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The Employment Non-Discrimination Act: Requiring Fairness for All Employees Regardless of Sexual Orientation or Gender Identity

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I. Introduction

Almost half a century ago, Congress passed a sweeping set of workplace protections barring employment discrimination. Through this measure, Title VII of the Civil Rights Act of 1964,¹ Congress announced that employees should be judged solely on the basis of their job performance, rather than on characteristics unrelated to the job at hand. Title VII prohibited discrimination on a number of bases: race, religion, color, national origin and sex.² In the United States of that time, however, issues of sexual orientation and gender identity were not a part of the nation's mainstream political consciousness; Title VII therefore incorporated no explicit protection against discrimination based on lesbian, gay, bisexual, or transgender (LGBT) status.

Since the passage of Title VII, Congress has closed other gaps in protections for U.S. workers. In 1967, it passed the Age Discrimination in Employment Act to protect older employees from discrimination.³ In 1990, it passed the Americans with Disabilities Act, in order to ensure that workers with disabilities were treated fairly.⁴ Congress has not yet, however, filled the gap in protection for LGBT workers. Today, the continued absence of protections against discrimination based on sexual orientation and gender identity imposes a heavy burden on LGBT workers. In a 2007 survey, twenty-eight percent of LGBT adults reported that they had experienced workplace discrimination; twenty-one percent experienced it on a *weekly* basis.⁵ This discrimination takes a variety of forms. Employees report being called disparaging names, having anti-gay jokes made to other employees or customers at the employee's expense, being subjected to mock and sometimes real sexual assaults, being refused jobs or promotions, and a

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¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000).

² *See id.* at 42 U.S.C. § 2000e-2.

³ Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified, as amended, at 29 U.S.C. §§ 621-634 (2010)).

⁴ Pub. L. No. 101-336, Title I, 104 Stat. 327 (1990) (codified, as amended, at 42 U.S.C. §§ 12111-12117 (2010)).

⁵ Press Release Archives, CareerBuilder.com, Twenty-eight Percent of Gay/Lesbian/Transgender Workers Have Experienced Discrimination or Unfair Treatment at Work (June 19, 2007), <http://www.careerbuilder.com/Share/AboutUs/PressReleases.aspx> (follow "2007" hyperlink; then follow title of article hyperlink) (last visited July 21, 2010). As M.V. Lee Badgett, Brad Sears, Holning Lau, and Deborah Ho, the authors of a careful review article of studies concerning the extent of workplace bias note, the rate of discrimination that studies such as this have found varies based on, among other things, the definition of discrimination used, the geographical range of the study, and the method of sampling. In the fifteen surveys conducted between the mid-1990s and 2008 on the issue of employment discrimination based on sexual orientation that were reviewed by the authors, 15% to 43% of LGB respondents reported that they had experienced discrimination in the workplace. M.V. Lee Badgett, Brad Sears, Holning Lau, & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI-KENT L. REV. 559, 559, 562, 570 (2009). When transgender persons were surveyed, they reported similar or higher rates of employment discrimination. In the six studies reviewed by the authors that were conducted between 1996 and 2006, 20% to 57% of transgender respondents reported having experienced employment discrimination. *Id.* at 560, 573-75.

retinue of other discriminatory actions.⁶ In one reported case, a gay maintenance worker had his hands and feet bound by his co-workers.⁷ In another, a transgender corrections officer was smashed into a concrete wall.⁸ Further, accounts of LGBT workers who are subjected to harassing comments and unequal working conditions once their status was discovered abound.⁹ Because of the lack of legal protections, many LGBT workers constantly police their own interactions with others in order to avoid disclosing their LGBT status: They pay attention to every statement they make to ensure that they do not disclose their living situation, family status, the identity of their partner, where and with whom they went the night or weekend before, and so on.

Discrimination based on LGBT status not only places a tremendous burden on LGBT workers and subjects them to unequal working conditions, it relegates many to a second-class status financially. Gay men earn anywhere from ten to thirty two percent less than their heterosexual counterparts, when controlling for education, location, occupation, and experience.¹⁰ These diminished salaries, or, worse, the loss of jobs as a result of discrimination, impede LGBT employees' ability to support themselves and their families. What is more, they create losses throughout the financial system: By one estimate, this discrimination costs \$47 million each year, when unemployment benefits and wasted training expenses are taken into account.¹¹ When the lowered productivity (of both the abusers and the victims) is also taken into consideration, the cost may rise to more than \$1.4 billion in lost output each year.¹²

Yet when it comes to issues of sexual orientation, the America of today is not the America of 46 years ago, when Title VII was enacted. The United States Supreme Court has since declared that government discrimination motivated by animus against homosexuals is irrational and violates the Constitution.¹³ It has also ruled that the constitutional protection for intimate sexual conduct extends to homosexual conduct.¹⁴ Public sentiment, too, has shifted considerably on these issues: Over half the American population now believes homosexuality is

⁶ *The Employment Non-Discrimination Act of 2009 ("ENDA"): Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor*, 111th Cong. (2009) (statement of R. Bradley Sears, The Williams Institute) available at <http://edlabor.house.gov/hearings/2009/09/hr-3017-employment-non-discrim.html> (select "Brad Sears" hyperlink under "Witnesses").

⁷ *Id.*

⁸ *Id.*

⁹ See DEBORAH J. VAGINS, AMERICAN CIVIL LIBERTIES UNION, WORKING IN THE SHADOWS: ENDING EMPLOYMENT DISCRIMINATION FOR LGBT AMERICANS, 2007, available at http://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf (last visited July 21, 2010) (containing LGBT workers' accounts of employment discrimination).

¹⁰ See Badgett, Sears, Lau, & Ho, *supra* note 5, at 560. The findings of a wage penalty against lesbians, however, are less clear. *Id.* Indeed, recent studies suggest that lesbians do not earn less than heterosexual women and may, in fact, earn more. *Id.* at 584-85. As Badgett, Sears, Lau, and Ho note, however, this does not rule out the possibility of wage discrimination against lesbians; instead, the fact that lesbians sometimes make different choices than heterosexual women that would otherwise raise their salaries, since they are less likely to marry men or put their careers on hold to have children, may produce an increase in wages that is offset by a wage penalty. *Id.* at 585-86. The authors also note that "[w]hile less data is available about the incomes of transgender people . . . , a number of surveys have found high unemployment rates and low income levels for transgender people." *Id.* at 562, 587-89.

¹¹ VAGINS, *supra* note 9, at 8 (citing Kenneth A. Kovach & Peter E. Millspaugh, *Employment Non Discrimination Act: On the Cutting Edge of Public Policy*, 39 BUS. HORIZON 65, 70 (1996)).

¹² *Id.*

¹³ *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

acceptable.¹⁵ When it comes to employment specifically, even more Americans—a full 89 percent—believe that gays and lesbians are entitled to equal workplace protections and opportunities.¹⁶ This is an increase of more than 20 percent since the late 1970s.¹⁷ Furthermore, same-sex couples have become a common feature of American communities. There are approximately 564,743 same-sex couple households in the United States, comprising just under one percent (.9 percent) of all coupled households.¹⁸ Given these changes, the time is ripe to fill the longstanding gap in federal protections against job discrimination based on LGBT status.

Passage of the Employment Non-Discrimination Act, or “ENDA,” which is currently being considered in Congress, would help fill the current void in legal protections.¹⁹ ENDA would ban discrimination based on sexual orientation and gender identity with respect to hiring, firing, and terms of employment. The bill would also protect workers from retaliation. In this way, ENDA is an important step toward ensuring fairness for LGBT workers. The legislation stands for the proposition that like other employees, gay, lesbian, bisexual, and transgender employees should be judged based on their work performance, rather than on their sexual orientation or gender identity.

This Issue Brief considers the role that ENDA could play to ensure fairness for LGBT employees who are the victims of employment discrimination. To do so, the second section discusses the current gap in federal and state legal protections against discrimination based on sexual orientation and gender identity. The third section then considers ENDA, explains its provisions, and assesses its ability to safeguard LGBT workers from bias. ENDA, it concludes, is a modest and pragmatic step toward ensuring that LGBT employees are judged fairly on the basis of their job performance, without regard to their sexual orientation or gender identity.

II. The Current Void in Protection for LGBT Employees

Employees discriminated against based on race, religion, color, national origin, and sex have remedies available to them under Title VII and, in many cases, state law. These legal protections are not reliably available to those discriminated against because of their LGBT status.

¹⁵ According to Gallup Poll News Service, 52% of Americans agreed with the statement “homosexuality is an acceptable alternative lifestyle;” whereas, only 38% agreed with the same statement in 1992. Frank Newport, *American Attitudes Toward Homosexuality Continue to Become More Tolerant*, GALLUP (2001), www.gallup.com/poll/4432/American-Attitudes-Toward-Homosexuality-Continue-to-Become-More-Tolerant.aspx (last visited July 21, 2010).

¹⁶ VAGINS, *supra* note 9, at 9 (citing Press Release, Gallup Poll News Service, Tolerance for Gay Rights at High Water Mark (May 29, 2007), <http://www.gallup.com/poll/27694/tolerance-gay-rights-highwater-mark.aspx> (last visited July 21, 2010)).

¹⁷ Marieka Klawitter & Victor Flatt, *The Effects of State and Local Anti-discrimination Policies on Incomes of Same-Sex Couples*, 17 J. POL’Y ANALYSIS & MGMT. 658, 660 (1998) (discussing the shift in popular approach to LGBT workers’ rights) (citing David Moore, *Public Polarized on Gay Issue*, GALLUP POLL MONTHLY, No. 331, at 31-34). The year 1977 was the first time that Gallup conducted any polling regarding American attitudes toward gays and workforce opportunities. See Frank Newport, *Homosexuality*, Sept. 11, 2002, <http://www.gallup.com/poll/9916/Homosexuality.aspx>.

¹⁸ U.S. CENSUS BUREAU, FAMILIES AND LIVING ARRANGEMENTS, *available at* <http://www.census.gov/population/www/socdemo/hh-fam.html#acs> (scroll down to “Same-Sex Couples” heading, select “Data from the American Community Survey” heading, then “2008 tables”).

¹⁹ S.1584, 111th Cong. (2009); H.R.3017, 111th Cong. (2009).

A. Title VII Antidiscrimination Law

Because Title VII does not explicitly bar discrimination based on sexual orientation, gays and lesbians who have brought claims of employment discrimination based on their sexual orientation, and transgender persons who have brought claims based on gender identity, have routinely had their cases dismissed.²⁰ This is the case even though Title VII's prohibition on sex discrimination could be construed to encompass LGBT discrimination. For example, a discrimination claim based on the sexual orientation of a lesbian could be construed as treating a female employee who is sexually attracted to women differently than a male employee who is sexually attracted to women, and as therefore based on sex. Courts, however, have uniformly declined to construe Title VII's ban on sex discrimination to encompass sexual orientation or gender identity on the ground that Congress did not explicitly include LGBT-status in the Act's protected categories.²¹

Despite Title VII's failure directly to bar discrimination based on sexual orientation, Title VII's ban on discrimination because of sex potentially offers LGBT employees some protection insofar as it protects against "sex stereotyping." The 1989 Supreme Court decision of *Price Waterhouse v. Hopkins*,²² provides strong support for such an interpretation. In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied partnership at her accounting firm in part because some members of the firm considered her mannerisms and dress to be too masculine. Ms. Hopkins was advised that for her candidacy for partnership to succeed she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair

²⁰ See, e.g., *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality."); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("Title VII does not, however, provide for a private right of action based on sexual orientation discrimination."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Ayala-Sepulveda v. Municipality of San German*, 661 F.Supp.2d 130, 136 (D.P.R. 2009) ("The caselaw from [the Fourth] [C]ircuit has established that, 'Title VII does not proscribe harassment simply because of sexual orientation.'" (quoting *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996))); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."); *Ulane v. Eastern*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("[W]hile we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals."); *Michaels v. Akal Security, Inc.*, No. 09-cv-01300-ZLW-CBS, 2010 U.S. Dist. LEXIS 62954, at *7 (D. Colo. June 24, 2010) ("Plaintiff's gender discrimination claims are based entirely on her transgender status. Therefore, Plaintiff is unable to sustain a Title VII claim based upon this status.").

²¹ See, e.g., *Bibby*, 260 F.3d at 265 ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by [the plaintiff] – and, indeed, his very claim – indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.").

²² 490 U.S. 228 (1989).

styled, . . . wear jewelry,” and go to “charm school.”²³ On these facts, the Court ruled that the defendant had violated Title VII, on the ground that Title VII’s prohibition on sex discrimination encompassed a prohibition on evaluating employees for conformity with gender stereotypes:

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁴

Although the sexual orientation of the plaintiff in *Price Waterhouse* was not identified, its prohibition on gender stereotyping would seem to bar a significant portion of discrimination against gay and lesbian employees, protecting against discrimination for being perceived as effeminate in the case of gay men, and as masculine or “butch” in the case of lesbians. Some courts have interpreted *Price Waterhouse* to provide such coverage. For example, in *Prowel v. Wise Business Forms, Inc.*,²⁵ the Third Circuit allowed a claim of sexual stereotyping by a gay man who was harassed on the job and terminated after thirteen years of employment. The *Prowel* plaintiff contended that, among other behaviors, co-workers called him “Princess” and “Rosebud;” derogatorily referred to his manner of sitting, walking, and dressing as effeminate; called him “fag” and “faggot;” and left a tiara on his work station. The Third Circuit ruled that although “the record is replete with evidence of harassment motivated by Prowel’s sexual orientation,” which was not actionable, “[n]evertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes.”²⁶ The court therefore allowed the plaintiff’s claim of gender stereotyping to go forward.²⁷

The possibility that gay and lesbian workers can bring a sex stereotyping claim based on *Price Waterhouse*, though, is far from adequate protection for these workers. First, this leaves these employees unprotected when they are discriminated against based on their sexual orientation alone, without the presence of gender stereotyping. A number of courts have

²³ *Id.* at 235.

²⁴ *Id.* at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

²⁵ 579 F.3d 285, 291 (3d Cir. 2009).

²⁶ *Id.* at 292.

²⁷ *Id.*; accord *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1036 (8th Cir. 2010) (plaintiff, described as “having an Ellen DeGeneres kind of look,” presented triable evidence that she was fired from hotel front desk because she did not appear suitably feminine, and therefore should have her day in court under Title VII); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874 (9th Cir. 2001) (“At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act,” and was therefore actionable); *Schmedding v. Tnemeco Co.*, 187 F.3d 862 (8th Cir. 1999) (plaintiff had actionable claim of gender stereotyping even though some harassment was directed at his perceived sexual orientation); *O’Donnell v. Pinnacle Corp. Town & Country Homes*, No. 03 C 2815, 2004 U.S. Dist. LEXIS 14623 (N.D. III. July 29, 2004) (lesbian who was called “butch” should be allowed to prove the comment demonstrated actionable sex stereotyping); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (jury could find plaintiff’s supervisor harassed and terminated lesbian plaintiff because she did not conform to sex stereotypes, based on comments that plaintiff’s shoes were “faggy” because he thought they were for men; “I thought you were the man;” “I thought you wore the pants;” and who “wore the dick in the relationship”).

dismissed the claims of gay and lesbian plaintiffs or those perceived to be gay on the ground that the discriminatory actions failed to demonstrate gender stereotyping.²⁸

Furthermore, some courts have rejected Title VII's coverage for gay and lesbian workers even where the facts suggest sex stereotyping. These courts take the position that actions that would constitute actionable sex stereotyping in the case of a straight plaintiff are not actionable in the case of a gay or lesbian plaintiff because Title VII's failure to cover sex orientation trumps an otherwise-valid claim of sex discrimination. The Second Circuit's decision in *Dawson v. Bumble & Bumble*,²⁹ demonstrates this line of analysis. In that case, a hairstylist sued based on her termination, alleging that she was fired because she failed to present a suitably feminine appearance. Though the Second Circuit acknowledged the similarities of the allegations to those made in *Price Waterhouse*, it rejected Title VII's coverage because of one difference: the *Dawson* plaintiff was an out lesbian. In the words of the Second Circuit Court of Appeals:

When utilized by an avowedly homosexual plaintiff, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII."³⁰

Likewise, in *Spearman v. Ford Motor Co.*,³¹ the plaintiff, a gay man, argued that he had an actionable Title VII claim based on, among other things, co-workers calling him a "bitch," "selfish bitch," "little bitch," "woman," and the presence of graffiti associating him with a drag queen. Despite the evidence of sex stereotyping, the Seventh Circuit rejected his claim of sex discrimination, on the ground that the plaintiff's "co-workers maligned him because of his apparent homosexuality, and not because of his sex."³² In courts that take this approach, not only are LGBT plaintiffs and LGBT-identified plaintiffs not protected from discrimination based on sexual orientation, they do not even receive the same protection against discrimination based on sex stereotyping that other workers receive.³³

²⁸ See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (gay male plaintiff had no claim under Title VII because "he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave"); *Hamm v. Weyauwega Milk Prods.*, 199 F. Supp. 2d 878, 895 (D.Wis. 2002), *aff'd*, 332 F.3d 1058 (7th Cir. 2003) ("Hamm was harassed not because of any of his characteristics, traits or mannerisms were feminine but because Hamm's coworkers... were hostile to Hamm's perceived homosexuality and were wary of what they perceived to be Hamm's desire of physical intimacy with them.").

²⁹ 398 F.3d 211, 219 (2d Cir. 2005).

³⁰ *Id.* at 218 (quoting *Howell v. North Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)).

³¹ 231 F.3d 1080 (7th Cir. 2000).

³² *Id.* at 1085-86.

³³ Courts have refused Title VII's protection not only to LGBT plaintiffs, but those who are identified (whether correctly or incorrectly) as LGBT by the employer or other workers. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Taylor v. H.B. Fuller Co.*, No. 06cv854, 2008 U.S. Dist. LEXIS 83420 (S.D. Ohio Oct. 20, 2008); *Valencia v. United States Dep't of Interior*, No. 3:08-cv-069-WKW, 2008 U.S. Dist. LEXIS 114815 (M.D. Ala. Aug. 5, 2008); *Webb v. Int'l Bhd. of Elec. Workers, Local Union, No. 654*, No. 04-3613, 2005 U.S. Dist.

Some courts have been more receptive to finding actionable sex stereotyping in cases of discrimination based on gender identity rather than sexual orientation. These courts recognize that discrimination against an employee because of transgender status inherently involves sex stereotyping, since it is motivated by the divergence between the employee’s biological sex and his or her expected gender identity. As the Sixth Circuit stated in *Smith v. City of Salem, Ohio*,³⁴ in allowing such a claim:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex

Sex stereotyping based upon a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label such as “transsexual” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.³⁵

LEXIS 21381 (D. Pa. Sept. 23, 2005); *Hamm v. Weyauwega Milk Prods.*, 199 F. Supp. 2d 878 (D. Wis. 2002), *aff’d*, No. 00-C-1283, 2003 U.S. App. LEXIS 11701 (7th Cir. Wis. June 13, 2003).

³⁴ 378 F. 3d 566 (6th Cir. 2004).

³⁵ *Id.* at 575 (citations omitted); *see also* *Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (“After *Hopkins* . . . , it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women. . . . Thus, [plaintiff] states a prima facie case of gender discrimination”); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (similar to *Smith*); *Glenn v. Brumby*, 2010 U.S. Dist. LEXIS 66207, *35-*36 (N.D. Ga. 2010) (“This Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex. . . . This conclusion is not at odds with this Court’s earlier decision . . . that transsexuals are not a suspect class, and is the result of the logical application of the Supreme Court’s reasoning in *Price Waterhouse*.”) (citations omitted); *Creed v. Family Express Corp.*, 2009 U.S. Dist. LEXIS 237 (N.D. Ind. 2009) (“Although discrimination because one’s behavior doesn’t conform to stereotypical ideas of one’s gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not. To sustain a claim based on sex stereotyping, then, a plaintiff must show that the employer actually relied on his or her gender in making an adverse employment decision. . . .”) (citations omitted); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653, 660-61 (S.D. Tex. 2008) (citations omitted) (“The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an ‘effeminate’ male or ‘macho’ female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes. There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII and *Price Waterhouse*.”).

The District Court for the District of Columbia also held that transgender status was protected in *Shroer v. Billington*, 424 F. Supp.2d 203 (D.D.C. 2006), although it rejected the plaintiff’s proffered sex stereotyping theory. Instead, the *Shroer* judge stated that discrimination based on gender identity is “literally” discrimination ‘because of

Other courts, however, have rejected claims of discrimination by transgender workers, even where the adverse employment actions were clearly based on gender stereotypes. The District Court for the Eastern District of Louisiana provided a fairly typical example of this position in dismissing a claim by a transgender employee.³⁶ According to the court, cases involving transgender employees are different than other sex stereotyping cases because they involve “not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. . . . While Title VII’s prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase “sex” has not been interpreted to include sexual identity or gender identity disorders.”³⁷ In this way, these courts deem gender stereotyping of a transgendered person to somehow be more permissible than gender stereotyping of a non-transgendered person.³⁸ Thus, discrimination against a non-transgender woman for behaving in a masculine manner is unlawful because it implicates actionable sex stereotyping. Discrimination against a transgender person who is biologically female but identifies as male for behaving in a masculine manner, however, is lawful even though it also implicates sex stereotyping. In this way, in the Sixth Circuit’s words, “courts superimpose classifications such as ‘transsexual’ on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.”³⁹

B. Title VII Sexual Harassment Law

Sexual harassment law under Title VII provides another potential theory of legal redress for LGBT employees. The Supreme Court’s 1998 case of *Oncale v. Sundowner Offshore Services*,⁴⁰ in which the plaintiff sued for sexual harassment based on a series of sex-related, humiliating actions committed by his coworkers, offers some support for such claims.⁴¹ In *Oncale*, the plaintiff, who was working as a roustabout on an eight-man, all-male oil rig in the Gulf of Mexico, endured a series of offensive acts committed by his coworkers, including their calling him derogatory names associated with gay men, sex-related assaults, and threats of rape.⁴² *Oncale*’s action for sexual harassment against his employer was dismissed by the Fifth Circuit on the ground that Title VII did not cover same-sex sexual harassment.⁴³ The high court reversed the dismissal, ruling that “nothing in Title VII necessarily bars a claim of discrimination

. . . sex. . . . That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality -- chromosomal, gonadal, hormonal, and neurological -- interact with each other, and in turn, with social, psychological, and legal conceptions of gender.” *Id.* at 213.

³⁶ *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *30 (E.D. La. Sept. 16, 2002).

³⁷ *Id.*; see also *Sweet v. Mulberry Lutheran Home*, 2003 U.S. Dist. LEXIS 11373, at *8-*9 (S.D. Ind. 2003) (“Sweet’s intent to change his sex does not support a claim of sex discrimination under Title VII because that intended behavior did not place him within the class of persons protected under Title VII from discrimination based on sex.”).

³⁸ See *Smith v. City of Salem, Ohio*, 378 F.3d at 574.

³⁹ *Smith*, 378 F.3d at 574.

⁴⁰ 523 U.S. 75 (1998).

⁴¹ *Id.* at 79.

⁴² *Id.* at 77.

⁴³ *Id.* (citing *Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996)).

. . . merely because the plaintiff and defendant are of the same sex.”⁴⁴ Justice Scalia, writing for a unanimous court, stated that the key to the validity of such an action was whether the harassment occurred “because of . . . sex.”⁴⁵ The Court then laid out three “evidentiary routes” by which a plaintiff could establish that same-sex harassment constituted discrimination “because of sex”: (1) where the challenged conduct involved explicit or implicit proposals of sexual activity and the harasser was homosexual; (2) where the harasser is motivated by general hostility to the presence of his or her own sex in the workplace; and (3) where the plaintiff provides “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”⁴⁶

Yet while *Oncale* established that courts should not dismiss same-sex harassment cases as a blanket matter, it has provided only sporadic protection for workers harassed because of their LGBT or perceived-LGBT status. This is because although a strong subtext in many same-sex harassment cases, and possibly in the *Oncale* case itself, concerns coworkers responding with animus to the perceived homosexuality of the plaintiff, the Court did not address how such actions should be assessed under the “because of sex” requirement.⁴⁷ Certainly, harassment motivated by anti-LGBT sentiment does not fit squarely into any of the three evidentiary routes explicitly discussed by the Court as satisfying this requirement. Indeed, it is not clear that the facts in *Oncale* would meet any of those routes.⁴⁸ Further, the *Oncale* Court did not make clear the extent to which courts may go beyond these routes in determining sex discrimination.

In the face of this uncertainty, lower courts have come to very different conclusions on whether and when they treat sexual harassment cases motivated by LGBT animus as actionable. The case of *Rene v. MGM Grand Hotel*,⁴⁹ demonstrates the legal uncertainty that surrounds this type of harassment. In it, an openly gay man who worked as a butler at the defendant hotel asserted a Title VII action based on sexual harassment by his male coworkers and supervisor. According to the plaintiff, the harassers' conduct “included whistling and blowing kisses at Rene, calling him ‘sweetheart’ and ‘muneca’ (Spanish for “doll”), telling crude jokes and giving sexually oriented “joke” gifts, and forcing Rene to look at pictures of naked men having sex.”⁵⁰ Plaintiff also testified that he was frequently subjected to offensive physical conduct of a sexual nature, including his coworkers “grabb[ing] him in the crotch and pok[ing] their fingers in his anus through his clothing.”⁵¹ The plaintiff asserted that he believed that the offensive actions were motivated by the fact that he was gay.⁵² The district court dismissed the Title VII action on the ground that “Title VII's prohibition of ‘sex’ discrimination applies only [to] discrimination on the basis of gender and is not extended to include discrimination based on sexual preference.”⁵³ On appellate review, a panel of the Ninth Circuit affirmed dismissal of the plaintiff’s claim by a divided vote. According to the panel opinion, the plaintiff’s case failed because it met none of

⁴⁴ *Id.* at 79.

⁴⁵ *Oncale*, 523 U.S. at 81.

⁴⁶ *Id.* at 80-81.

⁴⁷ *See id.* at 81.

⁴⁸ *See id.* at 80-81.

⁴⁹ 243 F.3d 1206 (9th Cir. 2001), *rev'd en banc*, 305 F.3d 1061 (9th Cir. 2002).

⁵⁰ 305 F.3d at 1064.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

the three evidentiary routes for demonstrating sex discrimination laid out in *Oncale*. “The degrading and humiliating treatment Rene contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.”⁵⁴

An en banc review of the panel’s decision reversed that outcome, although the uncertainty in the legal analysis that applied to same-sex harassment caused considerable disagreement on the rationale for holding the coworkers’ conduct actionable. A plurality opinion written by Judge William Fletcher and joined by four other judges, noted that the Supreme Court, in a past sexual harassment case, had “describ[ed] the kinds of sexual harassment that can create a hostile work environment, . . . [by] explicitl[ly] includ[ing] ‘physical conduct of a sexual nature.’”⁵⁵ Judge Fletcher’s opinion continued: “It is . . . clear that the conduct [in this case] was ‘of a sexual nature.’ Rene’s tormentors did not grab his elbow or poke their fingers in his eye. They grabbed his crotch and poked their fingers in his anus.”⁵⁶ The opinion declared that,

Rene’s otherwise viable cause of action [may not properly be] defeated because he believed he was targeted because he is gay. This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim. . . . The physical attacks to which Rene was subjected, which targeted body parts clearly linked to his sexuality, were “because of . . . sex.” Whatever else those attacks may, or may not, have been “because of” has no legal consequence. So long as the environment itself is hostile to the plaintiff because of [his] sex, why the harassment was perpetrated (sexual interest? misogyny? personal vendetta? misguided humor? boredom?) is beside the point.⁵⁷

A second opinion written by Judge Pregerson, in which two other judges concurred, stated that the plaintiff’s claim was actionable because it presented a viable claim of sex stereotyping harassment under *Price Waterhouse*. According to Judge Pregerson, “The repeated testimony that his co-workers treated Rene, in a variety of ways, “like a woman” constitutes ample evidence of gender stereotyping.”⁵⁸ Four other judges dissented.

A number of other courts, however, have denied similar harassment claims made by LGBT plaintiffs even where the harassment is of a sexual nature, on the ground that the harassers’ actions were motivated by anti-homosexual animus, which is unprotected by law.

⁵⁴ *Rene*, 243 F.3d at 1209.

⁵⁵ *Rene*, 305 F.3d at 1065 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

⁵⁶ *Id.*

⁵⁷ *Id.* at 1066 (quoting *Doe by Doe v. City of Belleville*, 119 F.3d 563, 578 (7th Cir. 1997)).

⁵⁸ *Id.* at 1068.

Some of these courts read the evidentiary routes laid out in *Oncale* as the only means by which LGBT plaintiffs can make out a claim for sexual harassment, and then deny coverage because evidence of anti-LGBT sentiments satisfies none of these routes. For example, in *King v. Superior Services*,⁵⁹ the plaintiff, who worked in a truck dispatching office, sued for sexual harassment based on coworkers repeatedly using a derogatory term for “homosexual” to describe him, and their frequent expression to the plaintiff of their professed belief that he wanted to perform oral sex on them.⁶⁰ The Sixth Circuit held that the case had been properly dismissed on summary judgment by the district court. According to the court, the harassing actions were not “based on sex” within the meaning of Title VII’s prohibition since none of the three evidentiary routes laid out in *Oncale* had been met by the plaintiff.⁶¹ The Sixth Circuit ruled that harassing actions, whether sexual or not, that were motivated by the harassers’ belief in plaintiff’s sexual orientation (whether correct or not), were “different from discrimination on the basis of sex,” and that even sexually explicit conduct based on such motivations did not constitute actionable sexual harassment.⁶²

⁵⁹ 68 Fed. Appx. 659 (6th Cir. 2003).

⁶⁰ *Id.* at 660.

⁶¹ The Sixth Circuit noted that, first, the speech and conduct were not motivated by (homosexual) sexual desire on the part of the harassers. *Id.* at 663. Second, “King might also prove discrimination on the basis of sex by showing that other male employees were harassed in such sex-specific and derogatory terms by another man as to make it clear that the harasser was motivated by general hostility to the presence of men in the workplace.” *Id.* at 664. The court found that King had made no such showing. In this regard, the court ruled that even if there was evidence in the case that the harassers’ actions involved sex stereotyping pursuant to *Price Waterhouse*, such remarks would not “prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff’s] gender in making its decision.” *Id.* (quoting *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000)). Third, the Sixth Circuit noted that plaintiff did not claim that the harassers at the defendant company treated men comparatively worse than women. *Id.*

⁶² *Id.* at 664 (citing *Spearman*, 231 F.3d at 1085). Similarly, in *Spearman v. Ford Motor Co.*, the Sixth Circuit dismissed a case in which the plaintiff, a gay man, was repeatedly called names by a coworker such as “selfish bitch,” “cheap ass bitch,” was subjected to graffiti comparing him with male drag queens, and stating that he had AIDS. The Sixth Circuit held that “[w]hile sexually explicit language may constitute evidence of sexual harassment, it is not ‘always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.’” *Spearman*, 231 F.3d at 1085 (quoting *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998)). Although the Sixth Circuit had deemed sexually explicit language to be sexual harassment on its face in other sexual harassment cases, *see, e.g.*, *Mire v. Tex. Plumbing Supply Co.*, 286 Fed. Appx. 138, 142 (5th Cir. 2008) (conduct that “included sexually suggestive comments about Mire’s appearance, inquiries about her sexual activity, and requests to fondle her or have sex with her” from multiple male coworkers constituted pervasive harassment); *Waltman v. Int’l Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (no dispute over whether harassment was “based on sex” in case of woman plaintiff harassed by male workers; evidence that “several different employees touched [plaintiff] in a sexual manner and directed sexual comments toward her . . . [and] of ongoing sexual graffiti on the walls” sufficient to make claim of hostile environment, *id.* at 477); *Hernandez v. Wangen*, 938 F. Supp. 1052, 1058 (D.P.R. 1996) (“[c]onduct, as alleged in this case which includes the spanking of an employee’s buttocks, repetitive sexual advances, repetitive sexual comments, and the physical touching” were sufficient to sustain a plaintiff’s claim against her male coworker), the *Spearman* Court stated that “[t]he plaintiff must still show that he was harassed because of his sex.” *Id.* at 1085. Similarly, even though the conduct at issue suggested the presence of sex stereotyping, the court stated that “‘remarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff’s] gender in making its decision.’” *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)). The court then found that the plaintiffs’ problems with his coworkers stemmed from “his apparent homosexuality. . . . [H]e was not harassed because of his sex (i.e. not because he is a man).” *Id.*

The Second Circuit used similar logic to dismiss the plaintiff's claims in *Simonton v. Runyon*.⁶³ In that case, the plaintiff was repeatedly called a "fucking faggot" and told "go fuck yourself fag," "suck my dick" and "so you like it up the ass?"⁶⁴ Co-workers placed pornographic photos in his work area, sent him male dolls and a copy of *Playgirl* magazine, and posted his name in the employee bathroom along with the names of celebrities who had died of AIDS.⁶⁵ Although Simonton produced substantial evidence of the explicitly sexual nature of the harassment he endured, the court found that the evidence failed to state a claim under Title VII because of the harassers' anti-gay motivations.⁶⁶ Its dismissal, it stated, was "informed by Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection of people based on their sexual preferences."⁶⁷ "The law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."⁶⁸ In other sexual harassment cases brought by LGBT-identified employees based on the theory that the harassers' actions involved sex stereotyping pursuant to *Price Waterhouse*, courts have dismissed such claims on the ground that the harassers' conduct was motivated by sexual orientation bias rather than gender stereotyping, despite the reality that sex stereotyping motivations and anti-LGBT animus are often, and were in these cases, inextricably linked.⁶⁹

Other circuits have also held that hostile work environment claims are not actionable if they are motivated by anti-LGBT animus. *See e.g.*, *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (hostile work environment claim fails where plaintiff was subjected to vulgar statements regarding his sexual orientation and practices accompanied by physical assault and graffiti because the plaintiff's "claim was, pure and simple, that he was discriminated against because of his sexual orientation"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258-59 (1st Cir. 1999) ("The record makes manifest that the appellant toiled in a wretchedly hostile environment. That is not enough, however, to make his employer liable under Title VII: no claim lies unless the employee presents a plausible legal theory, backed by significantly probative evidence, to show, inter alia, that the hostile environment subsisted 'because of such individual's race, color, religion, sex, or national origin.'"); *Soto-Martinez v. Colegio San Jose, Inc.*, No. 08-2374, 2009 U.S. Dist. LEXIS 82510, at *10 (D.P.R. Sept. 9, 2009) ("Plaintiffs submit conclusory allegations, which we cannot consider, that Soto-Martinez was discriminated because of his gender. The only factual allegations proffered by Plaintiffs are that Soto-Martinez suffered from verbal harassment that insinuated that he was a homosexual. These allegations are certainly not enough to sustain a Title VII hostile work environment claim."); *Ianetta v. Putnam Invs., Inc.*, No. 00-10385-JLT, 2002 U.S. Dist. LEXIS 3277, at *14-15 (D. Mass. Feb. 25, 2002) ("The most that is presented by the evidence is that Putnam has an animosity toward homosexuals which amounted to discrimination, but sexual orientation is not protected by Title VII."); *Trigg v. N.Y. City Transit Auth.*, No. 99-CV-4730, 2001 U.S. Dist. LEXIS 10825, at *20 (E.D.N.Y., July 26, 2001) ("An objective reading of the words uttered by Seabrook about which Trigg complains drives to the conclusion that it is his homosexuality at which they are aimed and not his gender. If the lack of civility, boorishness, or intolerance of Seabrook is deemed to be discriminatory, it is discriminatory against Trigg because he is a homosexual and not because he is a man.").

⁶³ 232 F.3d 33 (2d Cir. 2000).

⁶⁴ *Id.* at 35.

⁶⁵ *Id.*

⁶⁶ *Id.* at 36.

⁶⁷ *Id.* at 35.

⁶⁸ *Id.*

⁶⁹ *See, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759-60 (6th Cir. 2006) (LGBT plaintiff's allegations that harassers repeatedly questioned his masculinity, and directed women's sanitary napkins at him, as well as subjected him to sexually explicit acts such as restraining him and then forcibly simulating sex with him, and repeatedly touching his crotch, were not actionable because they failed to demonstrate that the action occurred "because of sex."); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005) (evidence that included a coworker

C. State Statutes

The gap in federal law has not been filled by state statutes that ban discrimination based on LGBT status. Twenty-nine states, including all of the South, and most of the Midwest and West, afford no employment discrimination protections for gays and lesbians. Moreover, the twenty-one state statutes that offer some protection generally are significantly limited in scope.⁷⁰ Three of them do not protect workers who are perceived to be gay.⁷¹ Five of them do not allow attorney's fees, which would make it difficult for many to file suits. Another five do not allow an award of attorney's fees unless a court, rather than an administrative action, is filed.⁷² Further, only twelve states protect against discrimination based on gender identity.⁷³ Under this patchwork of laws, whether an LGBT employee who suffers discrimination will have any recourse will turn on where he or she happens to live. Employees in the majority of jurisdictions can be discriminated against without consequence.

Moreover, state laws are no substitute for federal protection. As revealed by a 1998 statistical study by Marieka Klawitter and Victor Flatt of the effects of non-discrimination clauses on gay and lesbian couples, state laws had no significant impact on the incomes of the census registered gay and lesbian couples.⁷⁴ The authors of this study suggest that this is because states lack the resources and administrative infrastructure to enforce these ordinances. In contrast, the federal government has a well-developed apparatus to investigate and enforce employment discrimination statutes in the form of the Equal Employment Opportunity Commission (EEOC). As Professors Klawitter and Flatt point out, the same was true for employment discrimination based on race. Before passage of Title VII, twenty-five states had

telling plaintiff, “[y]ou are just so gay,” that she was happy that there were “real men” on the floor; statements that “[a] real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a ‘real man’!!!!!!;” and coworkers calling plaintiff the terms “faggot” and “fem,” based on which the district court had found sex stereotyping, “compel[] the conclusion that the reprehensible conduct that Kay alleges was motivated by sexual orientation bias rather than gender stereotyping”); *Webb v. Int’l Bhd. of Elec. Workers, Local Union No. 654*, No. 04-3613, 2005 U.S. Dist. LEXIS 21381, at *29-30 (D. Pa. Sept. 23, 2005) (“[A]lthough some of the harassment alleged by Webb involves ridicule of his appearance - his lips and his pierced ears - that could perhaps in some situations be motivated by gender stereotyping, the broader context of the harassment, including the more offensively obscene remarks and drawings, alleged by Webb, makes it clear that this conduct implicated sexual orientation bias. Webb's own rendition of the facts includes his belief that at least two of his alleged harassers wrongly believed him to be homosexual. . . . [N]o reasonable jury could find that the harassment alleged by Webb, reprehensible though it was, was motivated by gender stereotyping rather than by sexual orientation bias.”).

⁷⁰ HUMAN RIGHTS CAMPAIGN, FEDERAL LEGISLATION, EMPLOYMENT NON-DISCRIMINATION ACT (2010), http://www.hrc.org/law_and_elections/enda.asp (last visited July 27, 2010).

⁷¹ THE WILLIAMS INSTITUTE, *Analysis of State Laws and Executive Orders Prohibiting Employment Discrimination Against LGBT People*, in DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 15-2, available at http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html (last visited July 27, 2010).

⁷² *Id.*

⁷³ HUMAN RIGHTS CAMPAIGN, *supra* note 70. Ten states that have not passed statutes have gubernatorial executive orders that in theory prohibit discrimination against state employees. Still, not one of these orders allows for a private right of action; a mere six of them provide the authority to investigate a victimized employee's grievance. See WILLIAMS INSTITUTE, *supra* note 71, at 15-3.

⁷⁴ Klawitter & Flatt, *supra* note 17, at 658.

laws prohibiting race discrimination in employment. Yet significant economic gains for African-Americans did not occur until after passage of Title VII.⁷⁵

III. The Employment Non-Discrimination Act: Providing the Same Basic Protection from Discrimination that Other Employees Possess

Title VII established an important principle in American law: Employment decisions should be based on a person's qualifications and job performance, rather than on characteristics unrelated to their work. Until now, however, that principle has not been applied to employment decisions based on a person's sexual orientation or gender identity. The Employment Non-Discrimination Act, which is currently being considered by Congress, would at last forbid these types of discrimination.

By design, ENDA is modeled on the employment protections offered by Title VII, here extended to apply to sexual orientation and gender identity.⁷⁶ ENDA would make it illegal to discriminate against employees when it comes to hiring, termination, compensation, promotion, and most terms and conditions of employment based on either sexual orientation or gender identity, or the perception of either. It would also protect workers from discrimination because they associated with other workers with disfavored sexual orientations or gender identities, and would protect all workers from retaliation if they complained about discrimination based on sexual orientation or gender identity. It would cover the same employers currently covered by Title VII: Federal, state and local governments, private employers with fifteen or more employees, unions, and employment agencies. It would therefore give the same basic protection from discrimination based on sexual orientation and gender identity that is currently accorded by Title VII to race, color, religion, sex and national origin.

ENDA would also provide the same procedures and remedies available to other employees under Title VII. Sexual orientation and gender identity claims would come within the purview of the EEOC, the federal agency that enforces Title VII. Available remedies would include: awarding back or front pay; promotion, hiring or reinstatement; reasonable accommodations that would return the employee to the circumstances that he or she would have been in had the discrimination not occurred; and, attorney's fees, expert witness fees, and court costs.⁷⁷

Further, ENDA provides the same blanket exclusion for particular types of employers from its coverage that Title VII exempts from the ban on religious discrimination.⁷⁸ In other words, those employers who are currently not covered by Title VII's ban on religious discrimination would, on passage of ENDA, also be exempt from the prohibition on discrimination based on LGBT status. Title VII contains two such exemptions that would be

⁷⁵ *Id.* at 663.

⁷⁶ S.1584, 111th Cong. § 2 (2009); H.R. 3017, 111th Cong. § 2 (2009) (sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality," and gender identity is described as "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").

⁷⁷ *Id.*

⁷⁸ S.1584 § 6; H.R. 3017 § 6.

incorporated into ENDA.⁷⁹ The first, section 2000e-1(a), provides that Title VII "shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."⁸⁰ This provision has been routinely applied by courts under Title VII to exempt a broad variety of churches, faith-based ministries, and religious educational institutions.⁸¹ The second exemption, section 2000e-2(e)(2), protects religious hiring in sectarian education by providing, that:

[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.⁸²

ENDA also narrows the protections otherwise available under Title VII in particular ways where claims of sexual orientation or gender identity are at stake, in order to avoid any contention that LGBT employees would receive "special rights" under the law.⁸³ Thus, ENDA specifically prohibits the use of affirmative action as a remedy for LGBT discrimination, although this remedy is sometimes available for race and gender discrimination.⁸⁴ It also excludes the use of a "disparate impact" theory of discrimination for LGBT claims, a theory available for other claims of discrimination, which allows employees to sue for employer actions that disproportionately affect a protected class. Further, the bill explicitly permits employers to institute reasonable dress and grooming standards.⁸⁵ ENDA also states that it may not be interpreted to require the equal provision of benefits to same-sex partners.⁸⁶

⁷⁹ S.1584 § 6; H.R. 3017 § 6.

⁸⁰ 42 U.S.C. § 2000e-1 (1964).

⁸¹ *See, e.g.,* LeBoon v. Lancaster Jewish Cmty. Ctr Ass'n, 503 F.3d 217 (3d. Cir. 2007) (Jewish community center, which operated a variety of programs, including a summer camp and preschool, and published a newspaper, exempted); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000) (college associated with Baptist churches exempted); Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997) (similar); Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (nonprofit Christian humanitarian organization exempted); Saeemodarae v. Mercy Health Services, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (Catholic hospital exempted); EEOC v. Presbyterian Ministries, Inc, 788 F. Supp. 1154 (W.D. Wash. 1992) (retirement home operated by Presbyterian Church exempted); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (Salvation Army exempted).

⁸² 42 U.S.C. § 2000e-2.

⁸³ S.1584 § 8(a); H.R. 3017 § 8(a).

⁸⁴ *See id.*

⁸⁵ S.1584 § 5; H.R. 3017 § 5 (employers may limit the dressing and grooming standards of individuals participating in a gender transition to that gender the individual is transitioning to, or has transitioned).

⁸⁶ S.1584 § 8(b); H.R. 3017 § 8(b).

Finally, ENDA exempts the armed services from its coverage.⁸⁷ It therefore has no effect on current military policies for LGBT service members.⁸⁸ It also does not apply to veterans' benefits.⁸⁹

While some opponents of ENDA have contended that its passage might portend an explosion of litigation that would overwhelm the EEOC and federal courts with a flood of claims, the evidence belies this contention. A 2007 cost estimate by the Congressional Budget Office (CBO) predicts far more modest effects.⁹⁰ According to the CBO, the EEOC expects that the passage of ENDA would increase its annual caseload by 5 percent, and would require adding 60 to 80 staff persons.⁹¹ It estimated that ENDA would likely cause an insignificant increase in the workload of the federal courts because of the relatively small number of cases that would reach them.⁹² An earlier report of the General Accounting Office ("GAO") that gathered data concerning the utilization of state laws prohibiting sexual orientation discrimination found that less than 3 percent of all the employment discrimination complaints filed in each of these states were based on sexual orientation.⁹³ The report concluded that "relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints."⁹⁴

⁸⁷ S.1584 § 7(a); H.R. 3017 § 7(a).

⁸⁸ See S.1584 § 7; H.R. 3017 § 7.

⁸⁹ S.1584 § 7(b); H.R. 3017 § 7(b).

⁹⁰ STAFF OF CONG. BUDGET OFFICE, 110TH CONG., REPORT ON COST ESTIMATE OF H.R. 3685 EMPLOYMENT NON-DISCRIMINATION ACT (2007).

⁹¹ *Id.* at 2.

⁹² *Id.*

⁹³ See U.S. GEN. ACCOUNTING OFFICE, SEXUAL-ORIENTATION BASED EMPLOYMENT DISCRIMINATION: STATES' EXPERIENCE WITH STATUTORY PROHIBITIONS 11-13 (GAO/OGC-98-7R) (1997) (the average annual rates were as follows for each state: California, 1.05%; Connecticut, 1.36%; District of Columbia, 2.52%; Hawaii, 2.76%; Massachusetts, 2.17%; Minnesota, 3.10%; New Jersey, 1.27%; Rhode Island, 1.85%; Vermont, 2.94%; and Wisconsin, 1.1%); see also William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 SOUTHERN CAL. L. REV. 65 (2002). Rubenstein persuasively argues that the low percentages reported by the GAO are not evidence that gays and lesbians are not using these laws, but rather that they reflect the lower rates of gay workers who are employed as compared to, for example, women workers or minority workers. When Rubenstein accounted for the number of gays in the workforce compared to other protected populations, he concluded that in most states that have these statutes, sexual orientation complaints fall somewhere between the rates of sex and discrimination filings. Given the relatively small percentage of gays and lesbians in the workforce, however, Rubenstein concludes that "even the relatively frequent filing of discrimination complaints by gay workers will not swamp government agencies." *Id.* at 66-68; see also Badgett, Sears, Lau, & Ho, *supra* note 5, at 579-80 (reaching conclusion that although the raw number of complaints filed based on sexual orientation was small in states that had LGB antidiscrimination provisions, when the relatively low rates of LGB persons in the general population were factored in, "the actual number of sexual orientation discrimination complaints per gay person . . . were roughly equivalent to the number of sex-based discrimination complaints per woman").

⁹⁴ U.S. GEN. ACCOUNTING OFFICE, *supra* note 93. No similar studies have been conducted on the complaint rates for states that currently prohibition discrimination based on sexual identity. See Badgett, Sears, Lau, & Ho, *supra* note 5, at 580.

IV. Conclusion

A half century ago, Eleanor Roosevelt eloquently observed that human rights begin:

“[i]n small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.”⁹⁵

A substantial number of LGBT employees in the United States currently experience discrimination at their jobs – many on a weekly, even daily basis. These employees seek nothing other than to be judged fairly based on their work performance, rather than on their sexual orientation or gender identity. Yet, unlike other workers, they currently have no recourse under the law. The passage of ENDA is a modest, pragmatic step that would help ensure that these workers are judged fairly, based on their work performance rather than on their sexual orientation or gender identity. In this way, ENDA would bring us closer toward realizing the vital promise of ensuring that all persons are treated with equal justice, equal opportunity, and equal dignity under the law.

⁹⁵ Eleanor Roosevelt, Remarks At Presentation Of Booklet On Human Rights, In Your Hands, To The United Nations Commission On Human Rights, United Nations, New York, (Mar. 27, 1958).