DISCRIMINATION AT THE WORKPLACE, FROM APPLICATION TO TERMINATION

A Report on the Employment Experiences of Transgender and Gender Non-Conforming People

MAKE THE ROAD NEW YORK, October 2013
ACKNOWLEDGEMENTS

This report is only possible because hundreds of community residents living in Jackson Heights decided to tell their stories about their personal experiences applying for jobs and striving to make a living in their workplaces. First and foremost, we would like to thank the members of the LGBTQ Justice Project at Make the Road New York for sharing their stories, and for supporting people across the neighborhood to do the same.

This report was made possible in part by generous grants from the Paul Rapoport Foundation and the Queer Youth Fund at Liberty Hill Foundation. The Paul Rapoport Foundation’s mission is the achievement of full equality for the LGBTQ community, in all of its diversity. The Foundation supports programs and organizations working in the areas of social services, healthcare, legal rights and issues, and community empowerment for LGBTQ populations of low or no income. The Queer Youth Fund at the Liberty Hill Foundation awards grants to innovative and effective leadership development or organizing projects or programs that make a long-term difference by empowering gay, lesbian, bisexual, transgender, queer and questioning youth to improve societal conditions affecting them.

We would like to acknowledge the work of the Make the Road New York staff who spent endless hours interviewing community members, gathering their stories, supporting them as they chose to speak up, and then preparing this report. They include Karina Claudio, Stephen Cha-Kim, Ivan Luevanos, Bianey Garcia, Hilary Klein, Sebastian Sanchez and Lorelei Salas.

And last, but not least, we want to thank the amazing Make the Road New York interns Gerardo Romo, Priscilla DeLeon, Amy Elmgren, and Drew Pendergrass. They helped compile and analyze the surveys, gather stories, and research employment discrimination practices in New York City and across the country. This report would not exist without their contributions.

It is our hope that the efforts of all of these people, institutions, and the thousands of community members who raise their voices, share their stories, organize, mobilize, and strategize, will result in real changes in employment discrimination practices in New York State and beyond.
INTRODUCTION

The manager looked her up and down and told her: “with that hair and that faggot look of yours, you won’t be able to work here.”

Close to a year ago, Make the Road New York member Jennifer de la Cruz went to Radio Shack to apply for a job, responding to an ad in the front window of the store that said “Now Hiring”. Jennifer went into the store and told the manager that she wanted to apply for the job. The manager looked her up and down and told her: “with that hair and that faggot look of yours, you won’t be able to work here.” Jennifer was not surprised to hear these words; nonetheless, she was saddened. It was the fourth job that she had been rejected from because of who she is and the way she looks. Jennifer is a male to female transgender-identified Latina. Jennifer is in the process of transitioning, so she doesn’t “pass” like some of the other transgender Latina women that she interacts with.

Like many other transgender and gender non conforming people that we interact with at Make the Road New York on a weekly basis, Jennifer was explicitly denied a job because of her gender identity and expression. If she had cut her long hair and appeared wearing masculine clothing, maybe the results would have been different. For many of our members, this is a constant reality. And for the majority of the members, even if they get hired, it is hard for them to get promotions or even just be treated with respect in their jobs because of their gender identity and expression.

Take Isis’ case for example. Isis is a transgender Latina woman, who started transitioning from male to female after she was hired at the Gap. She has been working at the Gap for over 5 years now. Isis has the credentials and experience that she needs to move up in her field. But she has been passed over for managerial positions many times, even for more junior employees. Isis believes that she is being discriminated against because of her gender identity. After she transitioned, the store cut her hours, has not considered her for promotions and has not given her a raise in the five years she has been employed there.
These are the realities of many transgender and gender-non conforming members in our community. Back in 2010, Make the Road NY published a report entitled “Transgender Need not Apply” that revealed a 42% net discrimination rate against transgender applicants at retail stores. This study also looked at a sample of 100+ transgender identified interviewees, out of which almost 50% were unemployed and 60% had never been offered a job while being openly transgender.

Since the report was published we have achieved some victories. After making the findings published in this report, Make the Road New York filed complaints with the New York State Attorney General’s Office, which prompted investigations at national retailers J. Crew and American Eagle. At American Eagle, the investigation discovered various non-compliant practices, including a document that all employees were required to sign titled “Personal Appearance Standard”, which stated that they were to “wear gender appropriate clothing” and that “it is inappropriate for men to wear women’s products and for women to wear men’s products.” In April 2010, several weeks after the release of this report, American Eagle Outfitters signed a comprehensive corrective action agreement with the Attorney General’s Office. In the agreement, the company made a commitment to amend materials such as job postings, employee handbooks, and hiring guides to include information about non-discrimination with regards to gender identity and expression. The company was also required to train all employees about the new non-discrimination policy and to address dress requirements, proper pronoun use and restroom access according to an employee’s gender identity and expression. The changes affected all sixty-one American Eagle stores in New York State, employing over 2,000 people. And after an intense campaign against J Crew stores in Manhattan, we were able to get an informal commitment from them to change employee handbook policy regarding gender identity.

But Make the Road New York members wanted to dig deeper into these unlawful employment practices. In the study we did in 2010, race was not one of the factors that were measured. Neither was gender expression, which in many cases, affects individuals’ chances at obtaining jobs or affects how they are treated once employed. So we sat down with our members and drafted a new survey that included race and gender expression and identity. We interviewed over 250+ LGBTQ and Gender Non Conforming Identified people in our community, as well as 100 non-LGBTQ identified members of our community. The results were very similar to the ones we saw back in 2010, with the difference that race and gender expression added to the discrimination that people face when applying or trying to keep a job.
ABOUT MRNY and the LGBTQ JUSTICE PROJECT

Make the Road New York (“MRNY”) builds the power of immigrant and working class communities to achieve dignity and justice through community organizing, policy innovation, transformative education, and the provision of high quality legal and support services. MRNY was created in 2007 through the coming together of Make the Road by Walking and the Latin American Integration Center, two of New York City’s most dynamic community-based organizations. Today, MRNY is one of the largest participatory grassroots immigrant organization in New York State with 13,000 members, primarily Latina women, and offices based in the economically marginalized immigrant communities of Bushwick, Brooklyn; Jackson Heights, Queens; Port Richmond, Staten Island; and Brentwood, Long Island. MRNY brings together low-wage immigrant workers, parents, tenants, young people, and LGBTQ community residents, into a unified and powerful organization working to promote equality, justice and opportunity for all New Yorkers. MRNY’s LGBTQ Justice Project supports lesbian, gay, bisexual, transgender, questioning, and queer immigrants and people of color in efforts to promote respect, opportunity, and safety for the LGBTQ community. The project works to confront three interconnected community problems that uniquely negatively impact the low-income LGBTQ community, in general, and low-income LGBTQ youth of color, in particular: unsafe schools, unsafe workplaces, and unsafe communities. The project confronts these challenges through grassroots research, community organizing, leadership development, policy innovation and advocacy.
EXECUTIVE SUMMARY

“The LGBTQ community does not have the same rights that the majority of workers enjoy. It is not fair that solely because of my gender identity that I have fewer rights than other residents of NY.”
- Jocelyn Mendoza, Transgender latina woman from Brooklyn

In the spring and summer of 2013, Make the Road New York surveyed over 250 LGBTQ and gender non-conforming identified individuals about their experiences with gender identity/expression employment discrimination. The individuals surveyed had applied for jobs in a variety of different industries, including retail, finance, and education. We also surveyed more than 100 non-LGBTQ identified individuals. Surveys were conducted at local community organizations, LGBTQ support groups, and public events. Finally, we collected in-depth testimonies from transgender and gender non-conforming identified individuals about their experiences with employment discrimination. Those testimonies are included in this report.

Make the Road New York also partnered with the Attorney General’s Office to conduct match pair testing in retail and food service businesses. Since the analysis of the testing is still underway, we will not be publishing findings at this point but will publish an addendum once the project is complete. To date, we have investigated a total of thirteen retail and food establishments in the Jackson Heights/Corona and Elmhurst sections of Queens.

Results

- We conducted a matched pair test. In five locations, the gender conforming, or control, tester received a more favorable outcome than the transgender/ gender non-conforming applicant despite the fact that the two were materially indistinguishable in all other objective characteristics and in job-related credentials.

- We also conducted a survey. While over two thirds of heterosexual, gender conforming and over half of all LGBTQ respondents reported being employed, only 46% of transgender and gender non-conforming individuals had jobs and 43% were looking for employment.

- Survey results show that 40% of transgender and gender non-conforming respondents indicated that they had experienced discrimination in being considered for jobs or promotions based on their gender identity or sexual orientation. Slightly more than one quarter of LGBTQ respondents (27.3%) as a whole reported similar discrimination.
• 32% of transgender and gender non-conforming survey respondents reported having been fired from at least one job based on their actual or perceived gender identity and expression.

• 44% reported that they faced such serious discrimination on the job because of their gender identity and expression that they were forced to quit.

• 41% of all transgender and gender non-conforming respondents reported experiencing some form of harassment on the job, compared to 29% of all LGBTQ respondents as a whole

**Recommendations**

Our findings reveal that even though transgender and gender non-conforming New Yorkers are supposed to be protected under NYC Human Rights law, this is not the reality for many of them, specifically if they are Latino/a or African American.

• We urge federal legislators to pass the transgender inclusive ENDA (the Employment Non Discrimination Act-Polis HR 1755/Merkly S815) which would prohibit employment discrimination nation wide based on sexual orientation and gender identity/expression. ENDA was recently passed out of committee in the Senate in July 2013. We urge the Senate and the Congress to take immediate action.

• We urge the NYS Legislature to Pass GENDA (the Gender Expression non Discrimination Act- S.195A Squadron/A.4226A Gottfried) immediately in the next legislative session. GENDA passed in the Assembly in June 2013. We urge the NYS Senate to Act immediately on this legislation

• We also urge the NYS Legislature to pass the Whistleblower Protection Bill (S.3862 Klein/A.5696 Benedetto), which would protect workers who are reporting discrimination based on sexual orientation, gender identity and or gender expression from retaliation by their employer. We urge both the Assembly and the Senate to take immediate action on this legislation

• New York City should offer comprehensive training about discrimination based on gender identity and expression to all students in the public school system. In the long run, education about homophobia and trans phobia is the only way to address the root causes of discrimination. The Dignity in All Schools Act (DASA), passed by the City Council in 2005 but never implemented, requires the Department of Education to address bullying based on sexual orientation and gender identity. Mayor Michael Bloomberg vetoed it twice, calling it “silly law, that doesn’t make sense” The new NYC mayor should sign NYC DASA into law and implement it immediately.
• All employers in New York City should adopt policies and practices which explicitly address gender identity/gender expression discrimination, including training for employees, notice to job applicants of their rights, and protection from on-the-job harassment.

• Make enforcement of City anti-discrimination laws covering transgender and gender non-conforming individuals a high priority use of enforcement resources. Using methods such as matched pair testing, community organizations and government agencies such as the Commission on Human Rights should proactively identify gender identity and expression discrimination in various sectors of the New York City economy and by prominent employers. Evidence collected through techniques such as matched pair testing should be used to enforce the law in target industries and workplaces where problems are documented.

• The Commission on Human Rights should increase distribution of information on workplace rights to transgender workers and employers, especially in low-wage industries. Educational materials should be provided in plain language and should also be made available in the most commonly spoken languages in New York City. Additionally, outreach should be conducted in the community to break the barriers that often isolate the most vulnerable community members and that prevent them from seeking help.
BACKGROUND

After several decades of activism and advocacy, the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) rights movement has brought about a major sea change in the discussion around LGBTQ issues and rights in the United States. However, for marginalized groups within the LGBTQ community, in particular transgender and gender non-conforming individuals of color, the struggle for basic rights and protection from pervasive discrimination remains a daily reality.

In something as fundamental as the right to employment based on merit and to work free of harassment, people who identify as transgender or gender non-conforming continue to face enormous barriers. In most of the United States and even in much of New York State, employment discrimination based on gender identity – i.e. the ability to fire, refuse to hire and promote, or otherwise discriminate against a qualified person solely because he or she is transgender or gender non-conforming – remains legal. New York City has banned this type of discrimination since it passed a landmark amendment to its Human Rights Law in 2002. However, as Make the Road New York’s 2010 report Transgender Need Not Apply revealed, much work remains to be done to enforce this law on the ground. That report, as well as the findings presented here, shows that employers of all sizes in New York continue to deny LGBTQ individuals, particularly transgender individuals, a fair opportunity to make a living. This report builds on our previous study to highlight the insights and experiences in particular of LGBTQ people of color, mostly in the outer borough of Queens, demonstrating the injustices still faced by this especially marginalized group.

Surveys have revealed the troubling reality that transgender individuals are among the most financially disadvantaged groups in the U.S. Nationwide, they are twice as likely as the general population to be unemployed and are four times as likely to live in poverty. Nearly 20 percent have been, or are currently, homeless. These numbers are even more alarming for transgender people of color, whose unemployment rates are up to four times the national average. This group also experiences discrimination in the workplace at up to two or three times the rates suffered by white transgender employees.

\[1\] While definitions vary, in its Guidelines Regarding Gender Identity Discrimination, New York City’s Human Rights Commission defines transgender as “an umbrella term that includes anyone whose gender identity and/or gender expression does not match society’s expectations of how an individual who was assigned a particular sex at birth should behave in relation to their gender” and gender non-conforming as “individuals who have a gender identity and/or expression that is not completely male or female.”


\[3\] Law of April 24, 2002, Amendment to § 8-102, Ch. 1, Title B of the Administrative Code of the City of New York.


\[5\] Burns, Discrimination and Harassment, supra note 6, at 3.

\[6\] Id. at 3.

\[7\] Grant, supra note 7, at 51.

\[8\] Id. at 51.
Fifteen percent of transgender individuals earn less than $10,000 a year, four times as much as the percentage of the population as a whole that earns this little.\textsuperscript{11} Yet, the level of educational achievement of transgender people is high, with much higher rates of college and graduate degrees than the rest of the U.S. population.\textsuperscript{12} This disparity leads to the strong inference that the economic marginalization of transgender individuals is to a likely high degree the result of widespread employment discrimination.

The effects of this discrimination are felt broadly across society. When workers are fired for being transgender or are unable to get jobs due to discrimination, their wages fall, leading to lower income tax revenue and a greater strain on government resources in the form of survival benefits.\textsuperscript{13} In this current precarious economy, pervasive discrimination against LGBTQ and trans individuals – in hiring, treatment on the job, lack of promotions and benefits, and termination of employment – is, in addition to being a moral outrage, an issue with economic implications that must be addressed now.

\textsuperscript{11} Id. at 33.
\textsuperscript{12} Id. at 33.
Crosby Burns & Jeff Krehely, Gay and Transge
DISCRIMINATION AT THE WORKPLACE, FROM APPLICATION TO TERMINATION

Employment discrimination affects the entire LGBTQ community, although transgender and gender non-conforming people are especially susceptible, and is an ongoing and systemic problem. LGBTQ individuals encounter discrimination at all stages of employment: discriminatory hiring practices in refusing to consider qualified candidates; workplace harassment and abuse; denial of promotions and benefits; and even termination for identifying as an LGBTQ individual.

Discriminatory Hiring
Employment discrimination prevents a disturbingly large number of LGBTQ people from entering the workforce. In a series of surveys conducted by the Williams Institute of the University of California-Los Angeles on LGBTQ employment discrimination, up to 17 percent of LGBTQ workers nationwide reported being passed over for a job due to an employer’s prejudice against their sexual orientation or gender identity. This trend is even harsher for transgender people, as 44 percent nationwide reported having been denied jobs simply for being transgender. The numbers in New York State are not much better: 37 percent of transgender people were not hired because of their gender identity or expression. Seventy-one percent of transgender individuals who are currently unemployed report having encountered discrimination in hiring. Disturbingly, the data indicates that this discrimination is systemic, creating a pervasive and repeated experience of marginalization: nationwide, among those who lost jobs due to discrimination stemming from their gender identity or status as transgender, 81 percent reported experiencing further discrimination in hiring practices in their search for new jobs.

Workplace Harassment/Abuse
For those individuals who are employed, many LGBTQ, and especially transgender, they continue to face discrimination and harassment on the job. The Williams Institute compiled several nationwide surveys and found that from 15 to 43 percent of LGBTQ American workers reported some form of discrimination on the job. The same study discovered that from 7 to 41 percent reported that they were verbally or physically abused or had their workplace vandalized. Fellow employees have confirmed these reports: 12-30 percent of straight workers witnessed discrimination in the workforce based on sexual orientation.

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14 Crosby Burns & Jeff Krehely, Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment (2011) [hereinafter Burns, Discrimination and Harassment], at 1.
15 Jaime M. Grant et al., Injustice at Every Turn (2011), at 53.
17 Id. at 54.
18 Grant, supra note 7, at 54.
19 Burns, Discrimination and Harassment, supra note 6, at 1.
20 Id. at 1.
21 Id. at 2.
Again, transgender employees experience even worse conditions. Across the nation, 90 percent of transgender individuals have encountered some form of harassment or mistreatment on the job.\textsuperscript{22} In New York City, 74 percent of transgender respondents experienced harassment or mistreatment on the job.\textsuperscript{23} Such discrimination includes: offensive or intimidating behavior by co-workers or supervisors; colleagues not addressing a person by her or his chosen name or pronoun; employers refusing to allow a person to use the appropriate bathroom; bosses and co-workers asking offensive questions about a person’s medical history or genitalia, and sexual harassment.\textsuperscript{24}

**Denied Promotions and Benefits**

Discrimination not only affects LGBTQ individuals’ work environment, it also unfairly curtails the compensation and benefits they receive. Up to 28 percent of workers nationwide report receiving a negative performance evaluation or being passed over for a promotion because they were LGBTQ.\textsuperscript{25} Transgender people account for many of these lost opportunities: 23 percent of transgender workers were denied a promotion due to their gender identity.\textsuperscript{26} In New York City, 20 percent of transgender workers were denied a promotion because of their gender identity.\textsuperscript{27}

**Termination of Employment**

Many employers do not discover until after hiring someone that he or she identifies as an LGBTQ individual, and this discovery too often leads suddenly to the individual finding his or her job at risk. From 8 to 17 percent of LGBTQ workers reported having been fired at some point because of their sexual orientation or gender identity.\textsuperscript{28} The numbers are once again even worse for transgender individuals, 26 percent of whom have been fired because they were transgender.\textsuperscript{29} Even in New York State, this figure is 20 percent.\textsuperscript{30}

\textsuperscript{22}Grant, supra note 7, at 56.
\textsuperscript{23}Grant, supra note 8, at 1.
\textsuperscript{24}Grant, supra note 7, at 56.
\textsuperscript{25}Burns, Discrimination and Harassment, supra note 6, at 1.
\textsuperscript{26}Grant, supra note 7, at 53.
\textsuperscript{27}Grant, supra note 8, at 1.
\textsuperscript{28}Burns, Discrimination and Harassment, supra note 6, at 1.
\textsuperscript{29}Grant, supra note 7, at 53.
\textsuperscript{30}Grant, supra note 8, at 1.
Employment discrimination affects transgender people in many ways. The ninety percent of transgender people that have directly experienced harassment or mistreatment at work felt that this discrimination has negatively impacted their careers or their wellbeing. Many of these respondents reported that they were forced to hide who they were in order to avoid workplace repercussions. People of color generally report higher levels of abuse than their white counterparts. Researchers have demonstrated that such discrimination in the workplace diminishes productivity, job satisfaction, and the mental and physical health of not only the transgender workers, but all employees.

A further result of employment discrimination is that it pushes some transgender people out of the formal economy completely. Sixteen percent of people who had lost a job or were unemployed due to transgender bias reported having to enter the informal economy as a result, including selling drugs or engaging in sex work. This same group is also much more susceptible to incarceration, homelessness, criminalization and harassment by police, and negative health outcomes.

HOW DISCRIMINATION AFFECTS EMPLOYERS
From an economic standpoint alone, it makes extremely poor business sense for businesses to alienate the LGBTQ community. In 2012, the U.S. LGBTQ community had a projected buying power of $790 billion. And studies show that LGBTQ consumers are increasingly avoiding purchasing from companies with discriminatory policies. One study found that 71 percent of LGBTQ-identified people would be more likely to purchase goods and services from stores with LGBTQ-friendly policies, even if the products at these stores were costlier or less convenient.

Many of the top companies in the U.S. have been trendsetters in the field of LGBTQ-friendly workplace policies, realizing that sexual orientation and gender identity have no correlation with quality of work. Two hundred of the Fortune 500 companies now include gender identity in their non-discrimination policies. The advantages to employers from adopting such supportive policies are clear. Among those employees who underwent a gender transition, 78 percent reported that they feel more comfortable at work and that their job performance has improved.
In New York State, businesses have found the transition to trans-inclusiveness to be overwhelmingly positive. Large businesses in New York, including the Xerox Corporation, the law firm of McDermott Will & Emery LLP, and Corning Incorporated, have implemented policies that are inclusive of transgender and gender non-conforming people and have experienced better work environments and increased productivity. The same has occurred with small businesses, such as the Normanside Vet Clinic in Albany, NY, which reported that the closeness of the employees from being a smaller business actually helped the process of one of their employees transitioning.

Finally, many of the issues raised by critics of trans-inclusive policies — such as complications with bathrooms and problems with clients and vendors — were found to be easily remedied or non-existent. Indeed, they report seeing their policies as a competitive advantage that is needed to gain a high quality and productive workforce.

HOW DISCRIMINATION AFFECTS NY TAXPAYERS
Employment discrimination not only affects transgender people, but taxpayers as well. Workplace discrimination costs New York State about $7 million each year. When transgender individuals lose wages, health insurance, and housing stability due to discrimination, many have no choice but to rely to some extent on government aid. Studies have shown that this cost breaks down into more than $1 million in state Medicaid expenses, and as much as $5.9 million annually in federal and state housing program expenditures. In addition, the state loses millions of dollars in revenue that would be generated in income and payroll taxes had transgender individuals been able to stay employed without discrimination.

LEGAL LANDSCAPE
The presence of laws that explicitly protect against gender identity-based employment discrimination is inconsistent at both the state and local levels and completely non-existent at the federal level.

There are currently no federal laws protecting LGBTQ individuals from employment discrimination. Although the Employment Non-Discrimination Act (ENDA), which would create a nationwide non-discrimination law, has been introduced seven times in the U.S. Congress since 1994, it has never passed
the Senate.\textsuperscript{48} Further, only twice has it been inclusive and provided gender identity language; both times it never got past committee for a full vote.\textsuperscript{49} An inclusive ENDA has been reintroduced this year, but both the Senate and the House of Representatives must pass it and the President must sign it into law.\textsuperscript{50}

At the state level, 16 states\textsuperscript{51} and the District of Columbia have stepped in to pass laws prohibiting employment discrimination based on gender identity as well as sexual orientation.\textsuperscript{52} New York is not one of these states. Legislators in the New York State Assembly have passed the Gender Expression Non-Discrimination Act (GENDA) six times, but the Senate has not yet passed it.\textsuperscript{53} Transgender rights advocates in New York were hopeful that this year would be different, as a strong GENDA was reintroduced in the Senate this spring.\textsuperscript{54} Legislators said the bill had a bipartisan majority backing it, and 78 percent of New Yorkers polled stated that they supported gender identity protection measures.\textsuperscript{55} However, Senate leadership failed to bring the bill to a vote before the end of the legislative session in June 2013, thereby postponing statewide gender identity protections once again.\textsuperscript{56} This happened despite wide support for the bill at the city level and state level, including a letter that was published by New York Police Department Ray Kelly in support of the bill.\textsuperscript{57}

State executive branches can also take action. The governors of eight states, including New York, have banned discrimination against transgender state workers through executive orders; however, there is no guarantee that a subsequent governor will not rescind an executive order of a predecessor.\textsuperscript{58}

At the local level, at least 150 cities and counties nationwide have passed their own laws prohibiting gender identity-based employment discrimination.\textsuperscript{59} This includes seven cities in New York (Albany, Binghamton, Buffalo, Ithaca, New York City, Rochester, and Syracuse) and three counties (Suffolk, Tompkins, and Westchester), which represent 59 percent of the population of New York.\textsuperscript{60} This means that, absent state-level protection, out of the 58,000 New Yorkers who are


\textsuperscript{49}Id.

\textsuperscript{50}Id.


\textsuperscript{52}American Civil Liberties Union, Know Your Rights - Transgender People and the Law, April 24, 2013, http://www.aclu.org/translaw.


\textsuperscript{54}http://www.igbtqnation.com/2013/06/n-y-senate-adjourns-without-considering-transgender-protections-bill/

\textsuperscript{55}Id.

\textsuperscript{56}Id.

\textsuperscript{57}Id.

\textsuperscript{58}Id.

\textsuperscript{59}Id.

\textsuperscript{60}Id.

\textsuperscript{61}Herman, supra note 32, at 1.
transgender, 24,000 can still legally be fired from their jobs because of their gender identity or expression.61

Of course, even where they are present, these laws do not always stop employers from discriminating on the basis of gender identity or expression. For example, in San Francisco, where a gender identity protection law was passed in 1995, two surveys found that at least 50 percent of transgender individuals continued to experience employment discrimination.62 Make the Road New York’s previous 2010 report found that 59 percent of the workers we surveyed in Manhattan retail stores experienced employment discrimination, even 8 years after passage of New York City’s anti-discrimination law protecting transgender individuals.63 Additionally, a shocking 49 percent had never been offered a job while living openly as a transgender person.64

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61 Id. at 1.
63 Make the Road New York, supra note 4, at 4.
64 Id. at 4.
ABOUT THIS REPORT: METHODOLOGY

Match Pair Testing
Matched pair testing is a research method aimed at identifying discrimination against a particular group or category of people, typically in the areas of housing and employment opportunities, through the use of carefully screened and trained researchers.1 In the context of employment, a pair of testers is prepared with job application materials so that both are equal in terms of job-related qualifications, such as education and prior work history, as well as most personal characteristics, such as age, race, and gender. The only objective difference is the one variable characteristic that is being tested – in the case of the testing done for this study, one tester was always transgender or gender non-conforming while the “control” tester was always gender conforming. This type of testing allows researchers to isolate and measure the effect of that one differing characteristic in the pair’s success in securing employment at a particular business.

As a result, matched pair testing has been a reliable and well-established tool for documenting patterns of discrimination against historically marginalized groups. Courts have recognized the data collected from such testing as the basis for bringing discrimination lawsuits and it has been utilized by numerous government agencies, including the U.S. Department of Justice, the Equal Employment Opportunity Commission, the U.S. Department of Housing and Urban Development, and the New York State Attorney General’s office.2 Advocacy groups around the country have also employed matched pair testing, including the Urban Institute, Restaurant Opportunity Center of New York, the Fair Housing Justice Center, and the Chicago Legal Assistance Foundation.

Surveys
In the spring and summer of 2013, Make the Road New York supplemented our matched pair testing by surveying over 250 LGBTQ and gender non conforming identified individuals about their experiences with gender identity/expression employment discrimination. The individuals surveyed had applied for jobs in a variety of different industries, including retail, finance, and education. We also surveyed more than 100 non-LGBTQ identified individuals. Surveys were conducted at local community organizations, LGBTQ support groups, and public events. Finally, we collected in-depth testimonies from transgender and gender non conforming identified individuals about their experiences with employment discrimination. Those testimonies are included in this report.

FINDINGS AND TESTIMONIES

Matched Pair Testing Results
Make the Road New York partnered with the Attorney General’s Office to conduct match pair testing in retail and food service businesses. Since the analysis of the testing is still underway, we will not be publishing findings at this point but will publish an addendum once the project is complete. To date, we have investigated a total of thirteen retail and food establishments in the Jackson Heights/Corona and Elmhurst sections of Queens. In five locations, the gender conforming, or control, tester received a more favorable outcome than the transgender/gender non-conforming applicant despite the fact that the two were materially indistinguishable in all other objective characteristics and in job-related credentials.

In one apparel store, the control tester was interviewed and ultimately hired while the store took no action on the transgender tester’s near identical application. This disparity in treatment was all the more suspect because during the control tester’s interview, the store’s manager indicated that the location in question was in fact currently doubling its staff. Indeed, the control tester observed several other interviewees that day. It is remarkable that the qualified transgender applicant was not even considered for a follow-up interview given the large number of positions apparently available.

Our testing also revealed a similar pattern of employers denying qualified transgender applicants an opportunity for consideration for potential jobs from the start. At four locations – Dunkin Donuts, Boost Mobile, Metro PCS, and a fast food business – the transgender applicant was told on site that the business was not hiring or, in the case of Dunkin Donuts, that the hiring process was done off site through a centralized corporate process. The experience of the control tester at these very same locations was very different. In each case, the gender conforming applicant was told that there was an active hiring process in progress. For instance, at Metro PCS, the store representative began to go through the gender conforming applicant’s resume and asked questions about it on the spot – in stark contrast to the transgender tester who, despite having an objectively similar (in fact, a slightly
more impressive resume by design) than the transgender applicant, was summarily told there was no job.

The complete difference in response by the same employer (telling one that there is an opening and the other there is not) to two similarly qualified applicants, who arrived at the store to inquire about positions close in time to one another, is telling. Even if the employer does not behave towards the transgender applicant in ways that signal job discrimination outright, such as inappropriate comments, the design of matched pair testing nonetheless reveals the employer’s true reaction to the one variable of an applicant’s gender identity.
SURVEY RESULTS

We surveyed two distinct groups: the first consisting of 250 individuals who identified as lesbian, gay, bisexual, transgender, queer, or questioning (the LGBTQ respondents); and the second comprising 100 individuals who identified as heterosexual and conforming to traditional gender stereotypes (the non-LGBTQ respondents). All respondents from both groups were residents of Queens, the majority from Jackson Heights, where one of Make the Road New York’s community centers is located, and nearby neighborhoods – areas that are predominantly working-class, immigrant, and minority. As a result, the great majority of respondents from both the LGBTQ (76.3% Latino/a and 14.8% Black) and non-LGBTQ (93.9% Latino/a and 1% Black) survey groups were people of color, in particular Latino/a. Among the LGBTQ respondents, 50.6% identified themselves as lesbian or gay and 59.4%, or 148 individuals, as transgender or gender non-conforming.

Transgender and Gender Non-Conforming Individuals Face the Highest Rates of Unemployment and the Highest Number of Job Seekers

In terms of current employment situation, our survey revealed a stark divide between the non-LGBTQ respondents and their LGBTQ, particularly transgender and gender non-conforming, counterparts. While over two thirds of heterosexual, gender conforming and over half of all LGBTQ respondents reported being employed, only 46% of transgender and gender non-conforming individuals had jobs and 43% were looking for employment. These findings underscore how particularly vulnerable transgender and gender non-conforming individuals remain: discriminatory practices are keeping them out of the job market and perpetuating their economic marginalization in disproportionate numbers.
VICTORIA, TRANSGENDER LATINA WOMAN FROM QUEENS

“I noticed a help wanted ad in the newspaper, which stated a person was needed to work in a supermarket, and I went that same day to apply. I asked to speak with the manager and as soon as he saw me he immediately said that they did not have a job for me and that the position was already filled. I was very sad when I left the supermarket. Fortunately, I was with my friend that day and about 5 minutes later she entered the supermarket to apply for the same job. The manager told her the job was hers and he gave her an application to fill out and his business card. He then told her that she could start that same day. I then realized that discrimination against the transgender community exists. I do not have a job right now and I have tried to apply for jobs in other places but they always tell me that the position is filled or that they will call me. It is extremely difficult for transgender people to find jobs because we are always rejected from jobs after we apply.”
MARIANA, TRANSGENDER LATINA WOMAN FROM JACKSON HEIGHTS, QUEENS

“I was walking on Junction Boulevard and I saw a sign that said ‘Help Wanted’ in the window of a local clothing store so I went to my house to create my resume and cover letter. The next day, I returned to the store and asked to speak with the manager. I waited for approximately 10 minutes and when the manager arrived he greeted me but he kept staring at me up and down. I said hello and I told him that I was there because I was interested in the job. He said sorry but the job had already been filled. He explained that about half an hour before another person came in to apply for the job and the person was offered the job. He said that the person starts working tomorrow. I then asked why the sign was still in the front window if the position had already been filled. He said that they had forgotten to remove the sign. I said good bye and left the store. When I arrived home my brother asked me what was wrong and I explained to him what happened. He told me how bad he felt for me and then he went straight to the same store where I had applied for the job. He spoke to the same person I had spoken to. My brother said he was interested in the job and the manager told him the position was still available. The manager said if he was interested in the job he could start that same day. After this experience, I feel extremely bad because I know that my appearance, sexuality, and gender expression are the only reasons that I experience this type of discrimination against me. As a member of the LGBTQ community, I feel discriminated by society when I walk down the streets of my neighborhood and when I go to apply for good jobs.”
TRANSGENDER AND GENDER NON-CONFORMING PEOPLE ARE MUCH MORE LIKELY TO BE DENIED A JOB, REFUSED A PROMOTION, FIRED, OR FORCED TO QUIT BECAUSE OF DISCRIMINATION

Forty percent of transgender and gender non-conforming respondents indicated that they had experienced discrimination in being considered for jobs or promotions based on their gender identity or sexual orientation. Slightly more than one quarter of LGBTQ respondents (27.3%) as a whole reported similar discrimination, reiterating just how much more of an endemic problem such discrimination remains for transgender and gender non-conforming individuals specifically.

The numbers indicate how pervasive, discriminatory practices continue unjustly to drive transgender workers out of their jobs (either through direct termination or because they are forced out by hostile environments) at rates that exceed similar unlawful treatment of lesbians, gays, and bisexuals. For example, 32% of transgender and gender non-conforming respondents reported having been fired from at least one job based on their actual or perceived gender identity and expression. Disturbingly, an even higher number, 44% reported that they faced such serious discrimination on the job because of their gender identity and expression that they were forced to quit.
JOHANNA VASQUEZ, TRANSGENDER LATINA WOMAN FROM JACKSON HEIGHTS, QUEENS

“In 2003, I worked at a local pizzeria in Brooklyn for 6 months. During that time I decided to begin my transformation from a gay man to a transgender woman. As soon as I started taking hormones my body began to change. My face, voice, and chest changed. After a few months, I noticed that the manager and owner changed a lot with me and treated me differently. I also discovered that they paid me less because I was a gay person. A few years later, I went to work and the manager told me that he was sorry but he no longer had a job for me. I asked him why and he told because he doesn’t like fags and he continued to use homophobic words when referring to me. He gave me my last paycheck. I left the pizzeria very sad and angry because I could not do anything even though they discriminated against me and treated me very badly. After a few days I tried to apply for jobs at other places but they always told me to come back another day, they will call me, or the position was filled. I do not have a job right now because although my resume is excellent and I have a lot of experience, I am never offered the job.”
LEONARDO CARR, GAY LATINO MAN

“Two years ago, I worked in an Italian Restaurant [in Manhattan]. I worked there for 5 months. My co-workers were nice to me but the owner of the restaurant always gave me dirty looks. Every time he went to the restaurant, he insulted me and told me that I was a disgusting and that he disliked how I dressed. He also poked fun at my poorly pronounced English. He told the manager that I should change the way I dressed and that if I didn’t he was going to fire me. He also told him that he didn’t like that I wore lip gloss and that it gave people a bad impression of the restaurant. One day, when the owner arrived at the restaurant and...told [the manager] that the only thing I was good for was cleaning the bathrooms. After that, the manager sent me to go clean the bathrooms. I quit that day.”
TRANSGENDER AND GENDER NON-CONFORMING INDIVIDUALS CONTINUE TO FACE VARIOUS FORMS OF SERIOUS HARASSMENT AND DISCRIMINATION AT THE WORKPLACE

Fifty-three percent of all transgender and gender non-conforming respondents reported experiencing some form of discrimination on the job. Our survey highlighted the kinds of hostile conditions and abusive treatment that leads to so many transgender workers to feel they have no choice but to quit, including: experiencing invasive questions about bodies and healthcare; being addressed by the pronoun that does not match gender identity; being told to use a restroom that does not conform to gender identity; required to wear clothing that does not conform to gender identity; and even being paid less because of gender identity.
MARCOS PALACIOS, TRANSGENDER LATINA WOMAN FROM QUEENS

“Some time ago, I suffered discrimination and harassment at work. I was working the night shift in a kitchen. One day, there was a large party so I had to stay late at work. When the party finished and I was changing, the chef, already a bit drunk, tried to force me to hug and kiss him. I told him not to but he said not only could he do it but he would do it. I told him that I was going to tell the manager. He said, ‘Do whatever you want but he’s not going to believe you immigrant.’ I slapped him and ran out of that place. The next day, I was changing and about to start working when the manager asked me what happened yesterday...I explained to him what happened but he didn’t believe me. He told me that this can’t happen in his restaurant and that I was fired. I told him that it wasn’t my fault and he said that...it would be very difficult to find someone to replace [the chef]. Due to fear and my immigrant status I did not do anything but I do feel that as people we deserve respect.”

JOEL MARTINEZ, TRANSGENDER LATINO MAN FROM QUEENS

“About a year ago, I suffered employment discrimination while working at a restaurant...The manager treated me very badly. He called me Mexicano and he laughed at me as he called me she when my preferred gender pronoun is he. Also, he did not pay me for the extra hours I worked and I told him that he should pay me for those hours. He said, ‘You don’t have rights!’ I could not endure their taunts any longer so I decided to quit.”
Despite changes to New York City law to prohibit employment discrimination against transgender and gender non-conforming individuals, few employees are currently reporting violations.

The survey findings suggest that, although there is a generally high level of awareness of legal protections in place in New York against workplace discrimination on the basis of sexual orientation and gender expression/identity (over three quarters of the transgender/gender non-conforming subgroup reported that they knew of such laws), very few workers are coming forward to assert their rights despite the high prevalence of abuse. Less than one in five of the transgender/gender non-conforming respondents reported that they had reported discriminatory behavior to their supervisors at work, and even fewer – less than one in ten – made any kind of official complaint with a government body or investigator.

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<th>PERCENTAGE OF RESPONDENTS REPORTING AWARENESS OF LEGAL PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION</th>
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RECOMMENDATIONS

Our findings reveal that even though transgender and gender non-conforming New Yorkers are supposed to be protected under NYC Human Rights law, this is not the reality for many of them, specifically if they are Latino/a or African American. This is why we recommend:

Federal Legislation
• We urge federal legislators to pass the transgender inclusive ENDA (the Employment Non Discrimination Act-Polis HR 1755/Merkly S815) which would prohibit employment discrimination nation wide based on sexual orientation and gender identity/expression. ENDA was recently passed out of committee in the Senate in July 2013. We urge the Senate and the Congress to take immediate action.

State Legislation
• We urge the NYS Legislature to Pass GENDA (the Gender Expression non Discrimination Act- S.195A Squadron/A.4226A Gottfried) immediately in the next legislative session. GENDA passed in the Assembly in June 2013. We urge the NYS Senate to Act immediately on this legislation

• We also urge the NYS Legislature to pass the Whistleblower Protection Bill (S.3862 Klein/A.5696 Benedetto), which would protect workers who are reporting discrimination based on sexual orientation, gender identity and or gender expression from retaliation by their employer. We urge both the Assembly and the Senate to take immediate action on this legislation

City Legislation
• New York City should offer comprehensive training about discrimination based on gender identity and expression to all students in the public school system. In the long run, education about homophobia and trans phobia is the only way to address the root causes of discrimination. The Dignity in All Schools Act (DASA), passed by the City Council in 2005 but never implemented, requires the Department of Education to address bullying based on sexual orientation and gender identity. Mayor Michael Bloomberg vetoed it twice, calling it “silly law, that doesn’t make sense” The new NYC mayor should sign NYC DASA into law and implement it immediately.
Improve Corporate Policies and Practices
• All employers in New York City should adopt policies and practices which explicitly address gender identity/gender expression discrimination, including training for employees, notice to job applicants of their rights, and protection from on-the-job harassment.

Expand Legal Protections and Their Enforcement
• Make enforcement of City anti-discrimination laws covering transgender and gender non conforming individuals a high priority use of enforcement resources. Using methods such as matched pair testing, community organizations and government agencies such as the Commission on Human Rights should proactively identify gender identity and expression discrimination in various sectors of the New York City economy and by prominent employers. Evidence collected through techniques such as matched pair testing should be used to enforce the law in target industries and workplaces where problems are documented.

Dissemination of Information about Workers’ Rights
• The Commission on Human Rights should increase distribution of information on workplace rights to transgender workers and employers, especially in low-wage industries Educational materials should be provided in plain language and should also be made available in the most commonly spoken languages in New York City. Additionally, outreach should be conducted in the community to break the barriers that often isolate the most vulnerable community members and that prevent them from seeking help.

Further Research
• Using methods such as matched pair testing, community organizations, academic institutions and government agencies such as the Commission on Human Rights should conduct ongoing research to identify gender identity discrimination in various sectors of the New York City economy. In particular, research is needed to investigate, document, and publicize employment discrimination in low-wage industries and its impact on low-income transgender and gender non conforming people and transgender and gender non conforming people of color.
APPENDIX A: MODEL POLICIES FOR EMPLOYERS*

HIRING PROCESS
• Include non-discrimination statements in job listings which mention gender-identity and expression
• Change all forms related to the hiring process, to be inclusive of transgender and gender non-conforming applicants. Two good approaches to forms that ask people to identify their gender look like this:
  a) Please check ALL that apply:
      Female   Male   Transgender   Other
  b) Gender Identity: _______

TRAINING OF ALL EMPLOYEES
• Incorporate education about gender identity and gender expression in diversity and Equal Employment Opportunity compliance training programs. This training should also address courteous, respectful treatment of transgender individuals whether they are encountered as employees, customers, or in any other situation.

ON-THE-JOB PRACTICES AND POLICIES
• Prohibit discrimination against transgender employees by including—gender identity or expression or—gender identity among the list of protected categories in your firm-wide non-discrimination and anti-harassment policies.
• Ensure that records which contain the name and gender of an employee in personnel materials include the name and gender identity indicated by the employee. This should include all personnel and administrative records, including internal and external personnel directories, e-mail address and business cards. If an employee’s legal name is also reflected in company records, information about an employee’s transgender identity should remain confidential.
• Provide gender-neutral restrooms.
• Modify dress codes to avoid gender stereotypes. Transgender and gender non-conforming employees should be allowed to dress consistently in accordance with their full-time gender presentation.
• Provide transgender inclusive and transition inclusive health care to workers who identify as transgender and gender non-conforming

*Adapted from recommendations in Transgender Inclusion in the Workplace, 2nd Edition by Samir Luther, Human Rights Campaign Foundation and created with input from Transgender and Gender Non-Conforming members of Make the Road New York