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Is the ENDA Near?

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Forty five years after the passage of the Civil Rights Act of 1964 — which outlawed employment discrimination on the basis of race, national origin, religion and sex for the first time on the federal level — it remains legal both as a matter of federal law and in a majority of states to refuse to hire or to fire someone based on the fact that the person is gay, lesbian or transgender. Given that fact, the approximately five percent of the population that surveys typically indicate self-identify as gay or lesbian, and the perhaps two to three percent of the population that similarly identifies as transgender, frequently either end up relocating to large urban areas such as New York, Los Angeles or San Francisco, where they can pursue employment with less fear of legal discrimination; or remain where they are, and attempt to evade discrimination, frequently by hiding in the proverbial "closet." If passed by Congress and signed by President Obama, the Employment Non-Discrimination Act — or "ENDA" — now wending its way through Congress yet again — could radically alter this state of affairs as a matter of federal law — and open large swathes of the country for the first time to (nearly) equal employment opportunities for gay, lesbian and transgender Americans.

The first bill that would have outlawed employment discrimination against gays and lesbians was introduced in Congress in May, 1974, on the fifth anniversary of the so-called "Stonewall" riots by then Representatives Bella Abzug and Ed Koch of New York. It did not pass. Similar legislation was subsequently introduced in every Congress since with the exception of the 109th from 2005 to 2006. The closest that ENDA has previously come to passing was during the Clinton Administration in 1996, when it was put up for a vote in the Senate, but failed on a narrow 49–50 margin.

More recently, during the 110th Congress, as first introduced on April 24, 2007, H.R. 2015 would have enacted federal employment discrimination protection not only for gays and lesbians, but also, unprecedented federal protection for transgendered employees. This "trans-inclusive" bill subsequently died in the House Subcommittee on the Constitutional, Civil Rights and Civil Liberties, however. Undeterred, on September 27, 2007, Rep. Barney Frank (D-Ma.) introduced a separate bill, H.R. 3685, that did not contain provisions protecting transgendered employees. The stated hope for H.R. 3685 was that it would garner enough support in the Senate to be filibuster-proof and pass. Though the bill ultimately passed the House on a 235-184 vote, it ended up dying in the Senate anyway in late 2008.

On June 24, 2009, Rep. Frank introduced ENDA yet again. This time around, H.R. 3017 specifically includes not only federal proscription of discrimination based on actual or perceived sexual orientation, but also discrimination based on gender identity. As introduced, the proposed legislation has 114 original cosponsors, up from 62 cosponsors for H.R. 2015, the "trans-inclusive" bill first introduced in 2007 -

including several Republican members of the so-called "Main Street Partnership." The House Education and Labor Committee held hearings on the bill on September 23, 2009, and as of October 22, 2009, H.R. 3017 was reported to have 189 cosponsors in the House.

On August 5, 2009, donning a mantle long worn by the then-ailing Senator Kennedy, the junior Senator from Oregon, Sen. Jeff Merkley (D-Or.), introduced companion "trans-inclusive" ENDA legislation in the Senate as well - S.B. 1584. Among the 32 original co-sponsors of the Senate legislation were Republicans Olympia Snowe and Susan Collins of Maine. As of November 4, 2009, S.B. 1584 had 42 co-sponsors and was pending before the Health, Education, Labor, and Pensions (HELP) Committee, which held hearing on the bill on November 5, 2009.

Notably, even if this legislation passes the 111th Congress and Title VII is amended, the ENDA now pending in Congress will not quite provide the same level of protection from discrimination as the proscriptions against discrimination based on race, national origin, religion and sex currently found in Title VII.

Following the passage of Title VII of the Civil Rights Act in 1964, certain employers that could no longer "openly" discriminate based on race, for example, imposed "neutral" criteria for advancement for a first time — such as high school graduation requirements — that disproportionately excluded groups, such as African-Americans, that were newly protected under the Civil Rights Act. In recognition of this fact, in 1971, in the landmark case of *Griggs v. Duke Power Co.*, the Supreme Court interpreted Title VII as banning not only intentional discrimination — so-called "disparate treatment" — but also neutral practices that had a statistically significant, and otherwise unjustified, "disparate impact" on groups possessing a protected characteristic.[1] As Justice Burger, writing for the Court, put it: "Under the [Civil Rights] Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the *status quo* of prior discriminatory employment practices."[2] According to the Supreme Court, Title VII of the Civil Rights Act of 1964 proscribed "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." "The touchstone," the Court found, was "business necessity. "If an employment practice which operated to exclude Negroes" could not "be shown to be related to job performance," the Court found, the "practice is prohibited."[3]

A long — and often vitriolic — debate over the meaning and wisdom of *Griggs* — has ensued - and continues to the present day, as the Supreme Court's June 29, 2009 decision in *Ricci v. DeStefano*[4] amply demonstrates. Proponents of *Griggs* and its progeny insist that the effects of historical intentional discrimination against protected classes persist into the present day, and should lead courts, at a minimum, to closely scrutinize — and more quickly invalidate - "neutral" employment screens with demonstrable disparate impacts. Detractors of *Griggs*, on the other hand, decry a "quota" mentality they claim results from the legal viability of "disparate impact" claims.

This controversy has carried over into the legislative debate regarding ENDA, and resulted in certain differences between the proposed law and Title VII apparently aimed at addressing (or preempting) objections by opponents that ENDA would result in "affirmative action" for gays, lesbians, bisexual and transgender employees. In particular, in contrast with Title VII's current proscription of both "disparate treatment" and "disparate impact" discrimination based on race, national origin, religion and sex, the versions of ENDA now pending in Congress both explicitly state that "disparate impact" claims based on actual or perceived sexual orientation or gender identity will not be viable. Moreover, the proposed ENDA bills both make explicit that they do not authorize "preferential treatment" or "quotas" based on actual or perceived sexual orientation. In contrast with the state of affairs governing its charge with respect to race, sex and national origin discrimination as well, the Equal Employment Opportunity Commission is also explicitly prohibited under ENDA from collecting any statistics on the subject of sexual orientation or gender identity.

Another significant difference between ENDA and Title VII is that the proposed legislation specifically provides that it does not apply to the Armed Forces, and that it should not be construed in such a way as to prevent employers from giving preference to veterans. ENDA also makes clear that it does not require employers to treat unmarried individuals in the same manner as married individuals — and that "marriage" under ENDA will be construed in the same manner as it is under the federal "Defense of Marriage" Act.

In addition, in order to address or forestall objections from religiously-affiliated employers, ENDA contains a broad exemption for religiously-affiliated employers exempt under sections 702(a) and 703(e)(2) of Title VII. In particular, ENDA will entirely exclude from its coverage both entities exempted by section 702(a) of Title VII, which applies to "religious corporations, associations, educational institutional and societies" "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"; as well as entities exempted by section 703(e)(2) of Title VII, which allows schools, colleges, universities and other institutions of learning to hire and employ employees of a particular religion if the institution is in whole or substantial part owned, supported or controlled by a religion or religious entity. Private membership clubs are likewise exempt.

On the potentially touchy issue of dress codes, the proposed ENDA allows employers to adopt and enforce "reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law" — but only so long as transgender employees are allowed to dress consistently with their transitioned to (or transitioning) gender identity. In addition, the legislation specifically provides that it should not be construed to "establish an unlawful employment practice based on actual or perceived gender identity," if employers deny

> access to shared shower or dressing facilities in which being seen unclothed in unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the

> employer at the time of employment or upon notification to the employer that the employer has undergone or is undergoing gender transition, which ever is later.

Though this provision — and the proposed legislation — does not specifically speak to pure "bathrooms" or "lavatories" - it does make clear that nothing in ENDA "shall be construed to require the construction of new or additional facilities." Hence, as with changing and shower rooms, by implication if not explicitly, transgender employees must be allowed to use either single sex (or alternative equally open, i.e., unisex) bathroom facilities used by individuals of the gender to which the employee has transitioned (or is transitioning) upon notice to the employer.

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1 401 U.S. 424 (1971).
2 *Id*. at 430.
3 *Id* at 431.
4 129 S. Ct. 2658 (2009).