the Fourth Circuit Court of Appeals.[xxii]

State Nondiscrimination Laws

Considering that most state nondiscrimination laws derive from and are modeled on Title VII and other federal nondiscrimination statutes, the majority lack language protecting "actual or perceived" characteristics. In fact, only the District of Columbia and California[xxiii] explicitly include language prohibiting misperception discrimination for all characteristics. The District of Columbia's Human Rights Act provides that:

> It shall be an unlawful discriminatory practice to do any of the following [employment] acts, wholly or partially for a discriminatory reason based upon the actual or perceived: [list of characteristics including race, religion, sex, age, sexual orientation, gender identity, and disability] of any individual.[xxiv]

However, several states explicitly cover misperception discrimination for sexual orientation, gender identity, or both, but not for other characteristics. This difference is due to the fact that these characteristics were added to these laws after the initial passage of the state nondiscrimination law and unlike other characteristics, nondiscrimination laws tend to explicitly define sexual orientation and/or gender identity. For example, the Illinois Human Rights Act provides that:

> "Sexual orientation" means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth.[xxv]

Likewise, Colorado, Maine, Minnesota, New Jersey, New Mexico, Oregon, and Rhode Island prohibit misperception discrimination for both sexual orientation and gender identity.[xxvi] Other states, such as Connecticut, Iowa, Nevada, New Hampshire, New York, Utah, and Wisconsin, cover misperception discrimination only for sexual orientation.[xxvii] Finally, Washington prohibits misperception discrimination only for gender identity.[xxviii]

Given the lack of explicit state language regarding misperception discrimination, court interpretations of this issue are critically important. For example, courts in New Jersey have allowed claims for misperception discrimination based on religion to proceed under state law.[xxix] In Cowher v. Carson, the court made a comparison between misperception based on disability and other misperception claims:

> There is no reasoned basis to hold that the [state nondiscrimination law] protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class, as to which the [state nondiscrimination law] offers its protections in equal measure.

Moreover, the New Jersey court ruled that the plaintiff did not actually need to prove that he was misperceived as a member of the protected class because, "Otherwise, legitimate claims could be too easily defeated by self-serving denials on the part of otherwise culpable persons." However, many other courts have interpreted state nondiscrimination laws in accordance with analogous federal laws like Title VII, explicitly excluding coverage of misperception discrimination by state nondiscrimination laws.[xxx]

Notably, states are more likely to provide protection for misperception discrimination based on disability than other characteristics. Unlike other characteristics that have their basis in the Civil Rights Act of 1964, state prohibitions on disability discrimination frequently derive from the ADA, enacted in 1990. While some states used language similar to that defining a "disability" in the ADA (including perception of disabilities),[xxxi] others merely include "disability" (or a similar term) in the list of protected characteristics in an existing state nondiscrimination law or define this term in a different way than the ADA.[xxxii]

Also, unlike other characteristics and with analogy to the ADA, courts have generally interpreted state law prohibitions on disability discrimination to include misperception of disability.[xxxiii]

The Prohibition of Misperception Discrimination by State figure (page 17) shows which states have explicit language prohibiting misperception discrimination for at least some characteristics other than disability. The figure also shows states with positive case law regarding inclusion of misperception discrimination by the relevant Circuit Court of Appeals. Because of the significant differences between disability and other characteristics in the law of misperception discrimination, states that prohibit discrimination based on disability misperception were not included.

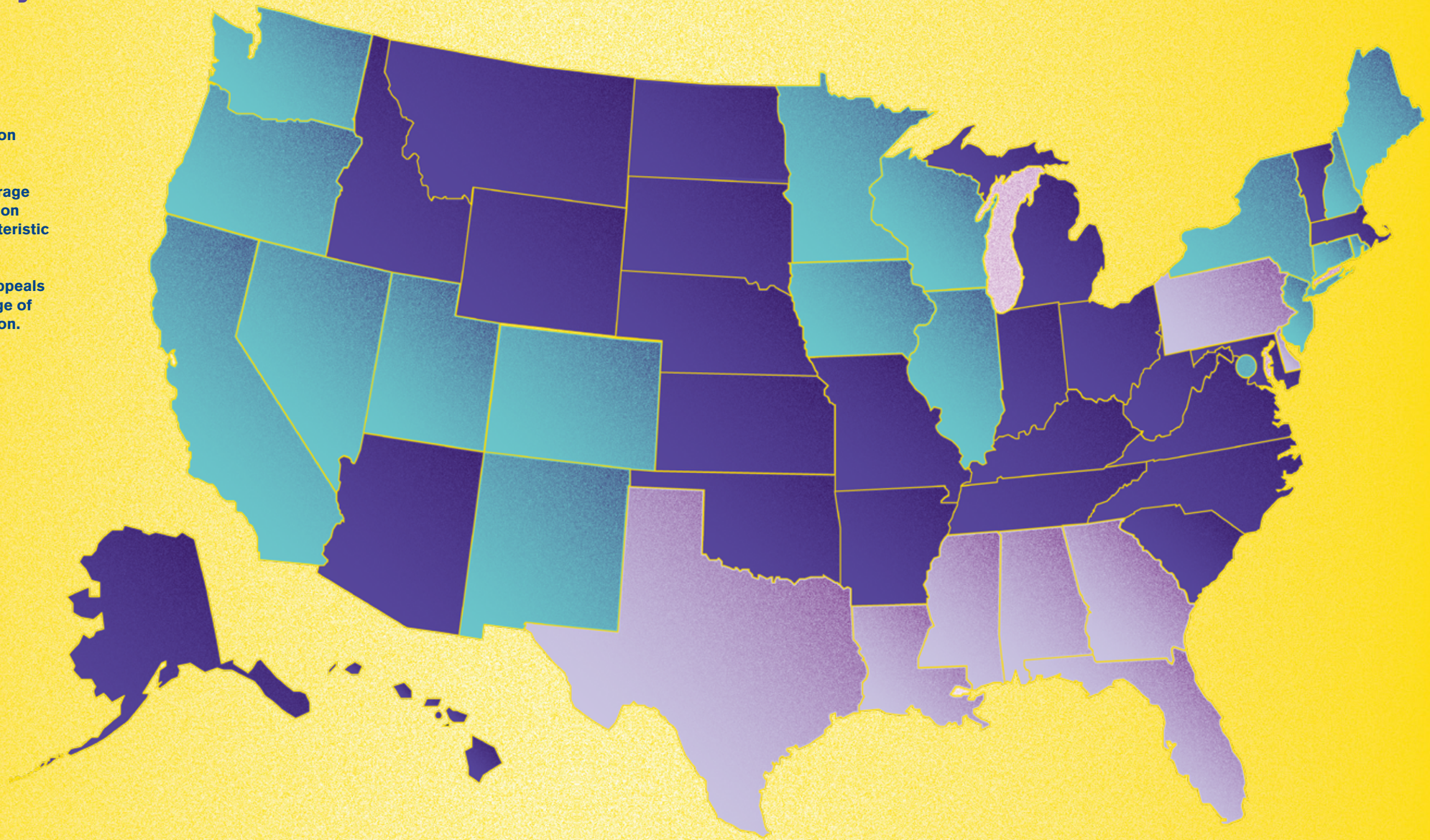
Currently, there is only limited information about how many of the approximately 19,500 municipalities in the US have nondiscrimination ordinances or the scope of such ordinances.[xxxiv] Many municipalities adopt ordinances that simply reproduce the language in the state's nondiscrimination law at the local level, often at the behest of state agencies charged with the enforcement of nondiscrimination laws.[xxxv] Other municipalities have adopted nondiscrimination ordinances that protect a broader range of characteristics as well as "actual or perceived" language, which is often featured as a best practice in model nondiscrimination ordinances.

Prohibition of Misperception Discrimination by State

No clear indication that misperception discrimination is prohibited.

At least some explicit coverage in state law for misperception discrimination for a characteristic other than disability.

Relevant Circuit Court of Appeals case law indicating coverage of misperception discrimination.



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Misperceptions Matter

In both conventional and misperception discrimination cases, the employer's stereotypes, biases, or prejudices motivate the differential treatment the victim suffers.

Therefore, in either instance, the employer engages in discrimination based on an impermissible characteristic like race or national origin. However, courts which have ruled that statutory protection is not triggered when the alleged workplace discrimination is animated by an employer's mistaken perception of the victim's race, religion, and national origin have held that victims of misperception discrimination are not "members of a protected class."[1] They assert that the only rightful beneficiaries of protection against workplace discrimination are individuals who allege suffering invidious, differential treatment on the basis of their self-ascribed or "actual" identity.

Despite their exclusion from statutory protection in some jurisdictions, research shows individuals experiencing misperception discrimination suffer real harm. In addition to the denial or loss of employment opportunities and attendant benefits such as financial compensation, workplace discrimination impairs victims' emotional, psychological, and physical well-being.[2] The injuries that misperception discrimination complainants endure are no different than complainants in conventionally framed discrimination cases.

For example, the plaintiff in a recent Title VII national origin misperception discrimination case, *Arsham v. Mayor & City Council of Baltimore*,[3] claimed that the ethnic-based discrimination she suffered at the hands of her supervisor who misperceived her ethnic identity left her feeling humiliated and embarrassed. She suffered severe emotional distress, ultimately resulting in a suicide attempt while she was working for the employer.

Consequently, the federal district court in Maryland permitted Ms. Arsham's claim, denouncing the argument that Title VII does not protect an individual from discrimination based upon her perceived national origin as "fundamentally abhorrent." To the court, if Ms. Arsham's Title VII misperception discrimination claim was dismissed, such a decision would unfairly "shield the employer from liability for discrimination that is no less injurious to the employee than if the employer guessed correctly the employee's national origin."

Several federal courts have recognized that victims of misperception or perception based discrimination are aggrieved and to deny statutory protection would sanction prohibited discrimination in contemporary workplaces. Accordingly, recent judicial decisions ensure that workers' statutory rights to be free from discrimination are not conditioned upon the precision with which an employer's perception corresponds with the victim's self-ascribed identity, but rather whether an employer discriminated on the basis of an impermissible characteristic. Inclusion of "perceived as" language in federal and state anti-discrimination law reinforces the correct statutory interpretation courts have adopted when deciding whether perception based claims are actionable under federal law and thus, would provide comprehensive protection for all victims of unlawful discrimination.

In addition to the denial or loss of employment opportunities and attendant benefits like financial compensation, workplace discrimination impairs victims' emotional, psychological, and physical well-being. The injuries that misperception discrimination complainants endure are no different than complainants in conventionally framed discrimination cases.

Recommendations

Allowing employers to use misperception in prohibited discriminatory conduct creates a loophole that undermines the purpose of nondiscrimination laws. However, lawmakers and advocates can work to close this loophole by explicitly including misperception discrimination in nondiscrimination laws and policies.

1) Pass the Equality Act to Provide Uniformity at the Federal Level

The discrepancy between the language of the ADA (which explicitly includes misperception discrimination) and other federal nondiscrimination laws such as Title VII (which does not) has created inconsistency among courts and an inconsistent application of federal law. Moreover, courts have relied upon this difference in language as evidence of Congress's intent to exclude misperception discrimination from Title VII and other federal and state nondiscrimination laws. Congress can and should address this inconsistency through a legislative solution such as the Equality Act,[xxxvi] federal legislation that would amend the Civil Rights Act of 1964 to include sexual orientation and gender identity.

The Equality Act includes language which specifically covers misperception discrimination, which would provide greater uniformity across federal nondiscrimination law: "The term 'race', 'color', 'religion', 'sex', 'sexual orientation', 'gender identity', or 'national origin', used with respect to an individual, includes… (B) a perception or belief, even if inaccurate, concerning the race, color, religion, sex, sexual orientation, gender identity, or national origin, respectively, of the individual."

2) Include "Actual or Perceived" Language in all State Nondiscrimination Laws and all Municipal Nondiscrimination Ordinances

State and municipal lawmakers can help to prevent court misinterpretations of nondiscrimination laws by drafting nondiscrimination bills with "actual or perceived" language within the list of protected characteristics. Such language does not significantly increase the cost of enforcement or the effect on employers, but it provides clarity to eliminate this inappropriate loophole. In fact, state lawmakers should amend existing nondiscrimination laws to add language that prohibits misperception discrimination. This is particularly important in states where there are court rulings that exclude misperception discrimination from the protection of state laws, such as Ohio, Tennessee, and North Carolina.

The majority of states do not restrict nondiscrimination protections created by municipalities to those provided at the state level, which means that municipal nondiscrimination ordinances may provide for broader protection. However, even in states where Dillon's Rule[xxxvii] applies or which have laws limiting municipal nondiscrimination protections to those provided at the state level, coverage of misperception discrimination through inclusion of "actual or perceived" language is likely to be allowable.

3) The EEOC and State Human Rights Offices Should Publish Clarifying Guidance

While the EEOC has already issued guidance clarifying that Title VII and other federal nondiscrimination laws prohibit misperception discrimination for some characteristics (such as ethnicity, national origin, and disability), the agency should issue guidance that clarifies this issue for all characteristics covered by federal law. Courts have found EEOC's interpretations including misperception discrimination reasonable and persuasive,[xxxviii] and such guidance would help to limit outlier rulings and provide consistency across federal nondiscrimination law.

Although the majority of state nondiscrimination laws originate from federal nondiscrimination statutes such as Title VII, states are not obligated to interpret their state nondiscrimination laws to exclude misperception discrimination. Courts give deference to the reasonable interpretations of agencies responsible for enforcing laws,[xxxix] and while this varies from state to state, state enforcement agencies or governors may issue guidance regarding enforcement of nondiscrimination laws. Therefore, states should issue guidance clarifying that nondiscrimination laws prohibit discriminatory conduct based on misperceptions. This would help employers and employees to understand the scope of the law and limit inconsistent court rulings.

About the Authors

Robin Maril serves as associate legal director at the Human Rights Campaign.

Her work focuses on federal programs and administrative policies that impact the LGBTQ community. Prior to joining HRC, Robin served as a Presidential Management Fellow at the U.S. Department of Housing and Urban Development in Washington, D.C. While at HUD, Maril worked on Section 8 voucher policy development, specifically focused on deconcentrating poverty and increasing mobility for voucher holders. Also at HUD, Robin worked as a regulatory attorney in the Legislation and Regulation Division of the Office of the General Counsel. An Oklahoma native, Robin graduated with her bachelor's degree in women's studies summa cum laude from the University of Oklahoma, where she was also selected for Phi Beta Kappa. Robin received her law degree from Temple University's Beasley School of Law, where she was named a Rubin Public Interest Law Fellow.

Alison Gill is an accomplished attorney and a nationally recognized expert on LGBTQ law

Alison frequently consults for foundations and nonprofits focusing on advocacy strategy and systemic change. Prior her consultancy work, Alison served as Senior Legislative Counsel at the Human Rights Campaign where she managed state-level advocacy for a diverse range of issue areas. Pior to her work with HRC, Alison served as Government Affairs Director with The Trevor Project and as State Policy Manager with GLSEN, the Gay, Lesbian & Straight Education Network.

D. Wendy Greene is a Professor of Law at Cumberland School of Law and an Inaugural Visiting Scholar at the University of California-Irvine School of Law's Center on Law, Equality, and Race (CLEaR).

Professor Greene is an internationally renowned employment discrimination law scholar whose legal scholarship has shaped the enforcement stance of the EEOC, administrative law judges and federal courts in civil rights cases. In her award-winning article, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection* 47 MICH. J. L. REF. 101 (2013), Greene coined the term "misperception discrimination." A leading authority on misperception discrimination, Professor Greene's article was cited in 2015 by a federal district court as foundational support for its momentous ruling, affording Title VII protection to a victim of workplace discrimination on the basis of her misperceived national origin.

Appendix

Misperceptions Matter

[1] See e.g., Burrage v. FedEx Freight, Inc., 2012 WL 1068794 at *5 (N.D. Ohio Mar. 29, 2012) (declaring "Title VII protects only those who are actually in a protected class").

[2] See generally Jane Goodman Delahunty and William E. Foote, *Compensation for Pain, Suffering, and Other Psychological Injuries: The Impact of Daubert on Employment Discrimination Claims*, 13 BEHAVIORAL SCIENCES AND THE LAW 183 (1995) (explaining that victims of workplace discrimination can suffer various psychological disorders like Posttraumatic Stress Disorder (PTSD), acute stress disorder, panic disorder, and agoraphobia). Studies also show that African Americans who observe and are the targets of racial discrimination in the workplace report "lack of life [and job] satisfaction, chronic health problems, psychological distress, depression, and generalized anxiety"). See Tyrone A. Forman, *The Social Psychological Costs of Racial Segmentation in the Workplace: A Study of African Americans' Well-Being*, 44 J. OF HEALTH AND SOCIAL BEHAVIOR 332, 333 (2003).

[3] 85 F. Supp. 3d 841 (D. Md. 2015). It is important to note that the EEOC's published "Guidelines on Discrimination Because of National Origin Discrimination," the Fifth Circuit's holding in EEOC v. WC & M Enterprises and Professor D. Wendy Greene's article, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection* influenced the court's holding that Ms. Arsham's national origin misperception discrimination claim was cognizable under Title VII.

Full Report

[i] *Nurrage v. FedEx Freight, Inc*, No. 4:10-CV-2755 (N.D. Ohio Mar. 29, 2012.)

[ii] *See* Greene, DW, *Categorically Black, White, or Wrong: 'Misperception Discrimination'* and the State of Title VII Protection, 47 Univ. Mich. J. L. Reform 87 (2013) (Arguing that federal courts have improperly imposed an actuality requirement into Title VII law); Aronson, EE, *Perceived-As Plaintiffs: Expanding Title VII Coverage to Discrimination Based on Erroneous Perception*, 67 Case W. Res. L. Rev. 235 (2016) (Arguing that Title VII covers discrimination based on race or ethnicity, regardless of whether the individual is actually a member of that class); Flake, DF, *Religious Discrimination Based on Employer Misperception, Wisconsin Law Review* (2016) (Arguing that legislative history, agency guidance, and federal law support recognition of misperception-based religious discrimination claims under Title VII).

[iii] A term that legal scholar D. Wendy Greene coined in her seminal work. See generally Greene, supra note 2.

Appendix

[iv] DC Code § 2-1401.11 (emphasis added).

[v] 42 U.S.C. § 2000e et seq.

[vi] 29 U.S.C. § 621 et seq.

[vii] 42 U.S.C. § 12101 et seq.

[viii] 42 U.S.C. § 12102(1)(c).

[ix] 42 U.S.C. § 12102(3)(a).

[x] See, e.g., *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995).

[xi] *EEOC. EEOC Enforcement Guidance on National Origin Discrimination*. Issued Nov. 11, 2016. Available at https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_ftn16.

[xii] *EEOC v. WC&M Enters*., 496 F.3d 393 (5th Cir. 2007) (National origin harassment of a Muslim car salesman from India included harassment based on the misperception that he was an Arab).

[xiii] *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012) (Noting that "a harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment.).

[xiv] 283 F.3d 561 (3rd Cir. 2002).

[xv] Pub. L. 75-718 (1938), as amended.

[xvi] See, e.g., *Perkins v. Lake County*, 860 F. Supp. 1262 (N.D. Ohio 1994); Arsham v. Mayor & City Council of Baltimore, 85 F. Supp. 3d 841 (D. Md. 2015); Kallabat v. Michigan Bell Telephone, No. 2:12-CV-15470 (E.D. Mich. June 18, 2015); Zayadeen v. Abbott Molecular, Inc. et al., No. 1:2010-cv-04621 (N.D. Ill. 2013).

[xvii] See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 2d 293(D.D.C. 2008); Adkins v. City of New York, 143 F. Supp. 3d 134 (S.D.N.Y. 2015).

[xviii] *Macy v. Holder*, Appeal No. 0120120821 (E.E.O.C. Apr. 20, 2012); *Baldwin v. Dep't of Transportation*, Appeal No. 0120133080 (E.E.O.C. July 15, 2015)

[xix] *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (The plaintiff must first establish a prima facia case of racial discrimination "by showing (i) that he belongs to a racial minority…")

[xx] 345 F. Supp. 2d 844 (E.D. Tenn. 2004).

[xxi] *See, e.g., Uddin v. Universal Avionics System Corporation*, No. 1:05-CV-1115-TWT (N.D. Ga. 2006); Lewis

[v] N. Gen. Hosp., 502 F. Supp. 2d 390 (S.D.N.Y. 2007); *Lopez-Galvan v. Mens Wearhouse*, No. 3:06-CV-537 (W.D.N.C. July 10, 2008); *Adler v. Evanston Nw. Healthcare Corp*., No. 07-CV-4203 (N.D. Ill. Dec. 16, 2008); *El v. Max Daetwyler Corp*., No. 3:09-CV-415 (W.D.N.C. May 9, 2011); *Burrage v. FedEx Freight, Inc*., No. 4:10-CV-2755 (N.D. Ohio Mar. 29, 2012); *Yousif v. Landers McClarty Olathe KS, LLC*, No. 12-2788-CM (D. Kan. Oct. 29, 2013); *Longoria v. Autoneum N. Am*., No. 3:14-CV-2648 (N.D. Ohio Sept. 13, 2016).

[xxii] *El v. Max Daetwyler Corp*., 451 F. App'x 257 (4th Cir. 2011) (Affirming dismissal of a district court case where plaintiff faced discrimination due to the mistaken belief he was Muslim).

[xxiii] Cal. Gov. Code § 12926(o).

[xxiv] DC Code § 2-1401.11 (emphasis added).

[xxv] 775 ILCS 5/1-103(O-1) (emphasis added).

[xxvi] C.R.S. § 24-34-301(7) (Colorado); 5 M.R.S. § 4553(9-C) (Maine); 5 M.R.S. § 4553(9-C) (Minnesota); N.J. Stat. § 10:5-5 (New Jersey); N.M. Stat. Ann. § 28-1-2 (New Mexico); Or. Rev. Stat. Ann. § 174.100(6) (Oregon); R.I. Gen. Laws § 28-5-6 (Rhode Island).

[xxvii] Conn. Gen. Stat. § 46a-81a (Connecticut); IA Code § 216.2(14) (Iowa); NRS § 613.310(7) (Nevada); RSA 354-A:2(XIV-c) (New Hampshire); NY Exec L § 292(27) (New York); Utah Code Ann. § 34A-5-102(1)(z) (Utah); Wis. Stat. § 111.32(13m) (Wisconsin).

[xxviii] Rev. Code Wash. 49.60.040(26).

[xxix] *Cowher v. Carson & Roberts*, 425 N.J. Super. 285 (App. Div. 2012).

[xxx] *See, e.g.,* Burrage v. FedEx Freight, Inc., No. 4:10-CV-2755 (N.D. Ohio Mar. 29, 2012); Longoria v. Autoneum N. Am., No. 3:14-CV-2648 (N.D. Ohio Sept. 13, 2016).

[xxxi] *See, e.g.,* AS § 18.80.300(14) (Alaska); A.R.S. § 41-1461(4) (Arizona); LA Rev Stat § 23:322(3) (Louisiana); Minn. Stat. § 363A.03, Subd. 12 (Minnesota); MCA § 49-2-101(19)(a) (Montana); ORC § 4112.01(A)(13) (Ohio); Utah Code Ann. § 34A-5-102(1)(f) (Utah); R.C.W. § 49.60.040(7) (Washington).

[xxxii] *See, e.g.,* A.C.A. § 16-123-102(3) (Arkansas); O.C.G.A. § 45-19-22(3) (Georgia); Wyo. Stat. § 27-9-105(d) (Wyoming).

[xxxiii] *See, e.g., Wallace v. County of Stanislaus*, 245 Cal. App. 4th 109. (5th App. 2016); Desrosiers v. Diageo N. Am., Inc., 314 Conn. 773 (Conn. 2014).

[xxxiv] *See Persad, X. Municipal Equality Index 2017.* Washington, DC: Human Rights Campaign Foundation (2017), available at https://assets2.hrc.org/files/assets/resources/MEI-2017-FullReport.pdf?_ga=2.33773544.815580823.1512666167-4155702.1503259110.

[xxv] *See, e.g.,* Michigan Civil Rights Commission, Non-Discrimination Ordinance Template (2015), available at http://www.michigan.gov/documents/mdcr/Ordinance_Template_ADOPTED_3-23-15_485045_7.pdf.

[xxxvi] Equality Act, S. 1006, H.R. 2282 (2017).

[xxxvii] Dillon's Rule states that municipalities only have those powers expressly granted to them by states and that those powers should be narrowly construed. See Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[xxxviii] See, e.g., *EEOC v. WC&M Enters*., 496 F.3d 393 (5th Cir. 2007).

[xxxix] *Auer v. Robbins*, 519 U.S. 452 (1997).

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