Why DOMA and Not ENDA?: A Review of Recent Federal Hostility to Expand Employment Rights and Protection Beyond Traditional Notions

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NOTES

WHY DOMA AND NOT ENDA?: A REVIEW OF RECENT FEDERAL HOSTILITY TO EXPAND EMPLOYMENT RIGHTS AND PROTECTION BEYOND TRADITIONAL NOTIONS

I. INTRODUCTION

Approximately thirty years have passed since Martin Luther King, Jr. lead thousands of African-Americans on a march to Washington, and Rosa Parks decided to sit in the front of the bus. Yet, as the fight by African-Americans to end racial discrimination in the workplace continues in the midst of great strides, another minority group still fights for a federal foothold.

Gays and lesbians in the United States have suffered years of employment related discrimination simply because of their sexual orientation. In fact, private employers have discriminated against gay men and lesbians by firing, and refusing to hire or promote homosexuals simply because of their sexual orientation, with impunity. For example, an employer can fire a gay employee, simply because another employee feels uncomfortable about working with homosexuals; an employer can fire a heterosexual employee

3. See The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 30-31 (1996) (statement of Todd M. Dobson). A computer consultant from Massachusetts was fired from his job when his employer had to make a choice between him

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because her foster child is a lesbian; and an employer can refuse to hire a gay applicant even though he exhibits the highest qualifications for employment, on the basis of his sexual orientation. In each of these instances, the victims have had no federal legal recourse.

As a result of these, and numerous other instances of employment discrimination, gays and lesbians have fought to secure governmentally mandated protection. Yet, even in the midst of recent success in several state legislatures, and in the U.S. Supreme Court, gays and lesbians have been unsuccessful in the federal sphere in securing employment rights and anti-discrimination protection, specifically in the form of a federal statutory ban on employment discrimination based on sexual orientation. Nor have they been successful in persuading federal courts to apply pre-existing federal anti-discrimination statutes, i.e. Title VII, to sexual orientation discrimination.

and a fellow worker who did not feel comfortable working with a gay man, despite an excellent work record. See id.

4. See The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 36 (1996) (statement of Karen Solon). Karen Solon was terminated from her employment at a child development center because her foster daughter was a lesbian, even though she has been commended by her community for exceptional service and work with special children, by receiving the Fairfax County Office for Children Award. See id.

5. See The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 25-26 (1996) (statement of Michael Proto). A college graduate with a masters in criminal justice, who was seeking employment as a police officer with the Hamden, Connecticut Police Dept., after receiving the highest score on a civil service test, and ranking in the top seven among all candidates, was ultimately passed up for consideration after a polygraph test disclosed that he was gay. See id.


10. See id. Title VII's ban on employment discrimination based on sex, has been judicially interpreted in an attempt to stay true to legislative history, as to only apply to gender based discrimination, in order to insure equality in employment for women and men, and not to sexual orientation discrimination. See id.
One recent setback for gays and lesbians in securing national protection against discrimination, is the failure of the passage of the Employment Non-Discrimination Act in the fall of 1996, by one Senate vote, which would have prohibited sexual orientation discrimination in employment.

The passage of the Defense of Marriage Act in 1996 represents another setback recently suffered by gays and lesbians. This act defines the term “marriage” for all federal laws and statutes, to mean only a union between a man and a woman, and the term “spouse” as only a person of the opposite sex. The Defense of Marriage Act also effectively defines the term spouse in the Family and Medical Leave Act, which provides employees up to twelve weeks of unpaid leave from their job to care for a seriously ill spouse.

Traditionally, Congress has left the definition of marriage up to the states. However, given the likelihood that Hawaii may eventually legalize same-sex marriages, and thereby entitle married gay and lesbian couples to all the employment related benefits that same-sex marriage would provide, Congress passed the Defense of Marriage Act to permit the states not to recognize same sex marriages from other states, and to define the terms “marriage” and


In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

Id.

14. See 29 U.S.C. § 2611 (1996). “The term ‘spouse’ means a husband or wife, as the case may be.” Id.
17. See Baehr v. Mille, --P.2d --, 1996 WL 694235 (Haw. Ct. App. 1996) (holding on remand from the Hawaii Supreme Court, that the state’s health department, charged with processing applications for marriage licenses, failed to demonstrate a compelling state interest to deny marriage licenses to same sex couples); Gay's Right to Marry Upheld, Newsday, Dec. 4, 1996, at A5 (stating that the appellate court’s decision has been stayed, pending a final appeal to the Hawaii State Supreme Court). This final appeal is expected to be affirmed by those members in Congress who introduced the Defense of Marriage Act. See H.R. Rep. No. 104-664, at 2 (1996).
"spouse" for all federal acts and laws.\textsuperscript{18} The effect such a statute would have includes denying same-sex married couples from benefitting from the same rights guaranteed to heterosexual married couples under the Family and Medical Leave Act.\textsuperscript{19}

This Note explores these recent setbacks for gays and lesbians in securing federally mandated protection against sexual orientation employment discrimination in the U.S. It will also include a discussion of the potential effects the Defense of Marriage Act would have on the availability of the Family and Medical Leave Act on married gay and lesbian couples should Hawaii legalize same-sex marriage. Part II will address the federal court debate of Title VII applicability to sexual orientation discrimination in the workplace. Part III will begin with a discussion of the recent trend in several states which have passed anti-discrimination statutes banning sexual orientation discrimination in employment, and develop into a comprehensive exploration of the Employment Non-Discrimination Act of 1996 (ENDA). Part IV will address the Defense of Marriage Act (DOMA) and its effect on the Family and Medical Leave Act (FMLA) should same-sex marriage become legal in Hawaii. This Note will conclude that the only viable way gays and lesbians can truly secure anti-discrimination rights in the workplace, is with the passage of a federal statute prohibiting sexual orientation discrimination in employment,\textsuperscript{20} which would be in accord with the general edicts of this nation's values of liberty and freedom. In addition, the Note will conclude that DOMA's arbitrary nature and application as well as its effect on the FMLA, requires that Congress either repeal the definition section of the DOMA, or at least amend it in order to exclude its applicability to the FMLA.

\textsuperscript{18} See H.R. Rep. No. 104-664, at 2 (1996) (stating explicitly that the Defense of Marriage Act was passed in order to prevent the imposition of same-sex marriage on those states which prohibit it, because of the judicial interpretation of one state's marriage laws by its highest court).

\textsuperscript{19} See id. at 8.

\textsuperscript{20} See Discrimination: Senate Rejects by 50-49 Bill to Ban Job Bias Based on Sexual Orientation, Employment Policy & Law Daily (BNA) (Sept. 12, 1996). Given the narrow defeat of ENDA, Sen. Kennedy stated that it will be re-introduced in the Senate in the beginning of Congress's next term. See id. See also The Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1997). In January 1997, Rep. Towns introduced a bill into the House of Representatives that would add sexual orientation to the list of protected classes against employment discrimination in Title VII, and is essentially the same in substance as the Employment Non-Discrimination Act of 1996, the subject of this Note. See id.
II. TITLE VII'S INAPPLICABILITY TOWARDS
SEXUAL ORIENTATION

Ever since the Civil Rights Act of 1964 was enacted, gays and
lesbians have attempted to get the judiciary to include, within its
prohibition against employment discrimination based on sex,21 a
sub-category of prohibition with regard to sexual orientation.22
However, as will be illustrated below, this attempt has been futile,
and has met strong opposition in the federal courts.

A. DeSantis v. Pacific Telephone & Telegraph Co., the
Seminal Case

Any discussion concerning Title VII's inapplicability to sexual
orientation discrimination must begin with DeSantis v. Pacific Tele-
phone & Telegraph Co.,23 the seminal case in this area. In DeSantis,
three males filed suit in federal court claiming that their rights
against discrimination under Title VII were violated.24 Robert
DeSantis alleged that he was refused employment with the Pacific
Telephone & Telegraph Co. (PT&T), because he was a homosex-
ual.25 Bernard Boyle, another plaintiff in the suit, claimed he had
to quit his job with PT&T because he feared his life was in danger
from gay related harassment he received from his co-workers.26
The third named plaintiff in the suit, Simard, claimed that harass-
ment from his supervisors, similar to what Boyle experienced, also
forced him to leave PT&T.27

All three men filed a charge with the Equal Employment Oppor-
tunity Commission (EEOC), claiming that PT&T had violated Title
VII's ban on sex discrimination in employment.28 However, the

   It shall be an unlawful employment practice for an employer—(1) to fail or
   refuse to hire or to discharge any individual, or otherwise to discriminate
   against any individual with respect to his compensation, terms, conditions, or
   privileges of employment, because of such individual’s race, color, religion, sex,
   or national origin . . . .

Id. (emphasis added).


23. 608 F.2d 327 (9th Cir. 1979).

24. See id. at 328-29.

25. See id.

26. See DeSantis, 608 F.2d at 328.

27. See id.

28. See id.

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EEOC rejected their petition for lack of jurisdiction. The men then initiated a Title VII class action suit in federal district court, which was dismissed, also for lack of jurisdiction. The Ninth Circuit for the Court of Appeals affirmed the EEOC's and the district court's decisions, and held on appeal that Title VII does not cover sexual orientation discrimination in the workplace.

On appeal, the men argued that Congress intended to incorporate a prohibition on sexual orientation discrimination within the general prohibition against discrimination based on sex. Specifically, they argued that "discrimination against homosexuals disproportionately affects men and that this disproportionate impact and correlation between discrimination on the basis of sexual preference and discrimination on the basis of 'sex' requires that sexual preference be considered a sub category of the 'sex' category of Title VII." Nevertheless, this argument was dismissed by the Court.

The Court reasoned that the legislative history of Title VII only intended that the "traditional notions of sex" be applied when interpreting Title VII's discrimination prohibition based on one's sex. The Court additionally rejected the plaintiff's disparate impact argument, by saying that Congress's failed attempts to incorporate sexual orientation discrimination within Title VII, is evidence of Congress's intent to have a narrow definition of sexual discrimination that does not include sexual orientation. Furthermore, by following its own decision in Holloway v. Arthur Andersen & Co., the Court held that Title VII's prohibition against sex discrimination applies only to discrimination on the basis of gender - to ensure that men and women are treated equally in the workplace - and should not be extended to include sexual preference such as homosexuality. Moreover, the Court stated that the plaintiff's disparate impact theory cannot be used to "bootstrap" Title VII pro-

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29. See DeSanis, 608 F.2d at 328.
30. See id.
31. See id.
32. See id. at 328-29.
33. DeSanis, 608 F.2d at 329.
34. See id.
35. See id.
36. 566 F.2d 659 (9th Cir. 1977) (holding that Title VII sex discrimination protection does not include transsexuals).
37. See DeSanis, 608 F.2d at 329-30.
tection to homosexuals, because doing so would frustrate Congressional intent regarding homosexuals, and thereby reach beyond the confines of judicial responsibility into the realm of judicial legislation, a form of judicial activism courts should restrain themselves from engaging in.\textsuperscript{38}

The same reasoning enunciated above, was also used by the Court to dismiss the plaintiff’s contention that PT&T violated Title VII by having a different set of hiring criteria for men and women, by requiring that men have female partners and women have male partners, for sexual relations.\textsuperscript{39} The basic argument for the plaintiffs was that this violated the Supreme Court’s warning in Phillips \textit{v. Martin-Marietta Corp.},\textsuperscript{40} saying that it will not permit an employer to have different hiring policies for men and women.\textsuperscript{41} Nonetheless, the Court dismissed the argument, saying that the employer is not differentiating his hiring policies based on sex, but rather uses the same criteria for both sexes - “it will not hire or promote a person who prefers sexual partners of the same sex.”\textsuperscript{42}

The final argument purported by the plaintiffs, that PT&T’s hiring policy interfered with their right of association, was also rejected by the Court. The EEOC has held that an employer violates Title VII where an employee is fired for having friends of a particular race, because such conduct amounts to discrimination because of race.\textsuperscript{43} The plaintiffs relied upon this, and contended that “analogously discrimination because of the sex of the employees’ sexual partner should constitute discrimination based on sex.”\textsuperscript{44} The Court rejected this argument, because the employer’s policies did not discriminate against employees because of the gender of their friends, but rather discriminates against employees who have a particular kind of relationship with the same sex, i.e. a homosexual relationship.\textsuperscript{45} Therefore, since Title VII does not apply to sexual orientation discrimination because it would violate Congressional intent, the plaintiff’s “interference with association” argument failed, as it would “bootstrap” Title VII protection to sex-

\textsuperscript{38} See id. at 330.
\textsuperscript{39} See id. at 331.
\textsuperscript{40} 400 U.S. 542 (1971).
\textsuperscript{41} See id. at 544.
\textsuperscript{42} See DeSantis, 608 F.2d at 331.
\textsuperscript{43} See id.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
ual orientation. Thus, the DeSantis Court declined to interpret Title VII's protection against sex discrimination, to apply to sexual orientation as well.

B. DeSantis's Progeny

The DeSantis decision was followed by a line of federal cases which have all served to buttress the reasoning of its opinion, and its ultimate holding.

In Smith v. Liberty Mutual Insurance Co., the appellate court affirmed the district court's dismissal of claims of Title VII racial and sex discrimination, where the plaintiff's application for employment with the defendant was declined because the interviewer thought that Smith was effeminate, and therefore a homosexual. Although Smith argued that the law prohibits an “employer to reject a job applicant based on his or her affectional or sexual preference,” the Court reasoned the Civil Rights Act of 1964 does not forbid such discrimination. The Court reasoned as the DeSantis Court did, that Congress intended that Title VII's prohibition against sexual discrimination only be applied to guarantee equal job opportunities for males and females, and thus does not extend to protection against sexual orientation discrimination.

In Blum v. Gulf Oil Corp., the circuit court affirmed the district court's denial of relief under Title VII. The plaintiff's claim was that he was unlawfully discharged from his employment by his former employer, Gulf Oil Corp., because of his religion and sexual preference, although Blum was granted several raises, and given time off to observe the Jewish holidays. The employer claimed that he was discharged for violating company policy by excessively using the company phones for personal use. However, Blum contended that this was all a pretext and that he was fired because he

46. See id.
47. 569 F.2d 325 (5th Cir. 1978).
48. See id. at 325-26.
49. Id. at 326.
50. See id.
51. See id. at 326-27.
52. 597 F.2d 936 (5th Cir. 1979).
53. See id.
54. See id. at 937.
55. See id.
was Jewish, white, male and a homosexual. The court held that the discharge was not pretextual, and even if it were, the claim for unlawful discharge because of one’s homosexuality was not protected under Title VII.

In *Williamson v. A.G. Edwards & Sons, Inc.*, a black male appealed from a district court’s order granting summary judgment to his former employer, A.G. Edwards and Sons, Inc., and Bruce Morgan, his former supervisor, who discharged Williamson purportedly because of his race. Citing *DeSantis*, the appellate court reasoned that Williamson’s complaint concerned more his homosexuality as the real cause for his termination, which is not protected under Title VII.

In *Quick v. Donaldson Co.*, the district court refused to apply Title VII protection against sex discrimination to the plaintiff who was harassed and physically threatened and assaulted because his co-workers were under the false impression that he was homosexual. The court applied the rationale of *DeSantis* to the case and concluded that Title VII protection against gender discrimination cannot be “judicially extended to include sexual preferences such as homosexuality.”

Finally, in *Sarff v. Continental Express*, the plaintiff’s employment with the defendant was terminated after he complained about harassment from other employees because they thought he was gay. The court found sufficient evidence in the record to indicate that the plaintiff was fired for due cause, as a result of poor job performance. However the court went further to say that notwithstanding the plaintiff’s poor work performance, “an employer can clearly fire an employee for being gay, and such an employee has no statutory protection in the vast majority of states

56. See id.
57. See id. at 938.
58. 876 F.2d 69 (8th Cir. 1989).
59. See id.
60. See id. at 70.
62. See id. at 1289.
63. See id. at 1297.
64. 894 F. Supp. 1076 (S.D. Tex. 1995), aff’d, 85 F.3d 624 (5th Cir. 1996).
65. See id.
66. See id. at 1082-83.
 whatsoever from such action or from being harassed by a member of his or her own sex." The court reasoned that Title VII simply does not afford an employee any protection against sexual orientation discrimination.

C. Synthesis of the DeSantis Progeny

As the above cases illustrate, the principle argument against applying Title VII's gender discrimination prohibition to sexual orientation, focuses on the legislative history regarding the incorporation of the gender discrimination provision within Title VII in 1964. When the Civil Rights Act of 1964 was first introduced in Congress, it did not contain any specific provision prohibiting sex discrimination in employment. However, this was changed in 1972 with an amendment to the bill which added "sex" to the prohibited bases for discrimination. The debates revolving around the amendment focused primarily on the disparate treatment between men and women in the workplace, based on gender. Therefore, one can easily conclude, that Congress intended that Title VII's prohibition against sex discrimination refer only to gender based discrimination, in order to place women on equal ground with men in the workplace, and not to sexual orientation. Given the failed effort by gays and lesbians to apply pre-existing federal anti-discrimination laws to sexual orientation discrimination in employment, the only other recourse for nationwide protection is a federal statute, explicitly prohibiting such discrimination in the workplace.

III. ENDA — CONGRESS ATTEMPTS TO APPLY TITLE VII TO SEXUAL ORIENTATION EMPLOYMENT DISCRIMINATION

The Employment Non-Discrimination Act of 1996 was introduced in the first session of the 104th Congress, and enjoyed bi-
partisan support." It would have provided, for the first time, nationwide protection for gays and lesbians from being discriminated against on the basis of sexual orientation in employment. However, before discussing ENDA, it is first necessary and logical to address similar protections against sexual orientation discrimination already provided to gays and lesbians by state laws, ordinances, executive decisions, and private business, that have inspired legislation like ENDA.

A. State and Local Government, and Private Employment Efforts to Prohibit Sexual Orientation Discrimination

Presently, only nine states and the District of Columbia have enacted legislation which prohibit sexual orientation discrimination in public and private employment. Six states have executive orders, and 142 cities and counties have ordinances, executive orders, or policies that extend civil rights protection to gay and lesbian employees in the public sector only. Although New York does not have a general statewide ban on sexual orientation discrimination, Governor George Pataki signed an executive order barring job discrimination against homosexuals in state agencies, leaving private employment free to discriminate.

73. See id.

74. See id.


77. See Gary Spencer, Pataki Continues Bar to Gay Bias, N.Y.L.J., Apr. 10, 1996, at A1. The executive order signed by Governor Pataki is actually a continuation of former Governor Mario Cuomo's policy. See id. When he signed the executive order, Governor Pataki stated that his reason for doing so, was because he believes the "ultimate philosophy of a conservative is that the state should not discriminate and that people should be judged by their ability or willingness to work and by their qualifications." Id. at A4. Furthermore, after much pressure, N.Y. State Attorney General Dennis Vacco, who had previously dropped a ban on job discrimination based on sexual orientation in his office, released a letter stating that his office would not discriminate against homosexuals either. See id.
1. The Importance of Local Measures to Ban Sexual Orientation Discrimination in Employment

The passage of such state and local laws and other related measures to protect gays and lesbians from sexual orientation discrimination in employment, is important for the prospects of future state and federal laws banning such discrimination. Such state laws are significant developments because they provide, for the first time, secure private employment protection for homosexuals, and have a much broader effect than local ordinances. Furthermore, these local statutes have produced a well established body of precedent that federal courts could draw upon if Congress were ever to pass a statute similar to those already enacted in the states previously discussed.

2. The Inadequacy of Local Measures to Ban Sexual Orientation Discrimination in Private Employment

Yet even in those states and localities with legislation protecting against sexual orientation discrimination in private employment, an argument can still be made that enforcement of gay and lesbian employment rights is questionable at best. For example, in many of those jurisdictions there is no oversight agency or office, like the Equal Employment Opportunity Commission, that would serve to enforce these statutes at all. In other words, even though there are statutes in place which ban sexual orientation discrimination in the workplace, they often go unenforced because the state has failed to commission an agency to enforce those laws. Further-

79. See id. at 1625. The relevant state decisional law, has even addressed a popular concern among opponents of a federal law prohibiting sexual orientation discrimination in the workplace, that such a prohibition would require private employers to provide domestic partnership benefits for gay and lesbian employees. See id. However, the state courts have uniformly held “that a ban on sexual orientation discrimination does not require an employer to provide benefits to a homosexual employee’s lifetime partner as the employer does for a heterosexual employee’s spouse.” Id. at 1626.
81. See id.
82. See id.
more, even where there is an enforcing governmental agency, only a very small number of complaints are ever filed, principally because filing a sexual orientation discrimination complaint requires the complainant to "out" himself, which may be very risky, and not even be worthwhile. For instance, of those cases that are actually litigated, they are usually decided in favor of the employer even where the facts of the case appear to significantly favor the complainant. Consequently, the average complainant may not even file a complaint at all, since the risk of "outing" oneself at work is too great, and the likelihood of success is relatively small. Therefore, even in those jurisdictions with protective statutes, ordinances, or executive orders for gay and lesbian employees, they are ineffective in protecting their employment rights.

3. Efforts by the Private Sector to Ban Sexual Orientation Discrimination

Although state and local laws banning sexual orientation appear to be ineffective in protecting gay and lesbian employment rights, the private sector appears to have supplemented this deficiency, but only to a degree. A significant number of private-sector employers have voluntarily adopted employment policies prohibiting discrimination and harassment based on sexual orientation, and have extended health insurance and other benefits to same-sex partners. Such companies include American Airlines, American Express, AT&T, Dow Chemical, IBM, Eastman Kodak, and Walt Disney. The main impetus for such non-discrimination policies has been that they are good for business by improving employee

83. See id.
84. See id.
85. See Even Without Legislative Mandate, Workplaces Are Friendlier for Gays, West's Legal News, Sept. 18, 1996, available in 1996 WL 524413. But see Debrah L. Rode, Anti-Gay Prejudice Persists in Legal Workplace, Nat'l L.J., Dec. 16, 1996, at A15 (stating that recent surveys from the California State Bar and local bars in New York and San Francisco, indicate that a majority of gay and lesbian lawyers feel that their sexual orientation has negatively affected their careers, and that gay lawyers earn less income and are less likely to become partner than their heterosexual counterparts).
86. See id.
morale, loyalty, and productivity, as well as garnering publicity for the company. 88

Even though the private sector has taken the lead in providing employment protection for gays and lesbians, more companies than not still persist in discriminating against homosexuals. 89 Therefore, given this continued exercise of blatant discrimination towards gays and lesbians, the insufficient enforcement of gay and lesbian employment rights at the state and local levels, and the refusal by the federal courts to apply Title VII's anti-sex discrimination provision to sexual orientation discrimination, a federal statute prohibiting such discrimination appears to be the necessary solution to this serious problem.

B. Congressional Effort in Providing Nationwide Uniform Protection for Gays and Lesbians in Employment

In an effort to provide gays and lesbians a uniform nationwide protection against employment discrimination Congress considered, for the first time, the Employment Non-Discrimination Act

88. See id. at 70; see also The Employment Non-Discrimination Act, 1996, Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 18 (1996) (statement of Patrick McVeigh). Patrick McVeigh is the Senior Vice President for Franklin Research & Development Corp., a Boston based investment firm, which manages about half a billion dollars in combined assets for institutional and individual clients. See id. His main reason for supporting ENDA and similar employment policies, is that

[n]ondiscrimination policies make good business sense. Businesses with such policies are better positioned to benefit from the diversity [of a larger and more qualified pool] of the American work force.

Nondiscrimination policies provide for a heightened sense of security for workers without imposing hiring goals, recruitment obligations, or other components of affirmative action programs.

Id.

89. See Kovach & Millsapugh, supra note 87 (stating that a “Wall Street Journal poll of Fortune 500 CEOs indicated that 66% of them would hesitate to offer a management job to a homosexual”); Michael Adams, Selling Out, SALES & MARKETING MGMT., Oct. 1996, at 78. The article states that in those areas of business where there is a lot of client contact, such as sales and marketing, the subject of the client’s and the employee’s personal lives invariably arise as part of the rapport such associations call for, (questions such as “are you dating anyone?” or “what did you do this past weekend?”) and therefore in order to maintain such a relationship and secure whatever business transaction that is being negotiated, the homosexual employee usually has to lie about his personal life as it pertains to his sexual orientation. See id. at 78, 81, 82. Even in those companies with sexual orientation as a part of their non discrimination policies, gay employees must still hide their sexual orientation from clients who might be offended by it. See id. at 82.
(ENDA) in the fall of 1996. This act would have prohibited sexual orientation discrimination throughout the nation. However, despite national and bipartisan support, the bill failed passage in the Senate by one vote.


Under ENDA, an employer with fifteen or more employees would be unable to "discriminate against an individual based on the sexual orientation of persons with whom such individual is believed to associate or to have associated." Essentially what this section of the bill would have done, is prohibit employers from subjecting an individual to a different standard of treatment on the basis of

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90. See The Employment Non-Discrimination Act of 1996, H.R. 1863, 104th Cong. (1995); S. 2056, 104th Cong. (1996); John E. Yang, Senate Passes Bill Against Same Sex Marriage; In First Test on Hill, Measure to Prohibit Employment Discrimination Is Defeated, 50-49, WASH. POST, Sept. 11, 1996, at A1. For other countries that have prohibited sexual orientation discrimination in the workplace, see Kenneth A. Kovach & Peter E. Millsapugh, Employment Non-Discrimination Act: On the Cutting Edge of Public Policy, 39 Bus. HORIZONS 65 (1996) (stating that Canada has already prohibited sexual orientation discrimination through a court decision from its highest court, which held "that the Canadian Charter of Rights and Freedoms (the equivalent to the U.S. Constitution)" covered such discrimination). The Employment Non-Discrimination Act was first introduced in Congress in 1994, during the 103rd Congress. See id.


92. See The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 41 (1996) (statement of Elizabeth Birch). Polls conducted by the Human Rights Campaign, found that 74% of Americans, regardless of political affiliation, supported equal rights in the workplace for gay and lesbian Americans. See id. at 42. Furthermore, a Newsweek poll conducted in May of 1996, found that 84% of Americans favored legislation like ENDA, and in June of the same year, the Associated Press found that 80% were in favor of ENDA. See id. at 42-43. As recent as 1994, 64% of those people who voted republican in that year, also stated that they were in favor of employment protection for gay people. See id. See also Clinton, Gore Renominated as Democratic Candidates at Party Convention in Chicago—Key Points of the 1996 Democratic Party Platform, FACTS ON FILE WORLD NEWS DIGEST, Aug. 29, 1996, available in 1996 WL 8621688 (stating that President Clinton supported ENDA, and promised to sign it, if Congress were to pass it); Statement of Attorney General Janet Reno Regarding the Senate's Vote on the Employment Non-Discrimination Act, DEPARTMENT OF JUSTICE, Sept. 11, 1996, available in 1996 WL 516041 (stating that U.S. Attorney General Janet Reno on behalf of the Justice Department, will work with members of Congress in both parties in the upcoming session, to pass ENDA, further stating that the closeness of the Senate vote is indicative of growing support to protect all Americans from unfair employment discrimination).

sexual orientation.\textsuperscript{94} Moreover, this protection is extended to an employee's right of actual or perceived association with others of the same orientation, meaning that even if an employee or applicant is not really homosexual, an employer violates the Act if he/she fires, hires, or refuses promotion on that basis.\textsuperscript{95}

a. Applicability to Heterosexuals and Homosexuals

Sexual orientation is defined in the bill as "homosexuality, bisexuality, or heterosexuality, whether such orientation is real or perceived."\textsuperscript{96} As a result, ENDA would not be limited to protecting only gays and lesbians from sexual orientation employment discrimination. It would have protected heterosexuals as well against sexual orientation discrimination by an employer who discovers that they either have a homosexual child or friend, and then proceeds to fire them on that basis.\textsuperscript{97}

b. Enforcement of ENDA

Enforcement of ENDA's provisions would be delegated to the Equal Employment Opportunity Commission, which was already commissioned by Title VII to enforce those federally mandated prohibitions against employment discrimination covered under that statute.\textsuperscript{98} The power and authority of the EEOC with respect to its enforcement of ENDA would also be the same as that already defined in Title VII.\textsuperscript{99} Furthermore, ENDA specifically states that employer coercion or retaliation against employees attempting to exercise their rights under the Act is prohibited.\textsuperscript{100} Finally, pursuant to the 11th Amendment of the U.S. Constitution, states would not be immune to a suit commenced under ENDA, and therefore, a state employer would not be able to discriminate against employees because of their sexual orientation.\textsuperscript{101}

\textsuperscript{94} See The Employment Non-Discrimination Act, 1996: Hearings on H.R. 1863 Before the Subcomm. on Government Programs of the House Comm. on Small Businesses, 104th Cong. 6 (statement of R. Gerry E. Studds).
\textsuperscript{95} See id. at 7.
\textsuperscript{96} H.R. 1863, 104th Cong. § 17 (1995).
\textsuperscript{97} See supra note 4 and accompanying text.
\textsuperscript{98} See H.R. 1863, 104th Cong. § 7 (1995).
\textsuperscript{99} See id.
\textsuperscript{100} See id. at § 11.
\textsuperscript{101} See H.R. 1863, 104th Cong. § 9 (1995).
c. Exceptions to ENDA's Applicability

During the debates and discussion regarding ENDA, there was much concern about its applicability to religious organizations and the armed forces. However, ENDA would not apply to religious organizations, as it exempts such organizations from the prohibition against sexual orientation discrimination. This was a necessary political maneuver by ENDA's proponents to circumvent the opposition of those organizations, principally religious organizations, which are vehemently against government recognition of rights for homosexuals. However, the religious organization exemption does not apply towards "for profit" activities of a religious organization, which are subject to taxation under § 511(b) of the Internal Revenue Code of 1986. Similarly, the armed forces, which include the army, navy, air force, marines, and coast guard, would be exempt from ENDA. This exemption also includes the allocation of veteran benefits.

d. The Limitations of ENDA

What ENDA does not do, is compel employers to provide employment benefits to the domestic partners of gay and lesbian employees. ENDA leaves the decision of providing such benefits up to the individual employer. ENDA also is exempt from the disparate impact theory - the theory that, based on statistics, a company rule or policy discriminates where it disproportionately affects a member or members of a class protected under legislation without regard to the employer's lack of intent to discriminate - in the enforcement provision enunciated above with respect to the EEOC. Furthermore, ENDA specifically prohibits the use of quotas or preferential treatment towards gays and lesbians for hir-
ing or promotion, a common concern of many opponents of similar affirmative action programs and policies used to correct the wrongs previously produced from past discrimination. Thus, the drafters of the Act have carefully carved out exceptions to the ban on sexual orientation discrimination so as to negate likely opposition to it.

2. Arguments Against ENDA and Their Downfalls

Even though ENDA appears to calm the fears of its likely detractors, opposition persists. One of the most typical arguments against legislation like ENDA has been that it confers "special rights" to homosexuals, who already enjoy a high standard of living, earning incomes significantly higher than the average American, and are one of society's elite groups, thereby negating any need for this kind of legislation.

This opposing argument is problematic given the real economic situation of gays and lesbians, and recent developments in the Supreme Court, which will be discussed below. The average annual household income for gays and lesbians is about $47,000, and individual income is about $36,000. This simply does not appear to be the income of an elite group, and it does not necessarily conclude that discrimination against gays and lesbians does not occur in the workplace simply because of an above average annual income. For instance, it is plain and obvious that one's salary, no matter how high it may be, does not protect an individual from discrimination when an employer prospectively discovers the sexual orientation of the employee, and subsequently fires him or her on that basis alone. Furthermore, the "special rights" rhetoric of ENDA opposition has been severely undermined by the U.S. Supreme Court in its decision in Romer v. Evans.

In Romer, the Supreme Court struck down a Colorado state constitutional amendment adopted by referendum, that prohibited the state of Colorado and its localities from establishing any legislative

114. See id.
protections based on sexual orientation.\textsuperscript{116} The main focus on the Court's reasoning to strike down this amendment, was that it denied gay men and lesbians the equal protection of the law as guaranteed by the U.S. Constitution's 14th Amendment, in that it did not "bear [a] rational relation to some legitimate end."\textsuperscript{117} Most significant for the purposes of this Note, is the Court's statement with regard to "special rights." In his opinion, Justice Kennedy countered arguments based on the "special rights" canard, by saying that:

\textit{[w]e find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in free society.}\textsuperscript{118}

The "rights" which Justice Kennedy spoke of, included the right to work and seek employment free from sexual orientation discrimination.\textsuperscript{119} Thus, in a sweeping statement, the Court dismissed any "special rights" argument against enacting legislation protecting people against sexual orientation discrimination in the workplace, and in effect, recognized homosexuals as a distinct and discriminated minority class in the U.S.\textsuperscript{120}

The opposition to ENDA does not stop at arguments involving special rights. A consistent argument against prohibiting an employer from discriminating against gays and lesbians, is that it "essentially takes away the rights of employers to decline to hire or
promote someone who openly acknowledges indulging in behavior that the employer or his customers find immoral, unhealthy, and destructive to individuals, families, and societies,"\textsuperscript{121} thereby violating the employer’s constitutional rights in the areas of freedom of speech, association and religion.\textsuperscript{122} This argument fails, because there is hardly any logical relationship between an employee’s choice of sexual partners, and his ability to do his job at work.\textsuperscript{123}

Another argument is that ENDA prohibits an employer from disciplining an employee from engaging in homosexual acts, regardless of how explicit they may be, which might be injurious to the employer’s business or relationship with clients, or may result in tort liability for the firm, because the bill protects such behavior.\textsuperscript{124} This does not appear to be the case. ENDA does not state at all, that an employee is protected from disciplinary action by his or her employer for engaging in sexually explicit behavior at work. Neither does the legislative history of ENDA indicate that gay and lesbian employees may engage in sexually explicit behavior at work with impunity. Rather, ENDA merely states that the employer cannot invoke different standards or treatment on the basis of sexual orientation, meaning that the employer shall not punish homosexual employees from engaging in such behavior, if heterosexual employees are not.\textsuperscript{125} Therefore, if an employer prohibits heterosexual employees from engaging in sexually explicit behavior, then it can do so with respect to homosexual employees as well, and punish them if they do, without violating the Act.

\textsuperscript{122} See id.
\textsuperscript{123} See 141 CONG. REC. S8,501 (daily ed. June 15, 1995) (statement of Sen. Jeffords) (advocating the proposition that all Americans should be free from discrimination at work because of personal characteristics unrelated to successful performance on the job). Sen. Jeffords, the principle Senate sponsor of ENDA, and a senator from Vermont, a state with a similar statute like ENDA, also stated that no employer in his state has complained about its ban on sexual orientation discrimination in the workplace, and “the sky has not fallen” there either. See id. Essentially, the senator is arguing that the fears of many opponents of ENDA-like legislation is unfounded and baseless, given the positive experiences of states like Vermont. See id.
\textsuperscript{125} See H.R. 1863, 104th Cong. (1995).
3. Support for ENDA

Even in the midst of the opposition to ENDA illustrated above, the bill enjoys support from organized labor, a number of religious organizations, and civil rights groups. Generally speaking, there are several perspectives that come into play when discussing those arguments in favor of ENDA. Arguments favoring sexual orientation anti-discrimination laws, primarily focus on handling it as “a civil right, maintaining consistency around the nation, and [consider] the economic aspects of such legislation.”

a. The Civil Rights Perspective in Favor of ENDA

Under the civil rights perspective, proponents of ENDA place such legislation in the category of civil rights. Essentially, under this rational, sexual orientation should be removed as a basis for job discrimination in the same way that race, gender, religion, national origin, age and disabilities have been under Title VII. The basis for such a contention by ENDA supporters, is the “lack of [any] evidence, scientific or otherwise, that sexual orientation relates to job performance,” and that “[s]uccess at work should be directly related to one’s ability to do the job.”

126. See Kenneth A. Kovach & Peter E. Millspaugh, Employment Non Discrimination Act: On the Cutting Edge of Public Policy, 39 Bus. Horizons 65, 69 (1996). Such labor groups include: the AFL-CIO; Amalgamated Clothing and Textile Workers; American Federation of Teachers; the National Education Association; American Association of Nurses; American Federation of State, County and Municipal Employees; and the International Association of Fire Fighters. See id.

127. See id. Religious groups in support of ENDA are: the National Council of Churches; Antidefamation League; Presbyterian Church; Disciples of Christ; Episcopal Church; Evangelical Lutheran Church; Union of Hebrew Congregations; Unitarian Universalistic Church; and the United Methodist Church. See id.

128. See id. Those civil rights groups that support ENDA include: the ACLU; Leadership Conference on Civil Rights; U.S. Civil Rights Commission; Women’s Legal Defense Fund, NOW Legal Defense and Education Fund; the Japanese American Citizens League; the Human Rights Campaign; Lambda Legal Defense Fund; and the National Gay and Lesbian Task Force. See id.

129. See id. at 69, 70.

130. Id. at 69.

131. See id. at 69.

132. See id.

133. Id.

b. The Consistency Perspective

The consistency perspective in support for ENDA addresses the fact that there is no uniform, nationwide standard of protection from workplace discrimination based on sexual orientation. Under this argument, ENDA is necessary because forty-one states do not provide for their citizens protection from sexual orientation discrimination in private employment, and in those states and localities that do have such laws, they vary substantially from jurisdiction to jurisdiction. Furthermore, it is also argued that "in those jurisdictions that have repealed laws that criminalize sodomy, it is feared that without ENDA a public policy climate that condones sexual orientation discrimination may be allowed to flourish." Finally, the consistency argument contends that the current non-uniform state of the law among the various jurisdictions, leaves some workers less protected or unprotected and thus more vulnerable than others to sexual orientation discrimination in employment. Therefore, as one senator argued, the ultimate result of this inconsistency, that can be solved with ENDA, is the denial of the "full and equal protection of the laws promised every American by the 14th Amendment," particularly in the area of employment for gays and lesbians.

c. The Economic Argument

Under an economic perspective, there are two basic rationales that are advanced in an effort to outlaw sexual orientation discrimination in employment. One addresses the need for a broad pool of talented prospective employees to draw from, and the other focuses on the costs related to a continued practice of sexual orientation discrimination.

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138. See id.
(1) The Need for Talented Employees

First, as alluded to above, as American companies encounter greater competition both domestically and globally, employers will be required to make sure they are recruiting the most qualified individuals available. Therefore, it would be detrimental to good business, if American companies intentionally refused to consider a segment of the “nation’s talent pool because of misgivings about sexual orientation.” It is further insisted, that such discriminating employment practices would thereby “impede our country in reaching its full economic potential.”

(2) The Cost of Discrimination

The second economic argument in favor of ENDA, addresses the costs associated with sexual orientation discrimination. A study conducted by the National Commission on Employment Policies to determine the costs of discrimination to taxpayers, corporations, and consumers, found that 42,000 gay and lesbian workers are dismissed from their jobs each year because of their sexual orientation. The study concluded that this “translates into a $47 million loss attributable to training expenditures and unemployment benefits alone.” Furthermore, even where there is no dismissal, the study proposed that “productivity from gay and lesbian workers declines significantly in those work environments hostile to homosexuality.” The final cost of this continued discrimination against gays and lesbians, to taxpayers, corporations, and consumers, according to the study, totals to about “$1.4 billion in lost output a year.”

Therefore, as the above discussion attempts to prove, ENDA should be passed because it would provide consistent protection from employment discrimination for all gay and lesbian Americans. It is economically more advantageous to the American economy

141. Id.
142. Id.
143. See id.
144. See id.
145. Id.
146. Id.
147. Id.
and American businesses, and it is necessary to secure basic civil rights enjoyed by heterosexual employees for gays and lesbians as well throughout the nation.

IV. The Defense of Marriage Act and its Potential Application to the Family and Medical Leave Act

Legal marriage between same sex couples is on the brink of reality in Hawaii.\textsuperscript{148} This development could have a substantial impact in the employment sphere, because of the number of employment benefits offered to married couples, and associated with marriage generally.\textsuperscript{149} One such benefit would be that gays and lesbians would have been able to take up to twelve weeks of unpaid leave to care for a serious ill spouse without losing their job under the Family and Medical Leave Act.\textsuperscript{150} The author says "would have," because the passage of the Defense of Marriage Act precludes that from happening.\textsuperscript{151} Before analyzing the potential effect DOMA would have on FMLA, we must go first to Hawaii, where the state's highest court has paved the road for the recognition of same sex marriage there.\textsuperscript{152}

A. Baehr v. Lewin

In \textit{Baehr v. Lewin},\textsuperscript{153} several same sex couples who were denied marriage licenses from the state's Department of Health, brought suit against that department's commissioner to compel the depart-
ment to issue their marriage licenses.\textsuperscript{154} In 1993, the case went to the Hawaii State Supreme Court, which reversed the lower court's decision to affirm the denial, and remanded the case to the appellate division with special instructions.\textsuperscript{155} The Court held that in the lower proceedings, the state's Department of Health must prove that the state's sex-based marriage law's limitation on the right of marriage to male-female couples, is supported by a compelling state interest, as is required by Hawaii's state constitution, in order to continue denying same-sex couples marriage licenses.\textsuperscript{156}

Upon remand in \textit{Baehr v. Miike},\textsuperscript{157} the court upheld the same-sex marriages at issue, citing to the dissenting opinion in \textit{Dean v. District of Columbia}\textsuperscript{158} as the basis for its holding, which stated:

\begin{quote}
[A] mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class—as the history of constitutional rulings against racially discriminatory legislation makes clear.\textsuperscript{159}
\end{quote}

Essentially, the Hawaiian court held that the evidence by the State did not “establish or prove that same sex marriage will result in prejudice or harm to an important public or governmental interest.”\textsuperscript{160} Nor did the state demonstrate a compelling state interest sufficient to justify withholding the legal status of marriage from the plaintiffs.\textsuperscript{161} Specifically, the court determined that the state failed to show any evidence that “the public interest in the well-being of children and families, or the optimal development of children...
would be adversely affected by same-sex marriage." As a result, the Court held that the state's marriage law is unconstitutional, and directed the state to grant marriage licenses to same-sex couples. However, the order of the court was enjoined pending further appeal back to the State Supreme Court, which is not expected to hand down its final decision until 1998, although an affirming decision is widely anticipated.

B. Congressional Preemption of Hawaii's Potential Legalization of Same-Sex Marriage: The Defense of Marriage Act

As a direct result of the Hawaii decision, Congress passed the Defense of Marriage Act (DOMA), in order to estop its applicability to all acts and laws of the United States. The terms "spouse" and "marriage," which are found in 3900 sections of the United States Code, were left undefined before DOMA. When interpreting those sections, the relevant state definition was used to fill in the gap. However, because of the development in Hawaii, Congress would have had to apply a number of federal employment benefits, such as the Family and Medical Leave Act, to same sex couples who marry if Hawaii finally sanctions such marriages. Therefore, one can safely assume, that Congress passed DOMA to preclude that effect, by specifically defining the terms "marriage" and "spouse" in a way that applies all federal employment statutes only to married couples of the opposite sex.

1. The Defense of Marriage Act as it Pertains to The Family and Medical Leave Act

The legislative history of DOMA actually focuses on the FMLA as a reason why it should be passed. The DOMA House Report

162. Id.
163. See id. at *22.
165. See id. at 6.
166. See id. at 10.
167. See id.
168. Although FMLA defines the term spouse as a "husband or wife, as the case may be," the male spouse of a gay "married" couple would be considered his husband, and thereby be entitled to the twelve weeks of unpaid leave FMLA provides for. See 29 U.S.C. § 2611 (13) (1996).
169. See id.
indicates that when the FMLA was originally drafted, the term spouse was not defined.\textsuperscript{172} However, an amendment was added defining the term spouse to mean “only a husband or wife as the case may be.”\textsuperscript{173} The report also stresses that the DOMA is needed in light of this definition, which does not define husband nor wife, in order to restrict application of the FMLA to only traditional married heterosexual couples.\textsuperscript{174} Furthermore, the report stresses, that without limiting the definition of spouse to married couples, the FMLA would invite lawsuits by workers who unsuccessfully seek leave on the basis of a serious illness of their unmarried adult companions.\textsuperscript{175} DOMA further limits the potential for such lawsuits by narrowing that definition even more to spouses of the opposite sex.\textsuperscript{176} Another motive for narrowing the applicability of the FMLA to only heterosexual married couples, is to preserve scarce government resources, such as employment benefits.\textsuperscript{177} Since a disproportionate number of HIV infected people are homosexuals,\textsuperscript{178} it is expected that many married gay couples would seek leave under FMLA to care for their HIV infected partner. Yet, as was alluded to above, the DOMA precludes this from ever happening.

2. Arguments Against the Limiting Effect of DOMA’s Section Defining “Marriage” and “Spouse”

There are two basic arguments against DOMA which the author terms the “Ineffective Legislation Argument,” and the “Purpose Frustration Argument.” The first argument focuses on one reason why Congress passed DOMA, and the other argument focuses on how DOMA frustrates the general purpose of the FMLA.

a. The Ineffective Legislation Argument

Although Congress hopes that DOMA will limit litigation in the U.S., it is interesting to point out that DOMA may actually increase

\textsuperscript{172} See id.
\textsuperscript{173} Id.
\textsuperscript{174} See id.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} See id. at 12.
aggregate litigation in this already litigious nation. After Hawaii legalizes same-sex marriage, it is not difficult to imagine that many gay and lesbian couples will go there to wed, and then return home to their respective states, or even remain in Hawaii to ensure the recognition of their marriage. Furthermore, it is equally likely that a number of these newly-weds will attempt to take advantage of the benefits outlined in the FMLA. The inevitable result, because of DOMA, will be the denial of their leave, which in turn may ignite an incendiary flame of more litigation by these people to enforce their rights under the FMLA. Thus, it seems that one of DOMA’s main purposes to limit litigation, may in fact be counter-productive, thereby characterizing it as ineffective legislation.

b. The Purpose Frustration Argument

Furthermore, it seems that the general purpose for the FMLA is frustrated by DOMA. One of the listed purposes of the FMLA is to “entitle employees to take reasonable leave . . . for the care of a . . . spouse . . . who has a serious health condition.” Yet DOMA arbitrarily distinguishes the necessity of taking time off to care for a sick heterosexual married partner, as opposed to a homosexual married partner. The need to care for both is obvious and apparent, whether it is for a lesbian wife to care for her sick lesbian wife, or for a heterosexual husband to care for his heterosexual wife. However, as much as DOMA seems to run contrary with the plain language of the FMLA’s purposes, in actuality, it does not when one considers the legislative history of that act. Nonetheless, if Congress explicitly wanted to limit the term spouse in the FMLA to only members of the opposite sex, why did it not do so in the first place when it was enacted, since it was an issue in the debates leading up to its passage in 1993? DOMA, it appears, answers that question by providing for such a narrow definition, at the expense of many gay and lesbian couples who will get married in Hawaii, after the state’s highest court legalizes their same-sex marriages.

181. See id.
V. Conclusion

As the beginning of this Note indicates, the fight for a federal foothold by gays and lesbians in securing employment rights against sexual orientation discrimination has met great opposition, both in the federal courts and the legislature. Although provided protection against such discrimination in several states, and by a number of private businesses, discrimination against gays and lesbians persists with impunity. Furthermore, whatever protection is provided, it is neither uniform in its availability or application, nor effective in its enforcement. Thus, a federal nationwide ban on such discrimination is necessary. Another attempt at achieving that result, has already arisen in the 105th Congress, where legislation identical in substance to the Employment Non-Discrimination Act, was introduced in the House of Representatives in January of 1997. As was demonstrated above, such a law is practical in terms of economics and basic human rights. It does not compel the populace to condone homosexual behavior, nor favor homosexuals when considering them for employment. Instead, ENDA would mandate that like race, sex, national origin, and disability, sexual orientation has no bearing on one’s ability to work; an employer should only judge an employee based on his or her own merits.

In addition, the passage of the Defense of Marriage Act, facilitates a “separate and unequal” atmosphere for all gays and lesbians who marry after Hawaii sanctions same sex marriages, by denying them the rights granted to married heterosexuals under the Family and Medical Leave Act. The arbitrary distinction the Defense of Marriage Act places by virtue of its definition section, will leave many gay and lesbian couples without any basis for taking leave from their employment in order to care for their seriously ill husband or wife. Therefore, in order to correct this Congressional oversight, a repeal of the definition section of the Defense of Mar-


America will only be America when we free ourselves from discrimination, and [the Employment Non Discrimination Act], carefully crafted, tries to say, “If you work in America, if you have the ability to work, you can work and you ought to be judged on your ability to work and not on the issues of sexual orientation.” That is the case.

Id.
riage Act, or an amendment that will exclude its application to the Family and Medical Leave Act, is necessary.

There is no doubt that when Thomas Jefferson proclaimed in 1776 in the Declaration of Independence, “We hold these truths to be self evident, that all men are created equal,” he and the other Framers of our nation did not even contemplate the employment rights of homosexuals. However, as Supreme Court Justice Ruth Bader Ginsburg so eloquently argued, many of the rights which Americans enjoy today (such as a women’s inalienable right to vote, abortion rights, and a number of civil rights), although inconceivable by the Framers, nonetheless eventually came to fruition in the 20th Century. It seems therefore, that the Framers’ initial inconceivability of a certain class of rights, did not serve well to block their preservation. As this Note has attempted to illustrate, the time has arrived that the “inalienable” employment rights of homosexuals, also initially not conceived by the Framers, be preserved for the thousands of gay and lesbian Americans who are to this day denied the “truths” of that great document which gave birth to this nation.

Pat P. Putignano

184. See The Declaration of Independence para. 1 (U.S. 1776).
186. See id. at 1202-1209.