

HALFWAY OUT: WHY AMERICA'S SEXUAL MINORITIES DESERVE BETTER THAN THE EMPLOYMENT NON-DISCRIMINATION ACT

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ABSTRACT

Sexual minorities lack protection from employment discrimination under U.S. federal law, but approximately half of the states have chosen to protect lesbians, gay men, bisexuals, and (less frequently) the transgendered. Almost all of these states have chosen the simplest method of doing so, which is to add the phrase "sexual orientation" to their preexisting sets of prohibited types of employment discrimination. At the federal level, a broad coalition is encouraging passage of the Employment Non-Discrimination Act. In every instance where the text of this bill differs from the Civil Rights Act it is to the detriment of sexual minorities. For example, the Employment Non-Discrimination Act would make it more difficult for employers to fire same-sex harassers than opposite-sex harassers. Truer equality of employment opportunity would result from a legislative strategy that more closely mirrored the one chosen by those states that have already chosen to move forward to address this issue.

PLACE-BOUND WORKPLACE RIGHTS

The city of Philadelphia has suburbs in Pennsylvania, New Jersey, and Delaware. Suppose an employer in that region found out that an employee was a member of the lesbian, gay, bisexual, and transgender (LGBT) community and fired the employee for that reason. In Philadelphia and New Jersey, the firing would violate state or city law. In Delaware, firing would be illegal unless the employee was transgendered. In the Pennsylvania suburbs of Philadelphia, no law would be

broken. But human rights are not supposed to be place-dependent, which is why the United Nations established the Universal Declaration of Human Rights (United Nations, 1948). Recognizing the importance of the workplace in modern life, Section 1 of Article 23 of the Universal Declaration specifies that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.” Section 2 continues, “Everyone, without any discrimination, has the right to equal pay for equal work.” The use of the word “everyone” 30 times in the Universal Declaration and as the choice of “universal” as the first word of the document’s title indicate that these rights are supposed to be enjoyed wherever one works.

This article is about the struggle to extend employment discrimination protection to sexual minorities throughout the United States so that their rights do not depend on the location of their workplaces. The Employment Non-Discrimination Act (ENDA) has been proposed, and it is enthusiastically supported by a broad coalition, whose members allege that it will “ensure workplace equality” (American Civil Liberties Union, 2012) and that it “provides gay and lesbian workers with the same employment protection enjoyed by all other Americans” (Log Cabin Republicans, 2012). This article will demonstrate that ENDA is inferior in important ways to state and federal antidiscrimination legislation, so that if passed it would elevate lesbian, gay, bisexual, and transgender (LGBT) employees only to second-class status, and that a much simpler solution would more truly give equal rights to this group. The article is organized as follows. First, approaches to protecting sexual minorities at the state level are surveyed. Then, ENDA is compared to similar federal legislation in order to show that every difference between it and other laws serves to weaken this group’s rights. Finally, suggestions will be offered that would more closely equalize the rights of LGBT employees and their heterosexual coworkers.

STATES AND THEIR PROTECTIONS

Roughly half of the states protect lesbians, gay men, and bisexuals from employment discrimination, although about half of those states do not extend these rights to transgendered workers (General Accounting Office, 2009). The states that prohibit sexual orientation discrimination in employment are concentrated in three regions of the United States: the Northeast (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont), the upper Midwest (Illinois, Iowa, Minnesota, and Wisconsin), and the West (California, Colorado, Hawaii, Nevada, New Mexico, Oregon, and Washington). This means that there are huge swathes of the country in which sexual minorities may be legally harassed and discriminated against, unless they work in certain primarily large cities such as Dallas or Detroit (Transgender Law and Policy Institute, 2012).

It is probable that a numerical majority of Americans have protection from sexual orientation discrimination at work because the states and cities that outlaw

it tend to be populous. Nonetheless, it is important to underscore the dire situation for those sexual minorities who do not work in states or cities that protect them from employment discrimination; many of them live hundreds of miles away from the nearest such jurisdiction. Although the Supreme Court ruled in 1998 that same-sex harassment can be illegal, most plaintiffs continue to lose such cases and the courts are unlikely to determine that sexual orientation harassment violates current federal law (Barber, 2002).

Almost every state has laws prohibiting gender, race, age, and disability discrimination, even though these actions also violate federal law (ELT, 2012). The near-universal approach to extending such protections to sexual minorities is to add the phrase “sexual orientation” to extant state equal employment opportunity laws and to define the term “sexual orientation” so as to either include or exclude the transgendered. As cases in point, the states of Oregon and New York both prohibit sexual orientation discrimination. Oregon’s list of prohibited forms of discrimination is “race, color, religion, sex, sexual orientation, national origin, marital status or age” (Oregon State Legislature, 2011b), while New York’s is “age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status” (New York State Division of Human Rights, 2012b). In Oregon, sexual orientation is defined as “actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth” (Oregon State Legislature, 2011a), whereas in New York, sexual orientation is defined as “heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived” (New York State Division of Human Rights, 2012a).

There are many advantages to grafting sexual orientation nondiscrimination rights onto existing law, which may explain the popularity of this approach at the state level. Procedurally, it is much simpler than creating entirely new legislation. Symbolically, it shows that the government perceives sexual orientation discrimination to be just as heinous as age, race, religion, national origin, and sex discrimination. And practically, it encourages judges and juries to apply to sexual orientation discrimination legal precedents that predate the elevation of sexual minorities to protected group status. This provides clarity to employees and their legal counsel. For example, a victim of sexual orientation harassment can rely on principles established through sexual harassment litigation to demonstrate that an employer’s harassment complaints procedures are inadequate. The Employment Non-Discrimination Act, as shown in the following sections, offers none of these pluses.

THE EMPLOYMENT NON-DISCRIMINATION ACT

The process of creating new federal laws in the United States is quite Byzantine and does not need to be fully explained here. Essentially, each bill is in a race

against time to get passed, because any bills that remain when Congress adjourns must start all over again from the beginning during the next year. It is not a complete waste of time for a politician to be associated with an unsuccessful bill, as this may influence future legislation while displaying the sort of dedication to a cause that may impress voters and donors (Koger, 2003).

The Employment Non-Discrimination Act has changed over time as it has been reintroduced from year to year. In 2007, it was radically altered and it progressed much farther through the legislative process than any previous or subsequent iteration. The major difference that year was that it stripped transgendered employees of protection, defining sexual orientation as “homosexuality, heterosexuality, or bisexuality.” This development was not universally welcomed within the LGBT community, but it was viewed by the bill’s lead sponsor as a politically necessary compromise (Clements, 2009). A note of caution has been expressed, warning that excising the transgendered from this legislation would have a deleterious effect on the rights of its remaining beneficiaries, because judges could determine that sexual orientation discrimination was really gender identity discrimination and use that as a reason to dismiss their lawsuits (Weinberg, 2009). All other versions of this bill have provided a separate definition of gender identity and have prohibited discrimination on its basis.

ENDA v. the Civil Rights Act

The text of the first eight sections of the most recent iteration of ENDA can be found in the Appendix (the remainder of the bill deals with minor technical issues). A common characteristic of all versions of the bill is that they provide inferior protection to victims compared to the Civil Rights Act, which deals with racial, sexual, ethnic, and religious discrimination. This occurs in three important ways. First, sexual minorities are not allowed to challenge corporate policies that appear to be applied neutrally but that cause a disproportionate number of protected group members to suffer. Such “disparate impact” lawsuits can be very effective in challenging an organization’s subjective promotional practices (Rudin & Gover, 2007).

Second, the Employment Non-Discrimination Act specifically does not require an employer to “treat an unmarried couple in the same manner as the [employer] treats a married couple for purposes of employee benefits,” and it uses a definition of marriage that excludes gay marriage. This issue is very important in the United States, where almost all employee benefits are purchased by employers, not provided by governments. Health insurance is especially expensive when purchased by an individual, so it could be very advantageous to be able to obtain it as a dependent of one’s working spouse. Pensions are also mostly funded by employers, who would be allowed under ENDA to deny survivor benefits to same-sex spouses.

Finally, disciplinary action against employees for sexual orientation harassment is permitted only when “rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.” The Civil Rights Act provides no special due process rights of harassers, which makes it easier for companies to fire them and thereby end the harassment. Firing the harasser is an effective remedy because the harassment cannot occur in the workplace if the harasser is no longer allowed to be there. For the same reason, it serves as a powerful deterrent to harassment. But in the case of same-sex harassment, the employer would be exposed to the risk of a lawsuit from the harasser claiming that the application of the policy had not been consistent. Any instance in which a company chose not to fire an opposite-sex harasser would further weaken its ability to fire a same-sex harasser, even if the same-sex harassment was more severe than the opposite-sex harassment. It is not clear why the drafters of ENDA felt that same-sex harassers needed or deserved more due process rights than opposite-sex harassers.

A trend in more recent versions of this bill is that the versions tend to become less employee-friendly. For example, a passage was deleted that made it illegal to retaliate against an employee who “opposed any practice that the individual reasonably believed is an unlawful employment practice under this Act.” Also, a passage was added stating that “nothing in this Act shall be construed to require the construction of new or additional facilities,” presumably to ensure that employers wouldn’t have to accommodate transgendered employees’ requests for separate washrooms. Yet washroom modifications are recommended by experts in order to facilitate gender transition in the workplace (Taylor, Burke, Wheatley, & Sompayrac, 2011).

The Transgendered Albatross

Transgendered individuals represent a political liability. Were this not so, the trans-exclusive version of the Employment Non-Discrimination Act would not have been so much more successful than its trans-inclusive older and younger siblings. Why? Part of it represents transphobia, which is related to but distinct from homophobia (Hill & Willoughby, 2005). Much of it reflects the concerns of businesses that their employee grooming policies could be affected. The text of the bill specifically allows employers to maintain “reasonable dress or grooming standards.” But given that these standards vary by gender, they have already been challenged under existing laws with limited success (Robinson et al., 2007). Trans-inclusive versions of ENDA define gender identity as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual,” so employers may have good cause for concern about this risk.

References are commonly made to the LGBT community as if it represents a homogeneous group with common challenges and aspirations (e.g., Bailey, 2010; Cahill & Kim-Butler, 2006). But transgendered Americans were not initially welcomed by lesbians, gays, and bisexuals and find the community's "homonormativity" to be problematic (Stryker, 2008). They probably also find it problematic that their fellow community members didn't raise more of an outcry about the trans-exclusive version of ENDA. Should lesbians, gay men, and bisexuals decide that their political interests can be furthered at the expense of the transgendered, which certainly seems to be one of the lessons that can be derived from the history of ENDA, the solidarity of the LGBT community will be sorely tested.

CONCLUSION

It has been suggested that American employers have a social and economic imperative to support LGBT workers (King & Cortina, 2010). Yet there remains "consistent and compelling evidence that discrimination against LGBT people exists" (Badgett et al., 2009: 594). So the profit motive has created an insufficient incentive to encourage employers to enforce nondiscriminatory policies with respect to their sexual minority employees. If government intervention in the form of new laws is necessary, what form should it take?

In comparison to adding the phrase "sexual orientation" to an existing law, stand-alone employment discrimination legislation is useful only to those would enjoy its protections when it is relatively more beneficial than existing laws. So, for example, if the Employment Non-Discrimination Act offered heavier penalties for noncompliance or a lower burden of proof of discrimination than the Civil Rights Act, then it would be worthy of LGBT support. Given the severely negative impact of discrimination on the well-being of LGBT employees (Gates, 2012), tougher legislation could be justifiable. Tougher legislation would probably also have been a wise bargaining strategy, in which the fallback position could have been equal protection under the law.

Instead, every difference between ENDA and the Civil Rights Act disadvantages sexual minorities. The Civil Rights Act allows disparate impact lawsuits while implicitly encouraging the prompt firing of harassers. ENDA does not; nor does it forbid employers from discriminating against LGBT employees who wish to extend their benefits to their spouses. So the initial bargaining position of the LGBT community appears to be that they deserve fewer rights than other victims of discrimination. Such an outcome is guaranteed even if the law passes in its current form, without being watered down any further during the legislative process.

Millions of Americans work in jurisdictions that do not protect lesbians, gay men, bisexuals, and the transgendered from employment discrimination. They

would obviously be better off if the Employment Non-Discrimination Act became law. But many Americans are protected by state and city laws, and they will be worse off under ENDA because they will gain no new rights yet it will become harder for their employers to fire their harassers. Most reasonable readers would agree that the right to keep one's job should be superseded by the right of others to be free of workplace harassment. Firing the harasser may be the only solution that allows the victim to keep working, yet ENDA discourages this outcome in comparison to opposite-sex harassment.

The solution is simple—scrap the stand-alone law and demand that the phrase “sexual orientation” be added to the text of the Civil Rights Act. This does little for those who already work where equivalent protections exist at the state and city level, but at least they will not become worse off under the new law. Would this be a perfect solution? No, because it fails to recognize intersectionality, which is the special challenge associated with simultaneous membership in multiple oppressed groups (Best et al., 2011). But it is not a novel idea, since it has been successfully implemented in dozens of states; nor is it more than sexual minorities deserve at the workplace.

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APPENDIX: FIRST EIGHT SECTIONS OF THE EMPLOYMENT NON-DISCRIMINATION ACT

(Source: United States Congress, 2011)

A BILL

To prohibit employment discrimination on the basis of sexual orientation or gender identity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Employment Non-Discrimination Act.”

SEC. 2. PURPOSES.

The purposes of this Act are—

- (1) to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal Government employers;
- (2) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including meaningful and effective remedies for any such discrimination; and
- (3) to invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.

SEC. 3. DEFINITIONS.

- (a) In General—In this Act:

(1) COMMISSION—The term “Commission” means the Equal Employment Opportunity Commission.

(2) COVERED ENTITY—The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) EMPLOYEE—

(A) IN GENERAL—the term “employee” means—

(i) an employee as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(ii) a Presidential appointee or State employee to which section 301(a)(1) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16(a)(1)) applies;

(iii) a covered employee, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) or section 411(c) of title 3, United States Code; or

(iv) an employee or applicant to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies.

(B) EXCEPTION—The provisions of this Act that apply to an employee or individual shall not apply to a volunteer who receives no compensation.

(4) EMPLOYER—The term “employer” means—

(A) a person engaged in an industry affecting commerce (as defined in section (701)(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(h))) who has 15 or more employees (as defined in subparagraphs (A)(i) and (B) of paragraph (3)) for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986;

(B) an employing authority to which section 302(a)(1) of the Government Employee Rights Act of 1991 applies;

(C) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 or section 411(c) of title 3, United States Code; or

(D) an entity to which section 717(a) of the Civil Rights Act of 1964 applies.

(5) EMPLOYMENT AGENCY—The term “employment agency” has the meaning given the term in section 701(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(c)).

(6) GENDER IDENTITY—The term “gender identity” means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.

(7) LABOR ORGANIZATION—The term “labor organization” has the meaning given the term in section 701(d) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(d)).

(8) PERSON—The term “person” has the meaning given the term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

(9) SEXUAL ORIENTATION—The term “sexual orientation” means homosexuality, heterosexuality, or bisexuality.

(10) STATE—The term “State” has the meaning given the term in section 701(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(i)).

(b) Application of Definitions—For purposes of this section, a reference in section 701 of the Civil Rights Act of 1964—

(1) to an employee or an employer shall be considered to refer to an employee (as defined in paragraph (3)) or an employer (as defined in paragraph (4)), respectively, except as provided in paragraph (2) below; and

(2) to an employer in subsection (f) of that section shall be considered to refer to an employer (as defined in paragraph (4)(A)).

SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.

(a) Employer Practices—It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.

(b) Employment Agency Practices—It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual or to classify or refer for employment any individual on the basis of the actual or perceived sexual orientation or gender identity of the individual.

(c) Labor Organization Practices—It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of the actual or perceived sexual orientation or gender identity of the individual;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment, or would limit such employment or otherwise adversely affect the status of the individual as an employee or as an applicant for employment because of such individual's actual or perceived sexual orientation or gender identity; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training Programs—It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of the actual or perceived sexual orientation or gender identity of the individual in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Association—An unlawful employment practice described in any of subsections (a) through (d) shall be considered to include an action described in that subsection, taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.

(f) No Preferential Treatment or Quotas—Nothing in this Act shall be construed or interpreted to require or permit—

(1) any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any actual or perceived sexual orientation or gender identity employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such actual or perceived sexual orientation or gender identity in any community, State, section, or other area, or in the available work force in any community, State, section, or other area; or

(2) the adoption or implementation by a covered entity of a quota on the basis of actual or perceived sexual orientation or gender identity.

(g) Disparate Impact—Only disparate treatment claims may be brought under this Act.

SEC. 5. RETALIATION PROHIBITED.

It shall be an unlawful employment practice for a covered entity to discriminate against an individual because such individual (1) opposed any practice made an unlawful employment practice by this Act; or (2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.

This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2)).

**SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED FORCES;
VETERANS' PREFERENCES.**

(a) Armed Forces—

(1) EMPLOYMENT—In this Act, the term “employment” does not apply to the relationship between the United States and members of the Armed Forces.

(2) ARMED FORCES—In paragraph (1) the term “Armed Forces” means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(b) Veterans' Preferences—This title does not repeal or modify any Federal, State, territorial, or local law creating a special right or preference concerning employment for a veteran.

SEC. 8. CONSTRUCTION.

(a) Employer Rules and Policies—

(1) IN GENERAL—Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.

(2) SEXUAL HARASSMENT—Nothing in this Act shall be construed to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.

(3) CERTAIN SHARED FACILITIES—Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

(4) **ADDITIONAL FACILITIES NOT REQUIRED**—Nothing in this Act shall be construed to require the construction of new or additional facilities.

(5) **DRESS AND GROOMING STANDARDS**—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee’s hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

(b) **Employee Benefits**—Nothing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits.

(c) **Definition of Marriage**—As used in this Act, the term “married” refers to marriage as such term is defined in section 7 of title I, United States Code (referred to as the Defense of Marriage Act).

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