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University of Baltimore School of Law Center on Applied Feminism's 8th Annual Feminist Legal Theory Conference on Applied Feminism and Work: Keynote Speaker Chai Feldblum, Commissioner, Equal Employment Opportunity Commission

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**UNIVERSITY OF BALTIMORE SCHOOL OF LAW CENTER
ON APPLIED FEMINISM'S 8TH ANNUAL FEMINIST LEGAL
THEORY CONFERENCE ON APPLIED FEMINISM AND
WORK: KEYNOTE SPEAKER CHAI FELDBLUM,
COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

Below is a transcript of the keynote speech from the University of Baltimore School of Law Center on Applied Feminism 8th Annual Feminist Legal Conference: Applied Feminism and Work. Chai Feldblum, Commissioner of the Equal Employment Opportunity Commission (EEOC), gave the keynote speech on Friday, March 6, 2015.

CHAI FELDBLUM*:

I'm thrilled to be here. I can't say how cool it is to be at a law school that has a Center on Applied Feminism. How many law schools have that? And given, as you heard, I'm a commissioner at the Equal Employment Opportunity Commission that cares about having fair and just work, to be at a conference on applied feminism and work.

This is also an important year for the Commission itself. Fifty years ago, in July, our Commission opened its doors for the first time and started to help implement Title VII of the Civil Rights Act of 1964. That Title of the law prohibited employers from discriminating on a range of characteristics, including sex.

So, what I want to talk about now, is gender equity in employment, and I'm hoping that it will be a useful way of kicking off what looks like a really incredible agenda for the day. So here's the framework I want to use in talking about this. I believe that to achieve any social justice outcome one needs three variables to converge: law, policies and practice, and social norms. Now by law, I mean a law that's passed by a legislature, the regulations and guidance that agencies might issue to implement that law, and then court decisions that might be handed down interpreting that statute, regulations, guidance. Lots of words. By policies and practice, I mean how and whether

* This address was transcribed by University of Baltimore Law Review staff editors.

those words of the law have actually been absorbed into the sinews of an organization. Are the requirements of the law, whatever the law is, actually reflected in the daily practices of whatever organization is governed by that law? Or are they still just words? And by social norms, I mean what the majority of people feel and think about the social justice outcome trying to be achieved by these laws and policies. Because until a tipping point of a majority of people in a country governed by those laws actually believe that the social outcome being achieved, being sought by those laws is a good thing, that social justice outcome will not be fully realized. How much in the hearts and minds of the people in a country is that social outcome seen as a good thing?

Now, by the way, these three elements are interrelated. There's like a dynamic dance that happens between them. So assume that the social justice outcome being sought, to be achieved, is equal treatment in the workplace. Well, we often need a law in place in order to get employers to put policies and practice that will prohibit the discrimination, right? If that law is absorbed into the sinews of that employment setup, you'll get often those policies and practice. Once you have those policies and practices in place, that can affect the way that co-workers think about that goal. Should there be equal rights for African Americans, for women, for people of particular religious beliefs? And, that can then affect the hearts and minds of those people. And then if that happens, that can then make the law more effective, because employers then find it easier to both understand and comply with the law, which then again has the cycle to changing social norms.

So let's think about this framework in terms of the anti-discrimination provision of Title VII of the Civil Rights Act of 1964 as it applies to sex discrimination because, of course, that's the first variable, law; the law that's passed by Congress. Now, as many of you may know, Title VII of the Civil Rights Act, when it was first introduced, did not include sex among the various characteristics. It's the reason why, in other titles of the Civil Rights Act, sex is not included. So the title of the Civil Rights Act that applies to public accommodations, sex isn't there. The title that applies to entities that get federal funds, sex isn't there. It's there in the employment section. Now the myth has arisen that Congress had never dealt with, had never even thought about, the issue of sex discrimination until sex was suddenly added to Title VII on the floor of the House by a congressman who opposed the Civil Rights Act and offered that amendment solely to kill the bill, the poison pill. Now there are some

elements of truth to this story. There always are some elements for any myth to arise. But mostly it's wrong.

The reality is that Congress had been debating the issue of sex discrimination, on and off, for over forty years at that point. Now, it had not been having that debate in the context of an employment law that would govern private employers. It had been having that debate in the context of a proposed Equal Rights Amendment (ERA) to the federal Constitution. The National Women's Party had been pushing for an ERA since the 1920's. By the 1940's, the language of the proposed Amendment read as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." So that Amendment, if adopted, would have meant there could be no federal or state law that denied or abridged equality of rights on account of sex.

Now the ERA, as you all know, was not passed by Congress, and was not sent to the states until many years later, and which ultimately ratification by the states failed. Now the reason for non-passage of the ERA was that, in 1950, various women's groups and unions prevailed over Congress to add a second sentence to the ERA. This second sentence read as follows: "The provisions of this Article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex." So the first sentence of the Amendment said, no law may take sex into account, and the second sentence said, yes law can take sex into account if they confer rights, benefits, or exemptions just to women.

So what was going on here? A combination of practical politics and social norms. As a matter of social norms, the assumption was that women were really different than men because their real jobs were to be wives and mothers, not to be workers within labor market. They might be forced into the labor market for reasons like—hello—make money. But that wasn't their real job. And as a practical political matter, unions and women's groups had successfully gotten labor laws enacted in various states, and most importantly, upheld against constitutional challenge, by having these protective labor laws protect only women, on the grounds that women were truly different than men. So, for example, they had gotten laws enacted that put a limit on the maximum number of hours that women could work, or provided premium overtime pay just for women, because the real job of women was to be wives and mothers, and these laws would help them do that by limiting their hours. These groups did not want an ERA to pass that would invalidate those laws. The National Women's Party had no interest in an ERA that would add the second sentence. So it passed.

Thirteen years later, 1963, Title VII is introduced without a sex discrimination prohibition. The National Women's Party saw this as an opportunity; let's get a sex discrimination prohibition into this law that's moving through, into this bill that's moving through Congress. The National's Women's Party specifically asked Congressman Howard Smith, a conservative Southern congressman who opposed the Civil Rights Act generally, to offer the amendment of adding sex to Title VII because Congressman Smith had been the person who had been introducing the ERA into Congress, every congress, for that past number of decades. Now, as a political matter, of course they assumed he might bring along votes of other members of Congress who, like Smith, opposed the Civil Rights Act. So many of those who voted would have assumed it to be a poison pill. But at least a number of members voted to add sex because they thought it was the right thing to do. In fact, eleven out of the twelve then women members of Congress—okay, think about that, twelve women members of Congress in 1963—eleven out of those twelve voted to add sex to the law, to the bill. And the sex provision stayed in the bill through various Senate machinations, which is interesting in its own right.

But here's the really interesting thing. The words became part of the law. But because social norms were not yet at a place where women and men were actually considered to be the same for purposes of employment, the EEOC, the agency created by Title VII to implement the law and subsequently the parts, found it hard to accept the words of Title VII with regard to sex at face value. It's almost like they couldn't really believe that employers could not take sex into account. For example, in September 1965, just a few months after the EEOC opened its doors in June 1965, the Commission announced its position that sex segregated advertisements were not illegal under Title VII. Now the general practice at that time was to have male and female columns in the "Help Wanted" section of the newspapers. There used to be things called newspapers, and there were a list of jobs under a "Man Wanted" heading and a "Women Wanted" heading. The EEOC decided that this practice did not violate Title VII because the personal inclinations of men and women were such that many job categories were primarily of interest only to men or to women. So segregating ads by sex was not discrimination. They were simply helping applicants find what they were looking for anyway. Now obviously, the EEOC explained, if a woman applied for a job in the Men Wanted column or if a man applied for a job in the Women Wanted column, which just happened all the time, the

law prohibited an employer from not hiring that person because of that person's sex. But the sex-segregated ads themselves were fine.

Now this decision by the EEOC so outraged various women's rights advocates, including the ones who had been afraid to have this in the law in the first place because they thought it would poison, you know, bring the law down, were furious at the EEOC's decision. That decision actually became the catalyst for the creation of the National Organization for Women (NOW). Now if you go onto NOW's website and look under History, you will see they describe this decision by the EEOC as the reason for their founding. One of their first victories was to get the EEOC to change its position on sex-segregated ads. After this inauspicious start, the EEOC actually emerged as a real leader in the law of sex discrimination and the problem in actually accepting the words at face value moved to the courts.

So how did the EEOC become a leader? Remember I said in terms of the law, you've got the legislation that passed, but that's just the first step. The next is what an agency does through its various tools. Well, the Agency issued Commission decisions because they were supposed to investigate charges and decide if there was reasonable cause to believe there was discrimination. So they issued decisions interpreting the law. "Yes, we think there is reasonable cause to think discrimination exists." The Agency issued regulations and guidance explaining what sex discrimination means. In 1972, the Agency finally got authority to file litigation in court in its own name and, in those cases, the EEOC also set forth its view of the law.

So here are some radical things the EEOC said the sex discrimination provision prohibited. It's sex discrimination if employers won't hire married women, but they will hire married men. It's sex discrimination if an employer won't hire women with children under a certain age, but they do hire men with children under a certain age. Now, these propositions may seem pretty obvious now, but they were very contested at the time. For example, with regard to employers' rule that they would not hire women with children below a certain age, but would hire men regardless of the age of their children, the Fifth Circuit held that that was not sex discrimination. It's not sex discrimination to distinguish between male and female applicants in that way. But why? Well, as the panel explained, they could not imagine that members of Congress could have been so irrational to believe that there was no difference between men and women with small children. So whatever it was, it was not sex discrimination, because then it would have to be prohibited, and there's no way Congress would have prohibited that. Interesting

legal reasoning. The Supreme Court reversed that particular ruling of the Fifth Circuit. It was sort of hard to say that it wasn't sex discrimination. But, you know, the law also committed employers to restrict certain jobs to one sex or another if there was a bona fide occupational qualification (BFOQ) for that job to be a person of a certain sex. It's supposed to be a very narrow exception. But the Court in that same case, after reversing the Fifth Circuit, said that it could be a BFOQ that women not have young children, because obviously they wouldn't be able to commit to the job in the same way. So that was an issue for the lower courts to sort out.

Not all Commission decisions on the meaning of sex discrimination were that positive. For example, in the 1970's, transgender employees and gay employees brought charges to the EEOC claiming sex discrimination when they experienced discrimination. The Commission concluded there was no coverage for these charges. Whatever it was, it wasn't sex discrimination.

But the EEOC was a leader in arguing that sex stereotyping was a violation of the law. That is, assumptions about how men and women would act on the job, or should act on the job, that could not be a legitimate basis for employment decisions. The EEOC said that pretty early on. In 1989, twenty-five years after the passage of Title VII, the Supreme Court finally endorsed that gender stereotyping theory in a case called *Price Waterhouse v. Hopkins*. The Court concluded if an employer acted on the basis of a gender stereotype, that a woman shouldn't be so aggressive or macho in the workplace, that was sex discrimination because, as the Supreme Court said in *Price Waterhouse*, "gender must be irrelevant to employment decisions." Now that might seem like a simple sentence: "gender must be irrelevant to employment decisions." But it was actually a momentous statement for the Supreme Court to make because, for almost two decades, courts had been twisting themselves into pretzels in order to avoid that plain import of the law that sex may not be taken into account. That's because social norms were such that not taking gender into account seemed improbable and, indeed, impossible.

So where are we now? Is it all over? Have sex and gender really become irrelevant in the workplace? News flash: No! In fact, it's sort of mind-blowing how much it's not over. We are so not where we need to be in terms of gender equity and the workplace. So I want to highlight a few areas where we are not where we should be and offer some ideas for moving forward. All of these are issues that the EEOC now is quite actively engaged with.

First, sexual harassment. The amount of sexual harassment that is still going on in our work places is horrific, and we see this particularly in low-wage jobs with teenagers or immigrant women, and we see this is non-traditional male-dominated jobs. I have to say, when I came to the EEOC and I started seeing these cases come across my desk, it was mind-blowing to me how much sexual harassment still exists. So I believe we need a creative multi-pronged strategic campaign to stop this epidemic. Law is a critical variable in this campaign. It can make employers take notice. We can litigate when there is significant sexual harassment. We can litigate when women are precluded from male-dominated jobs and then experience sexual harassment. We can litigate, but law on its own will never be enough. To eradicate sexual harassment, governments must work in partnership with businesses and advocacy groups to develop a proactive and creative strategy that will ultimately change the social norm so every man, every woman, and every workplace understands that sexual harassment is not okay.

By the way, I'm leaving this conference right now after this to go to the second planning meeting between my office and Office of Commissioner [Victoria A.] Lipnic, one of the Republican commissioners on the Commission with whom I have a very good working bi-partisan relationship—sort of also not the norm in Washington, D.C.—for a second planning meeting for the Select Task Force on the Study of Harassment in the Workplace that we are co-chairing. This is a task force that I've chaired. Jenny Yang announced at a hearing we held about a month or so ago on harassment in the workplace, and I want this task force to be informed, not just by lawyers in practical practice, but also legal academics, also social scientists. So that we have the benefit of, for example, elements of feminist theory applied to practice and getting something new and creative done.

Second issue: accommodations for pregnant workers. There are pregnant workers across the country today in workplaces that need accommodations in order to stay on the job during the course of their pregnancy. Particularly women who are working in manual physically demanding jobs, which are often lower skilled, lower paid, and they need some modified job duties, in lifting requirements, for example, while they're on the job. Now the policy of many employers today is to give male or female employees who have been injured on the job these modifications—that's because they want these folks to come back from worker's compensation so their premiums on worker's comp don't go up—or who will give male or female employees with a disability covered under the ADA an

accommodation—hello, because they have to. But their policy is not to give those same accommodations to pregnant workers. So, for example, Peggy Young, who worked at UPS, she needed to get an accommodation about not having to lift heavy packages, and she had co-workers who were willing to help her. She did a type of job that mostly she was not lifting heavy packages, but she needed that; she didn't get it. She had to leave the job; lost her health insurance. Now one would think, back to this first variable of law, that the law should have been pretty clear with regards to the rights of pregnant workers in these situations. As I noted, one of the radical decisions the Commission issued early on was that if you discriminated against a woman because she was pregnant, that was a form of sex discrimination. Well, when it got to the third actor, the courts, the Supreme Court disagreed and held pregnancy discrimination was not a form of sex discrimination because there are a lot of non-pregnant women in the workplace. Clearly it couldn't be a discrimination against women. Well in response, again this dynamic circle continuing, Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), and that law amended Title VII to say: (1) sex included pregnancy and (2) a second sentence in the law, a pregnant employee must be treated the same as other employees similar in their ability or inability to work. A year later, the Agency issues questions and answers, guidance on PDA, basically repeats that same sense.

Well as social norms changed, women began to move more into traditionally male-dominated jobs that actually included more physical labor. Now pregnant women needed equal accommodations to stay on the job, as opposed to equal access to leave, which is part of what had generated the pregnancy cases. But as these challenges for equal accommodations came to the courts, the courts consistently interpreted the PDA in a way that did not require employers to make the same accommodations, on the grounds that these other workers who were getting accommodations were really not comparable to pregnant workers. Now, let me tell you, the EEOC held a hearing on this issue in February 2012. It was the first time I really read those cases, heard this interpretation of the PDA. You know, I taught statutory interpretation for many years at Georgetown Law. I would have given those courts like a B-minus in their statutory interpretation, and that's only because B-minuses are sort of the lowest grade. So I thought, "This just can't be right."

Within the EEOC, we started working towards issuing guidance, because again, that's one of our tools. This past June we issued guidance that said the way we, the Agency, interpret the words of the PDA is that you do have to provide these equal accommodations.

We are very soon going to hear from the Supreme Court because Peggy Young's case is in front of the Supreme Court right now, so we will hear whether the Supreme Court agrees with the EEOC. Now obviously, I hope they will. But regardless, having sat through the oral arguments in Peggy Young's case, it was clear to me that the EEOC had at least shifted the legal conversation, because every other court, and by that point, there were five circuit courts that had ruled that the PDA did not offer this protection. The fact that we had intervened and issued the guidance at least meant the government was arguing for this position. So at least it shifted the legal conversation.

By the way, here's the power of media and social pressure. In the brief that UPS filed with the court defending their actions, it noted that it had changed its policy, and it was now going to offer these accommodations to their pregnant workers. Now, mind you, they said that it wasn't illegal that they didn't before, but, by the way, we're going to do it now.

Now, in the interest of time, I'm going to skip my comments on pay equity, but I will just say that it also requires a multi-prong strategy, because while some of the wage disparity is because of straight-out discrimination against women, a fair amount of it is because of the gender job segregation that women and men choose to do. While law can be one piece, we need a multi-prong strategic issue.

But I want to conclude with a discussion of whether discrimination based on sexual orientation and gender identity is sex discrimination and, therefore, already prohibited under the law we have, Title VII. Such that, while it would be great if Congress saw the light and passed ENDA, we might be getting a protection for gay people and transgender people under the law we currently have. So this, by the way, is not an issue that requires a proactive multi-pronged strategy to change social norms. Interestingly, this is a legal understanding where the changes in cultural norms over the past decades have now allowed us to actually interpret the words of the law as they should be interpreted.

As I mentioned, one case that was important in the development of the law was *Price Waterhouse* that recognized the idea of gender stereotyping as a form of sex discrimination. Another important case was *Oncale v. Sundowner Offshore Services, Inc.*, in 1998, about ten years after *Price Waterhouse*, where the Supreme Court held in an unanimous opinion same-sex sexual harassment was prohibited under the law just like opposite sex sexual harassment. Justice Scalia, writing for the Court, said the 1964 Congress was probably

not thinking about same-sex sexual harassment, but as he noted, what ultimately governs are the words of the statute, not the particular intent of Congress.

So after *Price Waterhouse* and *Oncale*, transgender folks starting bringing claims again in court saying that an employer discriminated against based on the fact that they had transitioned from being a man, if that's what they were designated at birth as, to a woman, which fit their internal gender identity more. That was a form of sex discrimination because the employer was acting on the stereotype that men should stay men all through their lives; women should stay women. They started winning in the courts, Sixth Circuit first, then the Eleventh Circuit.

Then in April 2012, we at the EEOC issued a decision in the federal sector. In the private sector, we had the right to investigate and ultimately litigate. In the federal sector, that is, applicants for federal employment, federal employees, if they have the charge of discrimination, they can ultimately come to us, and we issue a decision. In April 2012, in the case of *Macy v. Department of Justice*, we stated discrimination based on transgender status is sex discrimination. Now, in one way, we were just saying what courts were saying because we noted the gender stereotyping theory. But one of the ways, that I think, we at the Agency have moved the law forward in this area, is we went back to *Price Waterhouse*, and we highlighted the principle on which *Price Waterhouse* was based. That is, gender may not be taken into account. That's the core principle.

It's not that gender stereotyping is some free-floating cause of action. Gender stereotyping is evidence that gender has been taken into account. But if you can prove directly that gender has been taken into account, you don't even have to explain the cause of it. So if someone was going to hire a person when that person was a man and then fires the person because it turns out the person is now a female, that is taking gender into account. What we used to call in my office "gender on the brain," gender on the brain for whatever reason.

Now the same analysis is starting to happen with regard to sexual orientation. After *Price Waterhouse*, the courts and the EEOC began to apply what I would call a limited gender stereotyping theory that protected some gay men and lesbians. These courts ruled that if gay men or lesbians violated gender stereotypes with regard to how they dressed or walked or otherwise presented themselves and if it could also point to explicit epithets based on that perceived gender non-conformity ("Oh, you walk like a girl," "You dress like a man"), those gay men and lesbians could bring a claim under Title VII.

As I used to explain, that legal reasoning would not protect a lesbian who looked like me. I don't violate gender assumptions about how women should look or present themselves. Now I do of course violate the most basic of gender assumptions, which is that women should be sexually attracted to men, should marry men. But you wouldn't know that I violate that basic gender assumption unless I came out to you as a lesbian. It's amazing to me the number of times when I speak in front of management audiences, that even though in my bio it says that I'm the first lesbian Commissioner at the EEOC that that just doesn't get mentioned. I mean clearly, I put it in so I don't have a problem. I'm pretty sure it's on my website. It's in my Twitter profile and you only have X number of words on Twitter. [] So I often say to those management attorneys, "So how many of you thought when I walked up here, 'Oh my goodness, that must be the first lesbian Commissioner of the EEOC?'"

Of course, if I was your employee and I told you I was a lesbian and then I got fired because I was a lesbian, it would have been based on the stereotype that women should not be sexually attracted to women. And, over the past four years, even though it hasn't gotten as much notice, the Commission has been issuing decisions protecting gay applicants to the federal government employees on the basis of this, what I call, robust gender-typing theory. In March 2014, a district court in D.C. [*Terveer v. Billington*] adopted this gender-stereotyping theory.

But the thing is the same result can be achieved by just applying the plain words of the statute. If an employer takes an adverse action against a male applicant employee because that person is dating a man, it would not take that same adverse employment action against that same male applicant employee if that man was dating a woman. Clearly, sex has been taken into account—"Gender on the brain."

And in September 2014, a district court in Washington, in a case called *Hall v. BNSF Railway*, adopted that plain language theory. In that case, a male employee had legally married his husband in Washington State, applied for health insurance coverage, was denied it, he brought a claim under Title VII alleging sex discrimination, and the employer moved for summary judgment, citing those same sentences that appear in lots of decisions—sexual orientation is not covered under Title VII—hence, no case. The district court denied summary judgment, saying [upon] reading this complaint, there's no mention of sexual orientation. Plaintiff is arguing that, if he had been a woman married to a man, he would have gotten the health insurance for his spouse, but because he's a man married to a man, he didn't get the health insurance. That's sex discrimination.

So again, an agency moving in a certain way, courts now, at least one, and again they are going against a whole line of precedent. But it starts with changing the social norm, so that when gay men and lesbians come to the EEOC, they get their charges investigated. Now interestingly, since we've done this, we've had something like 900 charges, almost 1,000 charges. I don't think a lot of those charges are from gay men and lesbians who actually know that we've changed our position. I think that what's happening is those folks would always come to the EEOC, and they were just sent away, and no charge was filed because our investigators said we have no jurisdiction. Now those same people are coming, and their charges are getting investigated, and they're getting help. They're getting help, often through settlement of those charges before they ever get to court. []

Fifty years ago, Congress passed Title VII of the Civil Rights Act of 1964 and set us off on a journey in which sex would not be taken into account in the workplace, just like race, color, national origin, and religion were not to be taken into account. This journey has not been a simple one, and as the rest of this [symposium] will indicate, it has not over yet. But over time, the law has increasingly been understood to cover many forms of discrimination that the 1964 Congress could not have even anticipated.

It has generated policies and practice that have advanced gender equity in individual workplaces across the country. The law has both shaped and been shaped by social norms. We all need to remain part of this great journey, and to do our bit in bringing complete equity to our workplaces.