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Verdict

November 12, 2013

Joanna L. Grossman

ENDA and the Rainbow Workforce



By a vote of 64 to 32, the U.S. Senate recently passed a bill, the Employment Discrimination Act (ENDA) of 2013, which would prohibit employers from discriminating on the basis of sexual orientation or gender identity.

Although this bill stands little chance of making it through the Republican-controlled House of Representatives, its passage is noteworthy—and encouraging—on many fronts. Although bills of this sort have been introduced periodically since 1974, and the House of Representatives has voted to pass a bill like this, the Senate has never given its approval. Moreover, in addition to unanimous Democratic support, the bill also garnered the support of ten Republican senators, including John McCain and Orrin Hatch. And while most Republican senators voted against the bill, almost none of them spoke out against the bill, or trafficked in the kinds of stereotyping and disparagement that had accompanied debate on previous versions of this bill.

In this column, I'll explain the protections that ENDA would add, and the gaps in existing law that make it a necessary complement to existing anti-discrimination laws.

ENDA's History: A Long Struggle

The first bill to include protections against sexual-orientation discrimination was introduced by Congresswoman Bella Abzug in 1974. That bill was broader than the current one, proposing broad protection for gays and lesbians against discrimination in employment, housing, and public accommodations. Throughout the 1970s and 1980s, similar bills were introduced, but none became law.

In 1994, the first version of ENDA, a bill focused solely on protections against workplace discrimination, was introduced in the Senate by the late Senator Ted Kennedy, which held hearings on the bill. Neither that bill, nor any versions that succeeded it made it through the Senate. The House passed a version of ENDA in 2007, by a vote of 235-184, but the Senate never voted on the bill and then-President George Bush issued a veto threat that made any future legislative action futile.

Current Federal Anti-Discrimination Law: There Is No Direct Protection Against Sexual- Orientation Discrimination

Contrary to the views of House Speaker John Boehner, whose spokesperson claims that he has “always believed

this is covered by existing law,” current federal anti-discrimination law does not prevent employers from taking adverse employment actions against someone because he or she is gay.

The backbone of federal anti-discrimination law is Title VII of the Civil Rights Act of 1964, which prohibits employers with at least fifteen employees from discriminating on the basis of race, color, religion, sex, or national origin. The statute does not expressly cover sexual-orientation discrimination, and every court to consider the issue has ruled that the prohibition of actions taken “because of sex” does not include actions taken because of sexual orientation. Courts have also ruled, almost universally, that the ban on sex discrimination also does not extend to gender identity or transgender discrimination. Thus, gays and lesbians have no direct protection against discrimination under Title VII. (Title VII is not the only federal anti-discrimination law, but the others, such as Titles IX and VI, and Section 1981, are narrower and none of them applies to sexual orientation.) That means that an employer can openly fire a gay, lesbian, or transgender employee because of simple animosity or bigotry without fearing liability.

The only direct prohibition on sexual-orientation discrimination comes from Executive Order 13087, issued in 1998 by President Bill Clinton, which bans such discrimination in the civilian federal workforce. This order was in response to a long, if little known, history of the federal government’s banning gays from federal civil service jobs. It left in place the “Don’t Ask Don’t Tell” policy, which prohibited openly gay and lesbian individuals from serving in the military. (This policy was finally repealed as of September 2011.)

To the extent that gays, lesbians, and transgender individuals have found protection from discrimination under Title VII, it has been by (1) bringing claims of same-sex harassment and by (2) bringing claims of sex-role stereotyping discrimination. These claims have been made possible by two key Supreme Court rulings.

First, the Supreme Court held in *Oncale v. Sundowner Services* (<http://supreme.justia.com/cases/federal/us/523/75/case.html>) that Title VII prohibits same-sex sexual harassment, as long as the plaintiff is able to prove that the harassment occurred because of the victim’s sex. The Court in *Oncale* suggested that the “because of sex” requirement might be met in one of three ways: (i) with evidence of the perpetrator’s homosexuality; (ii) with evidence that the perpetrator in fact targeted only members of one sex; or (iii) with evidence that the harassment took the form of gender-role policing—to punish an employee for failing to live up to traditional gender norms. Gay men or lesbians can thus sometimes rely on *Oncale* to challenge conduct that they experience because of their sexual orientation. A gay man who is targeted by a homosexual supervisor will have a claim for harassment, as would an “effeminate” gay man who suffers gender-policing harassment.

Second, the Supreme Court ruled in a 1989 case, *Price Waterhouse v. Hopkins* (<http://supreme.justia.com/cases/federal/us/490/228/case.html>), that sex-role stereotyping can be an actionable form of employment discrimination. In that case, the Court held that a woman was a victim of sex discrimination when her employer denied her partnership in an accounting firm at least in part because she was insufficiently “feminine” in the way she dressed and conducted herself. That decision gave the imprimatur to the idea that an employer’s enforcing gender-role conformity is a form of illegal discrimination.

The *Price Waterhouse* case and its reasoning can be used, at least theoretically, by “effeminate” gay men and “masculine” lesbians who are singled out for adverse treatment because they do not live up to their employers’ sex-role expectations. It has been used, even more successfully, by transgender employees who claim that discrimination against them is a function of contempt for their failing to live up to the gender expectations assigned to their birth sex. (One such case is discussed [here \(http://verdict.justia.com/2012/05/01/the-eeoc-rules-that-transgender-discrimination-is-sex-discrimination\)](http://verdict.justia.com/2012/05/01/the-eeoc-rules-that-transgender-discrimination-is-sex-discrimination).)

While these two theories provide some protection to gay and lesbian employees against adverse employment actions and circumstances, they are far from sufficient. For one thing, gays and lesbians who do conform to sex-role expectations in terms of dress, manner, or behavior cannot utilize them. Courts have been unwilling to consider having sex with someone of the same sex, alone, as sufficient defiance of gender roles to qualify for protection under these doctrines. Thus, under current law, just being gay is not enough to provide the grounds for a sex-role stereotyping claim. And even in cases where employees do fail to live up to sex-role expectations,

courts sometimes rule against them anyway for fear of “bootstrapping”—that is, actually suing for what amounts to sexual-orientation discrimination under the guise that one is suing under sex-discrimination law.

While federal law has stagnated on these issues, despite vast social changes in the realm of gay rights, states and municipalities have taken steps to protect against sexual orientation and gender identity discrimination. Thirty-four states prohibit sexual-orientation discrimination, and twenty-nine prohibit gender-identity discrimination, in at least some contexts, including employment, housing, and public accommodations. But Title VII provides little in the way of a fallback in the remaining states.

The Employment Discrimination Act of 2013

At its core, this bill prohibits employers from taking any employment action on the basis of sexual orientation or gender identity, or from retaliating against any individual who sought to avail himself or herself of these protections. It creates these protections by amending Title VII to add “sexual orientation” and “gender identity” to the list of protected characteristics upon which employment decisions cannot be based.

ENDA’s express purpose is to fill the existing gap in federal anti-discrimination law for gays, lesbians, and transgender individuals. Under ENDA, employers would cease being able to take these characteristics into account when deciding whether to hire, fire or promote someone.

ENDA borrows its language and structure from Title VII in most pertinent respects. For example, like Title VII, ENDA only applies to employers with at least fifteen employees, and protects job applicants as well as employees. Also like Title VII, ENDA applies not only to employers, but also to job-training programs, employment agencies, and unions.

The bill defines *sexual orientation* to include “homosexuality, heterosexuality, or bisexuality,” and *gender identity* to refer to “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.”

One of the controversial points throughout ENDA’s history has been whether to prohibit gender-identity discrimination, or to focus only on sexual-orientation discrimination. Gay rights advocates split over whether to insist on broader protection at the cost of reducing the likelihood of passage of the bill. The version that was passed in 2007 by the House of Representatives was limited to sexual-orientation discrimination, but the version that was just passed by the Senate extends to both.

The current bill also has other notable features:

- It exempts religious employers from the bill completely. Thus, a church could refuse to hire a gay person, regardless of his or her religious affiliation, even if the refusal was motivated purely by animus.
- It exempts military employers, despite the repeal of “Don’t Ask Don’t Tell” and the ostensible commitment to non-discrimination in the U.S. military.
- It exempts dress and appearance codes, except that employers must permit “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 as apply for the gender to which the employee has transitioned or is transitioning.”
- It provides that only disparate treatment (a form of intentional discrimination) claims can be brought on the basis of sexual orientation or gender identity—disparate impact theory does not apply. A woman, for example, can challenge a height-and-weight requirement for a job as constituting sex discrimination in violation of Title VII if women are statistically less likely than men to meet the standard and the employer cannot demonstrate that the requirement is a “business necessity.” But ENDA would not allow that type of claim for sexual orientation or gender-identity claims. (For what it’s worth, it’s hard to imagine what neutral policies, tests, or practices would result in a statistically significant disparate impact on gay, straight, or transgender employees.)

ENDA's Future

Although President Obama would certainly sign this bill into law, he is unlikely to have the opportunity as long as Republicans control the House of Representatives. But given the rapid changes in the area of gay rights, it is becoming increasingly difficult to defend federal law's continued failure to protect against this sort of discrimination. Even those who are staunchly opposed speak generically about the "costs to businesses" of adding a nameless additional category of potential lawsuits, rather than openly attacking homosexuality or transgenderism, or trying to make a substantive case for the right of employers to discriminate against people who share these characteristics.

The triumph of the gay-marriage revolution—fifteen states now permit gay couples to marry, up from zero less than a decade ago—shows how quickly things can change. In the employment context, this change is long overdue. Gay and lesbian employees report high rates of employment discrimination, and transgender individuals report astronomical rates of discrimination, harassment, and abuse. States have taken the lead; it is time for the federal government to follow.



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