

### Extending Non-Discrimination in Employment to Gays and Lesbians

by Tracy Davis and Sarah Oppenheim\*

In the United States, as the federal and state governments continue to dismantle affirmative action programs, arguing that individuals should be judged solely on merit, there is no protection for people judged not on this basis, but on their sexual orientation. Discrimination based on sexual orientation is not included in any federal civil rights legislation and people are overlooked for employment, denied promotions or fired everyday because they are gay, lesbian, or bisexual. Only 11 states (California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin) and the District of Columbia have laws prohibiting employment discrimination on the basis of sexual orientation. In the other 39 states and in the branches of the federal government there is no recourse for those people discriminated against and the employers' behavior is legal.

Throughout the 1990s, however, increasing numbers of American citizens supported equal employment rights for gays and lesbians. For example, in a 1996 poll by the Associated Press, 85 percent of those people surveyed favored equal rights in employment.

To correct this oversight in national civil rights legislation, on June 24, 1999, Representative Christopher Shays (R-CT) and Senator Jim Jeffords (R-VT) introduced bills into the House of Representatives and the Senate, respectively, titled the Employment Non-Discrimination Act of 1999 (ENDA). ENDA prohibits public and private employers with over 15 employees, employment agencies, and labor unions from basing employment decisions on sexual orientation.

#### Substance of the Employment Non-Discrimination Act

Under the Fourteenth Amendment to the U.S. Constitution, all Americans have the right to equal protection. This protection extends to the context of employment, guaranteeing that the government not discriminate in its employment practices. Under Title VII of the Civil Rights Act of 1964 (Title VII), discrimination in employment practices based on race, sex, religion, or national origin is prohibited. Similarly, the American with Disabilities Act (ADA) prohibits discrimination against those people with physical or mental disabilities. The procedures in ENDA are the same as those included in Title VII and the ADA.

ENDA first was introduced into the Senate in August 1996 by Senators James Jeffords (R-VT), Edward Kennedy (D-MA), and Joseph Lieberman (D-CT) as an amendment to the Defense of Marriage Act (DOMA), an act that denies federal recognition of same-sex marriages. Although the Senate passed DOMA in 1996, and President Clinton shortly thereafter signed the bill into law, the Senate narrowly defeated ENDA in a vote of 50 to 49.

In addition to prohibiting employment discrimination on the basis of sexual orientation, ENDA provides remedies for those people discriminated against. Under Section 12(a), the Equal Employment Opportunity Commission (EEOC), the U.S. Attorney General, and federal courts will have the power to enforce

the act. Under Section 12(b), the remedies provided for violations of ENDA are the same as violations of Title VII; for government employees, the remedies are the same as for violations of the Government Employee Rights Act of 1991 and the Congressional Accountability Act of 1995, which implement non-discrimination policies in federal government employment. Under Section 13 of ENDA, the state and federal government also will not be immune from suits alleging violations. When evaluating claims of discrimination under ENDA, however, disparate impact will not establish *prima facie* evidence of discrimination.

In addition to discrimination, acts of retaliation against those people who enforce their rights or support those who enforce their rights under ENDA is prohibited. Any acts of coercion, such as intimidation, threats, or interference with exercising the rights protected under ENDA are violations of the act.

Significant exemptions from ENDA, however, are religious institutions and the U.S. Armed Forces. Religious organizations are exempted in Section 9, although any related business that generates taxable income is covered by ENDA. In Section 10, the bill states that opportunities in the Armed Forces are not "employment or an employment opportunity" within the meaning of ENDA. Moreover, in Section 6 of ENDA, employee benefits are not extended to the partners of lesbian and gay employees, as they are to married heterosexual couples.

In addition, members of the transgendered community have criticized ENDA. Although employers also discriminate against transgendered individuals, specific protection for them is omitted from ENDA. Transgendered people are not included in current non-discrimination laws, including Title VII and those based on personal appearance. Furthermore, transgendered people do not have statutory protection in a large majority of jurisdictions. Some supporters of ENDA, however, argue that transgendered people will be protected under the act's prohibition against discrimination based on sexual orientation.

#### Conclusion

As the U.S. Supreme Court explained in its 1996 decision, *Evans v. Romer*, anti-discrimination laws do not create "special rights." Although opponents to ENDA argue that the act will create preferences for gays and lesbians, this perception is unfounded. ENDA prohibits affirmative action based on sexual orientation and forbids quotas. It does no more than guarantee gay, lesbian, and bisexual people some of the same employment rights enjoyed by all Americans. ☐

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