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*Sexual Orientation Discrimination in Employment: Analysis
of H.R. 3685, the Employment Non-Discrimination Act of
2007*

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November 8, 2007

Abstract. H.R. 3685, passed by the House on November 7, 2007, would prohibit certain adverse employment actions taken against an individual because of that individual's actual or perceived sexual orientation. Referred to as the Employment Non-Discrimination Act of 2007 (ENDA), the bill also explicitly prohibits employment discrimination against an individual based upon the sexual orientation of persons associated with that individual, but does not permit disparate impact claims of sexual orientation discrimination. A substantial minority of states have enacted their own prohibitions against sexual orientation employment discrimination. Some instances of sexual orientation employment discrimination may also be prohibited by existing protections under Title VII of the Civil Rights Act of 1964, despite the fact that Title VII's definition of sex does not encompass sexual orientation. H.R. 3685 would also appear to exempt religious organizations as defined under Title VII.

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Summary

H.R. 3685, passed by the House on November 7, 2007, would prohibit certain adverse employment actions taken against an individual because of that individual's actual or perceived sexual orientation. Referred to as the Employment Non-Discrimination Act of 2007 (ENDA), the bill also explicitly prohibits employment discrimination against an individual based upon the sexual orientation of persons associated with that individual, but does not permit disparate impact claims of sexual orientation discrimination. A substantial minority of states have enacted their own prohibitions against sexual orientation employment discrimination. Some instances of sexual orientation employment discrimination may also be prohibited by existing protections under Title VII of the Civil Rights Act of 1964, despite the fact that Title VII's definition of sex does not encompass sexual orientation. H.R. 3685 would also appear to exempt religious organizations as defined under Title VII.

Contents

Overview	1
Employment Practices Prohibited by ENDA	1
<i>Perceived</i> sexual orientation discrimination is prohibited	1
Associational rights are protected	2
Disparate sexual orientation impact claims are disallowed.....	2
Sex vs. Sexual Orientation	2
Sexual harassment.....	3
Sex stereotypes.....	3
Religious Organizations Under ENDA	4
The “ministerial exception”	4
Statutory exemptions.....	5

Contacts

Author Contact Information	5
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Overview

On November 7, 2007, the House passed H.R. 3685, the Employment Non-Discrimination Act of 2007 (ENDA).¹ Apparently modeled after Title VII of the Civil Rights Act of 1964 (Title VII), ENDA, if enacted, would create the first federal prohibition against sexual orientation discrimination by private employers.² ENDA appears to represent one half of an earlier bill introduced by Representative Frank, which would have additionally prohibited employment discrimination on the basis of gender identity.³ This report will discuss issues relating to employment discrimination on the basis of sexual orientation and specific provisions of ENDA.

Employment Practices Prohibited by ENDA

For the most part, the *types* of employment actions prohibited by ENDA dovetail with Title VII's prohibitions against discrimination on the basis of race, color, sex, national origin, and religion.⁴ Notwithstanding this overall similarity, the text of ENDA does go beyond Title VII's text in two main ways: (1) prohibiting discrimination on *perceived* characteristics; and (2) textually creating associational rights under the act. That is not to say, however, that the protections of ENDA appear uniformly at least as extensive as Title VII's protections, as the bill explicitly *disallows* victims of sexual orientation discrimination from pursuing a disparate impact claim.⁵ Each of these three differences is discussed in detail below.

Perceived sexual orientation discrimination is prohibited

ENDA prohibits discrimination on the basis of actual or *perceived* sexual orientation.⁶ The text of Title VII contains no comparable prohibition against discrimination on the basis of the *perceived* race, color, sex, national origin, or religion of a person. The Americans with Disabilities Act (ADA), however, does include in its definition of disability "*being regarded* as having a [physical or mental impairment]."⁷ The semantic similarity between "perceived" and "regarded" suggests that existing judicial interpretation of that language in the ADA may be instructive for courts, agencies or employers attempting to interpret what is meant by "perceived sexual orientation." In

¹ Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

² A substantial minority of states have enacted laws prohibiting sexual orientation discrimination. *See, e.g.*, GAO Report, *infra* footnote 12. Additionally, Executive Order 13,087 prohibits sexual orientation discrimination against federal executive branch employees. Exec. Order No. 13,087, 3 C.F.R. 191 (1998).

³ Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007). Gender identity is defined by H.R. 2015 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." For a discussion of issues related to gender identity discrimination, see CRS Report RL34242, *Gender Identity Discrimination in Employment: Analysis of H.R. 3686 in the 110th Congress*, by Edward C. Liu.

⁴ Compare H.R. 3685 § 4(a-d) with Civil Rights Act of 1964, P.L. 88-352, tit. vii, § 703(a-d) (codified at 42 U.S.C. § 2000e-2(a-d)). H.R. 3685 also limits applicability to those employers with 15 or more employees, as does the current version of Title VII. Compare H.R. 3685 § 3(a)(4)(A) with 42 U.S.C. § 2000e(b).

⁵ H.R. 3685 § 4(g).

⁶ H.R. 3685 § 4(a-f).

⁷ 42 U.S.C. § 12102(2)(C).

other words, to the extent that “being regarded” as disabled under the ADA has been held to require an examination of an *employer’s* subjectively held beliefs, courts may interpret ENDA to require the same.⁸

Associational rights are protected

H.R. 3685 prohibits adverse employment actions taken against an individual on the basis of the actual or perceived sexual orientation of a person who associates with that individual.⁹ Although Title VII contains no analogous text, associational rights under Title VII have been recognized by federal courts in the context of interracial marriage.¹⁰

Disparate sexual orientation impact claims are disallowed

Section 4(g) of ENDA disallows disparate impact claims on the basis of sexual orientation. Therefore, whereas a Title VII claim could proceed where the plaintiff showed that a particular job requirement disproportionately impacted one racial or religious group, ENDA does not appear to allow a plaintiff to show that a particular job requirement disproportionately impacts one sexual orientation over another.¹¹

Sex vs. Sexual Orientation

ENDA defines sexual orientation as “homosexuality, heterosexuality, or bisexuality.”¹² In contrast, Title VII’s prohibition against discrimination on the basis of sex has consistently been interpreted to exclude discrimination on the basis of sexual orientation.¹³ However, courts have held that the fact that a victim of discrimination is homosexual or bisexual does not preclude a claim under Title VII. In some cases, victims of treatment that would arguably *also* qualify as sexual orientation discrimination, may be able to successfully assert that they were victims of sexual harassment or sex stereotyping under Title VII.

⁸ For further discussion of the definition of disability under the ADA, *see*, CRS Report RL33304, *The Americans with Disabilities Act (ADA): The Definition of Disability*, by Nancy Lee Jones.

⁹ H.R. 3685 § 4(e).

¹⁰ *E.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-892 (11th Cir. 1986).

¹¹ For an example of how a disparate impact claim of racial discrimination is established under Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹² The bill does not define these terms, although the terms are defined elsewhere in the U.S. Code, in the context of the military. 10 U.S.C. § 654(f) (2007). Among the states that do prohibit discrimination on the basis of sexual orientation, it is almost universally defined as including homosexuality, bisexuality, or heterosexuality. *See*, GOV’T ACCOUNTING OFFICE, *Sexual Orientation-Based Employment Discrimination: States’ Experience with Statutory Prohibitions* at 2-4, tbl.1, July 9, 2002, available at <http://www.gao.gov/new.items/d02878r.pdf>.

¹³ *See, Ulane v. Eastern Airlines*, 742 F.2d 1081 (8th Cir. 1984); *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 237 (9th Cir. 1979); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977).

Sexual harassment

In the context of sexual harassment, recent court decisions have been guided by the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*.¹⁴ In that case, a male employee suffered physical abuse of a sexual nature, but his claims of sexual harassment were initially denied by Fifth Circuit precedent which held that same-sex sexual harassment is not actionable under Title VII. The Supreme Court reversed, holding that, in cases of alleged sexual harassment, the gender of the victim and harasser are not dispositive, but rather the critical question is whether the harassment occurred "because of sex."¹⁵ The Court also recognized that an inference that harassment is "because of sex" is not obvious where the harasser and the victim are of the same sex,¹⁶ but provided three examples of how such an inference could be established: (1) if the harasser sexually desired the victim; (2) if the harasser was hostile to the presence of one sex in the workplace; or (3) if comparative data showed that the harasser targeted only members of one sex.¹⁷ The Ninth Circuit appears to have further held, in *Rene v. MGM Grand Hotel*, that harassment "which targeted body parts clearly linked to [a person's] sexuality" constituted sexual discrimination prohibited by Title VII.¹⁸ Even though the victim believed he was harassed because of his *sexual orientation*, the court held that "whatever else those attacks may, or may not, have been 'because of' has no legal consequence."¹⁹ Although the plaintiff in *Rene* prevailed, the holding of the Ninth Circuit may contradict the Supreme Court's earlier holding in *Oncale*. As the dissent in *Rene* noted, the Ninth Circuit relied in large part on *Doe v. City of Belleville*, in which the Seventh Circuit argued that evidence of physical abuse of a sexual nature alone could lead to an inference that the victim was targeted because of his gender.²⁰ That judgment, however, was vacated and remanded to the Seventh Circuit after the Court's decision in *Oncale*.²¹ The text of the opinion in *Oncale* also seems to require more than conduct of a sexual nature in order to give rise to an inference that it was "because of sex."²²

Sex stereotypes

Based upon the Supreme Court's opinion in *Price Waterhouse v. Hopkins*, victims of sexual orientation discrimination may also prevail under Title VII, where the facts *also* indicate the presence of discrimination for failure to conform to sex stereotypes.²³ In *Price Waterhouse*, a female employee was denied partnership in an accounting firm, despite the fact that she was

¹⁴ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

¹⁵ *Id.* at 77, 81.

¹⁶ The Court did note, however, that in the related context of racial discrimination it has never *presumed* that members of one race will not discriminate against other members of the same race. *Id.* at 78.

¹⁷ *Id.* at 80-81. This discussion of *Oncale* is not meant to imply that sexual orientation harassment is only perpetrated by persons of the same sex as the victim, but merely to suggest that an employer's assertion that harassment occurred solely because of sexual orientation, and not sex, may be refuted by the methods of proof offered in *Oncale*.

¹⁸ *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1066 (9th Cir. 2002). In this case, the court found that the sexual nature of the harassers' attacks, which were directed at the victim's crotch and anus, readily gave rise to the inference that he was targeted because of his sex. *Id.* at 1065.

¹⁹ *Id.* at 1064, 1066.

²⁰ *Id.* at 1066 (citing *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997)).

²¹ *City of Belleville v. Doe*, 523 U.S. 1001 (1998).

²² "[The plaintiff] must always prove that the conduct at issue was not merely tinged with offensive sexual connotations." *Oncale*, 523 U.S. at 81.

²³ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

regarded as a high performer.²⁴ Furthermore, partners in the firm had instructed her to act more femininely in order to be considered for a partnership in the future.²⁵ The Court held that Price Waterhouse was applying standards for partnership in a prohibited sexually disparate manner, in that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer's stereotypical view of femininity.²⁶

Relying on *Price Waterhouse*, the Third Circuit held, in *Bibby v. Phila. Coca Cola Bottling Co.*, that harassment of an individual for failure to conform to sex stereotypes could constitute harassment "because of sex" consistent with *Oncale*.²⁷ Furthermore, the court held that harassment for failure to conform to gender stereotypes is still "because of sex" even if the animosity towards nonconformance is caused by a belief that such behavior indicates homosexuality.²⁸

Therefore, based upon the decisions in *Rene v. MGM Grand Hotel* and *Bibby v. Coca Cola*, one could conclude that certain types of sexual orientation discrimination are currently prohibited under Title VII.²⁹ However, one should *not* take this to mean that ENDA does not purport to prohibit conduct not already prohibited by Title VII. For example, were an employer simply to require job applicants to state his or her sexual orientation on a job application, and consequently refused to hire applicants that indicated they were homosexuals, it is not clear that this would be prohibited by Title VII's existing provisions. However, such actions would almost certainly be prohibited by a plain reading of ENDA.

Religious Organizations Under ENDA

ENDA states that its provisions do not apply to "religious organizations" as defined under Title VII.³⁰ Similarly, religious organizations would likely remain free from claims of any discrimination with respect to their selection of clergy and certain other positions related to worship.

The "ministerial exception"

At a minimum, ENDA would likely not apply to religious organizations' selection of clergy or other positions involved in worship or ritual. Discrimination on the basis of race, sex, national origin or religion has been held to be permissible, in these positions, under the judicially created "ministerial exception" to Title VII. This exception was created to reconcile some of Title VII's prohibitions with the Free Exercise Clause of the Federal Constitution. It has been adopted in

²⁴ *Id.* at 233-234.

²⁵ *Id.* at 235.

²⁶ *Id.* at 250-251.

²⁷ *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3rd Cir. 2001).

²⁸ *Id.* at 265.

²⁹ Note that § 15 of H.R. 3685 states that the act will not be construed to invalidate or limit the rights under any other Federal or state law. Therefore, to the extent that sexual orientation discrimination is prohibited under Title VII or state law, it may remain so if ENDA is enacted.

³⁰ H.R. 3685 §§ 3(a)(8) and 6. *See also*, CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religious Organizations*, by Cynthia Brougher.

eight Federal Circuits and applies to employees whose “primary duties include teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship.”³¹ This exception to Title VII allows discrimination on the basis of any characteristic, including race and sex, but only with respect to “a religious institution’s choice as to who will perform spiritual functions.”³² Because the rationale for this exception is derived from the Federal Constitution, and not the text of Title VII, it would likely be wholly applicable to ENDA as well.

Statutory exemptions

In addition, ENDA states that its prohibitions will not apply to religious organizations as they are defined under Title VII.³³ Title VII exempts religious organizations generally, as well as educational institutions that are either substantially owned by a religious organization or directed towards the propagation of a particular religion.³⁴ Federal courts have interpreted Title VII to require an inquiry into whether an entity’s “purpose and character are primarily religious” in order to qualify as a religious entity.³⁵ Most recently, in September of 2007, the Third Circuit identified nine factors other courts have considered when determining if an institution is religious, none of which are determinative.³⁶ This statutory exemption appears to apply to a much broader group of entities than the ministerial exception, which only applies to specific positions with a close nexus to ritual or worship activities.

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³¹ *Petruska v. Gannon Univ.*, 462 F.3d 294, 304 (3rd Cir. 2006) (citing favorable opinions in the 4th, 5th, 7th, 8th, 9th, 11th, and D.C. Circuits).

³² *Petruska v. Gannon*, 462 F.3d at 305.

³³ H.R. 3685 §§ 3(a)(8), 6 (explicitly adopting the definition of religious organizations in Title VII).

³⁴ 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

³⁵ *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). *See also EEOC v. Kamehameha Schools*, 990 F.2d 458, 461 (9th Cir. 1993).

³⁶ *LeBoon v. Lancaster Jewish Comm. Ctr. Ass’n.*, 2007 U.S. App. LEXIS 22328, 19-20 (3rd Cir. 2007) “(1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.” *Id.*