Testimony of Samuel R. Bagenstos
Professor of Law, University of Michigan Law School

on

Equality at Work: The Employment Non-Discrimination Act

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Committee on Health, Education, Labor, and Pensions

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Chairman Harkin, Ranking Member Enzi, and Members of the Committee, thank you for inviting me to testify today in support of the Employment Non-Discrimination Act. My name is Samuel Bagenstos. I hold an appointment as Professor of Law at the University of Michigan Law School. For most of the past two decades, I have taught, written about, and litigated cases in civil rights and employment discrimination law. From 1994 to 1997, and again from 2009 to 2011, I served in the United States Department of Justice, where I most recently was the Principal Deputy Assistant Attorney General for Civil Rights.

ENDA is an exceptionally important bill and one that is much needed. It will be the logical next step in our Nation's commitment to eradicating workplace discrimination. In this testimony, I will make three essential points: first, that discrimination against lesbian, gay, bisexual, and transgender individuals is a serious problem; second, that the current legal regime is inadequate to respond to that problem; and, third, that ENDA is an appropriately tailored remedy for that problem.

Discrimination Against LGBT Individuals is a Serious Problem

LGBT individuals who have experienced discrimination have testified before this Committee in the past, and the Committee will hear more of their stories today. Their testimony stands on its own and provides the most compelling reason Congress should adopt this bill. Let me offer a wider scale view on why discrimination against LGBT individuals is wrong and why Congress should do something about it.

At the most fundamental level, workplace discrimination against people who are gay or lesbian or bisexual or transgender violates the basic American values of equal opportunity and fair play. If a person can do the job—and can do it as well as, or better than, anyone else—an employer has no business firing or refusing to hire that person simply because he or she is

gay, lesbian, bisexual, or transgender. When employers discriminate against LGBT individuals, those individuals confront a choice that can be tragic: give up job opportunities in their chosen field—opportunities to perform jobs that they can do as well as or better than anyone else—or try to hide who they are, at great psychological cost and fear of discovery. An array of medical, psychological, and social scientific evidence demonstrates that the experience of workplace discrimination and stigma harms the mental and even physical health of lesbian, gay, bisexual, and transgender persons.[1] And the testimony this Committee has heard from individuals who have experienced discrimination because of their sexual orientation or gender identity highlights the very substantial costs that discrimination imposes on those individuals.

But the cost is not just to LGBT individuals. When productive workers are denied the opportunity to perform their jobs, all of society loses out. In our current economic crisis, we don't have a person to lose. This is why 87 percent of Fortune 500 companies include sexual orientation in their nondiscrimination policies, and 41 percent include gender identity. They recognize that their businesses will be more competitive when they hire all talented individuals—and that, in the words of an official at one major company, "our people can serve our clients best when they can be authentic in the workplace."[2]

Unfortunately, despite the policies of forward-thinking employers like these, discrimination against lesbian, gay, bisexual, and transgender individuals is widespread. A review of the evidence, published just this Spring, found, among other things, that:

1. "LGBT people and their heterosexual coworkers consistently report having experienced or witnessed discrimination based on sexual orientation or gender identity in the workplace";
2. A national survey of gays and lesbians in 2008 found that "37 percent had experienced workplace harassment in the last five years, and 12 percent had lost a job because of their sexual orientation";
3. A 2011 survey of transgender people found that 90 percent had "experienced harassment or mistreatment at work, or had taken

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[1] See Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 738-742 (2012).

[2] See WILLIAMS INST., ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES, Oct. 2011, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf.

actions to avoid it, and 47 percent [had] been discriminated against in hiring, promotion, or job retention because of their gender identity";

4. "Numerous reports of employment discrimination against LGBT people [appear] in court cases, state and local administrative complaints, complaints to community-based organizations, academic journals, newspapers and other media, and books"; and
5. "State and local governments and courts have acknowledged that LGBT people have faced widespread discrimination in employment."[3]

Current Laws are Inadequate

These widespread harms demand a response. Unfortunately, current law is inadequate to the task. Although a patchwork of state statutes address discrimination against lesbian, gay, and bisexual—and sometimes transgender—individuals, the gaps in their coverage are significant. And although some federal courts and the Equal Employment Opportunity Commission have interpreted Title VII of the Civil Rights Act of 1964 as addressing aspects of the problem, the law under that statute remains uncertain and developing. A clear federal prohibition of workplace discrimination against LGBT individuals is needed.

Sixteen states[4] plus the District of Columbia currently prohibit workplace discrimination based on sexual orientation or gender identity. Another five states[5] prohibit workplace discrimination based on sexual orientation but do not include any prohibition on gender identity discrimination. But the enforcement procedures and remedies for those statutes vary. They do not provide the clear and strong set of remedies—crucially including access to federal courts—that Congress has developed for workplace discrimination over the past five decades. And LGBT workers outside of those states enjoy no clear state statutory protection against discrimination at all.

As for Title VII, a growing body of cases holds that discrimination against LGBT individuals can, at least in some circumstances, violate the statute's prohibitions on sex discrimination. Relying on the well-established principle that Title VII prohibits discrimination motivated by an individual's

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[3] Pizer *et al.*, *supra* note 1, at 721.

[4] California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[5] Delaware, Maryland, New Hampshire, New York, and Wisconsin.

failure to conform to sex stereotypes at work,[6] the Sixth, Ninth, and Eleventh Circuits have allowed claims brought by transgender individuals under the statute to proceed.[7] In discharging its responsibilities to adjudicate Title VII claims brought by federal employees, the Equal Employment Opportunity Commission has recently held that discrimination against an individual because she is transgender violates the statute. The Commission reached that conclusion both under a sex stereotyping theory and because discrimination against someone because she changed her sex is a quite direct form of discrimination because of sex (just as discrimination against someone because she changed her religion is discrimination because of religion).[8] And the EEOC's Office of Federal Operations has, on two recent occasions, concluded that a lesbian or gay individual can challenge workplace harassment where the harassment is motivated by the individual's failure to conform to gender stereotypes.[9]

But these developments are not grounds for complacency, and they do not detract from the compelling need for Congress to enact ENDA. A number of courts—even those that have permitted claims by some LGBT plaintiffs to proceed—have gone to great pains to separate out those cases that "really" involve sex stereotyping (and thus may proceed under Title VII) from those that "really" involve sexual orientation discrimination (and thus, according to these courts, may not).[10] The result is uncertainty—for lesbian, gay, bisexual, and transgender workers and for employers alike. The only way to provide clear and certain protection for LGBT workers is to write that protection explicitly into federal law. That is precisely what ENDA would accomplish.

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[6] See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) ("As for the legal relevance of sex stereotyping, 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.'") (internal quotation marks omitted; quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

[7] See, *e.g.*, *Glenn v. Burmby*, 663 F.3d 1312 (11th Cir. 2011); *Kastl v. Maricopa County Community Coll. Dist.*, 325 Fed.Appx. 492 (9th Cir. 2009); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

[8] See *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C., Apr. 20, 2012).

[9] See *Castello v. Donahoe*, 2011 WL 6960810 (E.E.O.C. Off. of Fed. Operations, Dec. 20, 2011); *Veretto v. Donahoe*, 2011 WL 2663401 (E.E.O.C. Off. of Fed. Operations, July 1, 2011).

[10] See, *e.g.*, *Kalich v. AT&T Mobility, Inc.*, ___ F.3d ___, 2012 WL 1623193 at *4 (6th Cir., May 10, 2012); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762-765 (6th Cir. 2006).

ENDA is an Appropriately Tailored Response

In responding to these problems, ENDA would do nothing more than extend to sexual orientation and gender identity discrimination the same basic legal structure that has applied to other forms of employment discrimination for nearly 50 years. The bill takes its operative provisions directly from the operative provisions of Title VII.[11] The experience that employers have developed in complying with those provisions over the past five decades, and the law developed under those provisions, will necessarily inform, guide, and ease employer compliance with ENDA.

One of the Title VII provisions that ENDA incorporates deserves more extended discussion. That is the statute's religious exemption. Section 6 of ENDA plainly states that the statute "shall not apply" to an organization "that is exempt from the religious discrimination provisions of title VII."[12] Section 6 specifically refers to the two provisions of Title VII that create religious exemptions: Section 702(a) and Section 703(e)(2).[13] Section 702(a) exempts any "religious corporation, association, educational institution, or society,"[14] and Section 703(e)(2) exempts any "school, college, university, or other educational institution or institution of learning" that "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."[15] These exemptions have been well settled for decades, and they have been upheld as constitutional by the Supreme Court.[16]

At its 2009 hearing on ENDA, this Committee heard testimony from Mr. Craig Parshall—who is also scheduled to appear as a witness before this Committee today—that asserted that the bill's religious exemption would not be effective.[17] But Mr. Parshall's assertion is based on a clear misreading of ENDA's text. Mr. Parshall testified that because Title VII exempts religious organizations only from the statute's prohibition of religious discrimination,

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[11] Compare S. 811, 112th Cong., 1st Sess. § 4(a)-(d) (2011), with 42 U.S.C § 2000e-2(a)-(d).
[12] S. 811 § 6.
[13] *Id.*
[14] 42 U.S.C. § 2000e-1(a).
[15] 42 U.S.C. § 2000e-2(e)(2).
[16] See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).
[17] See Testimony of Craig L. Parshall before the Senate Comm. on Health, Education, Labor, and Pensions (Nov. 5, 2009).

and not from its prohibition of race or sex discrimination, the incorporation of Title VII's exemption in ENDA will protect religious organizations only if the courts conclude that sexual orientation discrimination is more like religious discrimination than like race or sex discrimination.[18]

That is simply incorrect. Section 6 of the bill under consideration states clearly that "[t]his Act"—*i.e.*, ENDA—"shall not apply" to an entity "that is exempt from the religious discrimination provisions of Title VII."[19] In other words, if an entity cannot be sued for religious discrimination under Title VII, it cannot be sued for sexual orientation or gender identity discrimination under ENDA. It does not matter whether courts conclude that sexual orientation discrimination is more like religious discrimination or race or sex discrimination. That question is irrelevant, because ENDA exempts any entity that is exempt from the religious discrimination provisions of Title VII. The bill could hardly be clearer on the point.

The bill before this Committee also contains a number of limitations that sharply restrict the burdens it would impose on employers. Most notably, the bill provides that "[o]nly disparate treatment claims may be brought under this Act."[20] In other words, the statute does not provide a cause of action to challenge neutral employer practices that merely have a disparate impact on LGBT individuals. And the bill bars quotas and other preferential treatment.[21]

Finally, I would like to add a word about ENDA's protection of state employees. The bill would guarantee that employees of state governments have the same protections, and are generally entitled to the same remedies, as the employees of private employers. It would do so in two respects. First, it would require that states waive their sovereign immunity against ENDA suits brought by employees or applicants for employment in their programs or activities that receive federal financial assistance.[22] Second, it would abrogate all states' sovereign immunity against suits brought for violation of the statute.[23]

Both of these provisions fit well within the constitutional requirements set by the Supreme Court. The Court has made clear that Congress can

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[18] See *id.* at 4-5.
[19] S. 811 § 6.
[20] *Id.* § 4(g).
[21] *Id.* § 4(f).
[22] *Id.* § 11(b).
[23] *Id.* § 11(a).

condition federal funds on a state's waiver of sovereign immunity.[24] And ENDA's abrogation of state sovereign immunity responds to a significant history and pattern of employment discrimination against lesbian, gay, bisexual, and transgender state employees—discrimination that generally lacks even the "rational basis" that the lowest equal protection standard of review demands.[25] It thus satisfies the standards the Court has set for abrogation of state sovereign immunity.[26]

Conclusion

Thank you again for the opportunity to testify in support of this important legislation. I look forward to answering the Committee's questions.

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[24] See *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686-687 (1999).

[25] For discussions of the evidence of a widespread pattern of unconstitutional discrimination against LGBT state employees, see WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVT.: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 2003-2007 (July 2001), available at http://williamsinstitute.law.ucla.edu/research/workplace/evidence-of-employment-discrimination-on-the-basis-of-sexual-orientation-in-state-and-local-government-complaints-filed-with-state-enforcement-agencies-2003-2007/; Letter from Matthew A. Coles to Hons. George Miller & John Kline (Sept. 23, 2009), available at http://www.aclu.org/lgbt/discrim/41193leg20090923.html.

[26] See, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 523-529 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 728-735 (2003)