

Testimony on S.811, The Employment Non-Discrimination Act of 2011

M. V. Lee Badgett

June 12, 2012

U.S. Senate Committee on Health, Education, Labor, and Pensions

Summary of testimony:

S.811, the Employment Non-Discrimination Act, would outlaw discrimination in hiring and other employment decisions based on sexual orientation and gender identity. I will use recent and ongoing research to document the clear need for this legislation.

First, several decades of social science research have demonstrated that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) Americans occurs in workplaces all across the country. This evidence comes from many different methods of studying discrimination, including self-reported experiences, official complaints of discrimination in states that already ban it, experiments to measure the treatment of LGBT job applicants, and comparisons of wages earned by LGBT people and heterosexual people. The evidence includes discrimination in both private sector employment and public employment in state and local governments.

Second, nondiscrimination laws like ENDA are likely to reduce discrimination. Some recent evidence suggests that state laws banning discrimination have been effective in reducing wage gaps and employment discrimination against LGB people, in particular.

Third, evidence suggests that employers would also benefit if ENDA were passed, since LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.

Full Testimony:

Good morning, Senator Harkin and members of the committee. I am an economist and director of the Center for Public Policy and Administration at the University of Massachusetts Amherst, and I'm also the research director of the Williams Institute on Sexual Orientation Law and Public Policy at UCLA. I have studied employment discrimination based on sexual orientation, race, and gender for more than twenty years and have published two books and numerous studies on this topic.

Today I am here to speak to you about S.811, the Employment Non-Discrimination Act of 2011. As you know, this bill would outlaw discrimination in hiring and other employment decisions based on sexual orientation and gender identity. I will use recent and ongoing research to make three main points to document the clear need for this legislation.

First, several decades of social science research have demonstrated that employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) Americans occurs in workplaces all across the country. This evidence comes from many different methods of studying discrimination, including self-reported experiences on surveys, official complaints of discrimination in states that already ban it, experiments to measure the treatment of LGBT job applicants, and comparisons of wages earned by LGBT people and heterosexual people. Together these sources provide ample evidence that employment discrimination based on sexual orientation and gender identity is a serious problem in the United States.

For several decades, academic researchers have surveyed LGBT people about their workplace experiences. Those surveys reveal numerous experiences of being fired, being

denied a job, or some other form of unequal treatment in the workforce that stemmed from these individuals' sexual orientation or gender identity. Most recently, the 2008 General Social Survey found that 42% of a national random sample of lesbian, gay, and bisexual people had experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives. In addition 27% had experienced employment discrimination during the five years prior to the survey. That figure includes both employees who have disclosed their sexual orientation in the workplace and those who have not.

Findings from recent surveys of transgender employees confirm similar and even more common experiences of discrimination. For example, in the largest survey of transgender people to date, 78% of respondents reported experiencing at least one form of harassment or mistreatment at work because of their gender identity. More specifically, 47% had been discriminated against in hiring, promotion, or job retention.

A different source of data supports the finding that discrimination based on sexual orientation is common, and perhaps as common as other kinds of discrimination, relative to population size. My colleagues and I collected the numbers of sexual orientation discrimination complaints in states that outlawed such treatment from 1999-2007. The number of complaints in each state is relatively small compared with the overall level of complaints filed at state agencies. But once we adjust for the population size of the different protected groups, we see that LGB people are as likely to file complaints as women and people of color. The annual rate of complaints was 4.7 per 10,000 LGB people on average in these states (assuming that LGB people are 4.1% of the U.S. population). That figure is quite similar to the number of sex discrimination complaints per woman (5.4

per 10,000 women) and race-related complaints per person of color (6.5 per 10,000). In other words, LGB people are about as likely to file discrimination complaints as are people in groups that are currently protected against discrimination under federal law.

We see particularly compelling evidence of discrimination in two recent studies that tested employers' responses to a pair of identically qualified applicants differing only by sexual orientation or gender identity. Sociologist Andras Tilcsik sent out pairs of fictional resumes in response to ads for entry-level positions in seven states, with one resume indicating volunteer work as treasurer of a gay campus organization and the other including volunteer work at a non-gay organization. The differential treatment of gay applicants was clear. Of the gay-coded applicants, only 7.2% were offered an interview, while 11.5% of the non-gay-coded applicants were invited to an interview. To get a job interview, a gay applicant had to apply to 14 jobs, while the average heterosexual applicant only had to apply for 9 jobs to get an interview.

Another study sent pairs of actual applicants, one transgender and one not, to apply for jobs in the retail sector in New York City. In eleven out of 24 applications (46%), the non-transgender applicant but not the transgender applicant received a job offer. Only one out of 24 (4%) resulted in the transgender applicant being offered the job while the non-transgender applicant was not—a 42% net rate of discrimination.

An additional way that economists and sociologists look for evidence of discrimination is to compare the earnings of people who have different personal characteristics, such as sexual orientation, but the same productive characteristics. If there is a wage difference after controlling for all of the factors that we reasonably expect to

influence wages, such as education and experience, then most of us would conclude that discrimination is likely the reason for the wage gap for the disadvantaged group.

Across two decades of research, studies show a significant pay gap for gay or bisexual men when compared to heterosexual men who have the same productive characteristics. Depending on the study, gay and bisexual men earn from 10% to 32% less than similarly qualified heterosexual men. Lesbians generally earn the same as or more than heterosexual women, but lesbians earn less than either heterosexual or gay men. We have no comparable studies for gender identity, but the National Transgender Discrimination Survey found that 15% of respondents had incomes under \$10,000 per year, while the general population figure for that income level was 4% at the time of the survey.

Also, it's important to note that the evidence of discrimination discussed here includes both private sector employees and employees of state and local governments. When my Williams Institute colleagues compared reports of discrimination, complaints of discrimination, and the wage impact of discrimination between the public and private sector, they found the same patterns of employment discrimination against LGBT people who work for state governments and for private sector employers. Based on this research, they concluded that there has been a widespread and persistent pattern of discrimination by state governments as well as in the private sector.

Overall, there is extensive evidence of discrimination against LGBT people, as well as evidence that sexual orientation discrimination results in economic harm to LGBT people, reducing their earnings by thousands of dollars.

The studies showing wage gaps also lead to my second major point: Discrimination hurts, but nondiscrimination laws like ENDA are likely to reduce discrimination. Some recent evidence suggests that state laws banning discrimination have been effective in reducing wage gaps and employment discrimination against LGB people, in particular. Two recent studies using Census 2000 data found that state-level sexual orientation nondiscrimination laws reduced the gap in annual earnings for gay men. In the study referred to earlier that found differential treatment of gay male job applicants, the gap in treatment was significantly smaller in states or local areas with nondiscrimination laws that included sexual orientation—8.7% received invitations compared with 5.3% in states without such protections—although the non-gay applicants were still favored in both sets of states.

My third and final point is that America's businesses are also likely hurt by the direct and indirect effects of discrimination in the workplace. Economists and businesses have long argued that businesses will be most successful when they recruit, hire, and retain employees on the basis of talent, not personal characteristics that have no impact on an employee's ability to perform a job well. Beyond that most basic reason to forbid discrimination, the evidence suggests that employers would also gain in other ways if ENDA were passed. Numerous studies from various academic disciplines suggest that LGBT workers will be healthier and more productive workers if they have legal protection from discrimination.

A key link between policies and productivity is disclosure of one's sexual orientation. Many studies have demonstrated that fear of discrimination keeps LGB workers, particular from revealing their sexual orientation in the workplace. Although

having experienced discrimination directly is a powerful reason for some to “stay in the closet,” many studies show that LGB people who fear discrimination are also less likely to reveal their sexual orientation to co-workers and supervisors.

Employers have a stake in these individual decisions, since disclosure has potentially positive benefits to LGB workers’ well-being and job performance. Studies find that people who have come out report lower levels of anxiety, less conflict between work and personal life, greater job satisfaction, more sharing of employers’ goals, higher levels of satisfaction with their co-workers, more self-esteem, and better physical health. So when fear of discrimination causes LGB employees to conceal their sexual orientation or gender identity, employers experience negative costs along with LGB people themselves. The time as well as social and psychological energy that is required to maintain a hidden identity would, from an employer’s perspective, be better used on the job.

As in the case of wage gaps, nondiscrimination policies can improve the workplace climate and influence choices about disclosure and concealment. Several studies have found higher levels of disclosure in workplaces when employers have their own non-discrimination policies that include sexual orientation. And one study found that LGB people who live in places covered by a nondiscrimination law had higher levels of disclosure than those in unprotected locations.

Perhaps the best evidence that nondiscrimination policies are good for business comes from the fact that many companies have voluntarily adopted policies and point to the business value of those policies. According to the Human Rights Campaign, 86% of the Fortune 500 companies include sexual orientation in their nondiscrimination policies, and 50% include gender identity. A Williams Institute study shows that large companies report

that they adopt these policies to improve employee retention, recruitment, and productivity, as well as to generate the best ideas and a stronger customer base.

To sum up, several decades of research demonstrate that discrimination based on sexual orientation and gender identity exists in our nation's workplaces. This discrimination hurts LGBT people financially and in other harmful ways. Our nation's employers and employees would be better off with an LGBT workforce that no longer fears discrimination. The research overwhelmingly demonstrates that passing the Employment Non-Discrimination Act would benefit both employees and employers.

References

Badgett, M. V. Lee. 2007. "Discrimination Based on Sexual Orientation: A Review of the Economics Literature and Beyond," in *Sexual Orientation Discrimination: An International Perspective*, co-edited by M. V. Lee Badgett and Jeff Frank, Routledge, 2007.

M. V. Lee Badgett, Christopher Ramos, and Brad Sears. 2008. "Evidence of Employment Discrimination on the Basis of Sexual Orientation and Gender Identity: Complaints Filed with State Enforcement Agencies 1999-2007," Williams Institute.

Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. 2011. "Injustice At Every Turn: A Report Of The National Transgender Discrimination Survey," National Center For Transgender Equality & The Gay And Lesbian Task Force, http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Klawitter, Marieka. 2011. "Multilevel Analysis of the Effects of Antidiscrimination Policies on Earnings by Sexual Orientation," *Journal of Policy Analysis and Management*, Vol. 30, No. 2, 334-358.

Make the Road New York. 2010. *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination*.
http://www.maketheroad.org/pix_reports/TransNeedNotApplyReport_05.10.pdf, 2010.

Sears, Brad, and Christy Mallory. 2011. "Economic Motives for Adopting LGBT-Related Workplace Policies," Williams Institute, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>.

Brad Sears, Nan D. Hunter, Christy Mallory. 2009. "Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment," Williams Institute, <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment/>.

Tilcsik, András, 2011. "Pride and Prejudice: Employment Discrimination against Openly Gay Men in the United States," *American Journal of Sociology*, Vol. 117, No. 2 (September), pp. 586-626.