Cracks in the Shield: The Necessity of the Employment Non-Discrimination Act

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EMPLOYMENT NON-DISCRIMINATION ACT

Introduction: ENDA’s proposed protections and a roadmap through why its passage is imperative

When the United States Congress passed the Civil Rights Act of 1964, known to many as Title VII, they made it illegal for an employer to discriminate against individuals with respect to their compensation or terms of employment because of an individual’s race, color, religion, sex, or national origin. Furthermore, Congress banned limiting or classifying employees or applicants for employment in any way that may adversely affect the status of an employee because of the same protected reasons. This was certainly a monumental change in the laws of the country, giving federal protection to many classes of people who had traditionally suffered workplace discrimination. However, the statute lacks explicit protection for individuals based on sexual orientation, and the vast majority of courts have refused to define sex as including sexual orientation. Interpreting the “sex” protected by Title VII as referring to biological sex (and many times interpreting “gender” to mean the same thing), the federal courts almost uniformly hold that Title VII does not protect against discrimination based on sexual orientation, though courts following the standard from

3 Id.; See DeSantis v. P. Tel. & Tel. Co., Inc., 608 F.2d 327, 329-30 (9th Cir. 1979) abrogated by Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001).
Price Waterhouse v. Hopkins have extended prohibition against discrimination based on “sex” to include gender and its stereotypes. ⁴

At least one scholar argues that this is a misinterpretation of the law, positing that Title VII’s protection against discrimination “because of sex” should already protect gays and lesbians, as the basis of the discrimination “occurs because of the sex or gender of the harasser and of the victim.”⁵ Others argue that winning a case under existing Title VII provisions is possible as long as plaintiffs use a sex stereotyping argument and “distance themselves from any characterization of the harassment that would hint at prejudice against gays and lesbians, and focus instead on the specific stereotyping that they suffered and the way these stereotypes are connected with gender.”⁶ While scholars argue that Title VII should or already does protect against employment discrimination based on sexual orientation, Congress has regularly considered legislation that would answer this question unequivocally. Such federal legislation, which would explicitly ban discrimination on the basis of sexual orientation, has regularly been introduced and rejected since 1974, and is currently under consideration in the latest form of the Employment Non-Discrimination Act (ENDA).⁷

Though there have been amendments to Title VII, including to the sex discrimination provisions, none of these have been especially helpful to sexual minorities. In 1972, Congress passed the Equal Employment Opportunity Act which “enabled the EEOC to bring enforcement litigation in federal court and extended Title

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⁴ 490 U.S. 228 (1989).
⁵ See McGinley, supra note 2, at 716.
⁶ Clare Diefenbach, Same-Sex Sexual Harassment After Oncale: Meeting the "Because of . . . Sex" Requirement, 22 BERKELEY J. GENDER L. & JUST. 42, 92 (2007).
VII’s coverage to public employers.” 8 This amendment arose due to issues with discrimination against women, as “discrimination against women continue[d] to be widespread, and [was] regarded by many as either morally or physiologically justifiable,” despite the Title VII statute. 9 While many women were optimistic in 1964, “Title VII’s promise had not been realized in the context of sex.” 10 This amendment was rather successful at eliminating common arguments from employers who discriminated against women in order to “preserve conventional sex roles and maintain the traditional family structure.” 11 However, it did not expand protection for those who were discriminated against based on their sexual orientation or gender identity. Congress again amended Title VII with the Civil Rights Act of 1991, however this act was mostly meant to overrule certain Supreme Court decisions which had “weakened the scope and effectiveness,” of Title VII and to add remedies such as compensatory and punitive damages as well as the ability for a plaintiff to request a jury trial. 12 It did not add any more explicit protection for sexual minorities.

This paper argues that legislation protecting homosexuals from employment discrimination is necessary, despite hopeful arguments that the text of Title VII should or can already protect against discrimination based on sexual orientation. The paper discusses how the precedent of the federal courts has gone too far in the wrong direction to believe that they will fix this interpretation problem on their own. Furthermore, it

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8 Cary Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1346 (2012).
9 Id. (alteration in original).
10 Id. at 1347.
11 Id.
posits that the passage of ENDA or similar legislation will successfully lessen the prevalence of this type of discrimination.

Part I considers the history of Title VII’s “because of sex” protection. This includes a short discussion of theories of legislative intent, and an examination of how courts have defined “sex” in the context of Title VII. The paper looks then at a string of mostly unsuccessful cases where homosexuals or other sexual minorities (lesbians, gays, bisexuals, and transgender and intersex individuals)\textsuperscript{13} attempted to bring claims of discrimination under Title VII. Finally, the paper analyzes the evolution of the courts’ interpretation of Title VII’s prohibition of discrimination “because of sex”, including cases where plaintiffs, who were not necessarily sexual minorities, had success in ways that could help those claiming discrimination based on sexual orientation by using established mechanisms, such as the *Price Waterhouse* sex stereotyping framework.\textsuperscript{14}

Part II discusses the many states that have taken this issue into their own hands, by passing state legislation that bans discrimination on the basis of sexual orientation and/or gender identity. The paper analyzes examples of state statutes, including an examination of differences and similarities in various state statutes. This section concludes that, overall, state legislation has been successful in combatting this type of employment discrimination; however, a national law could be equally beneficial, if not more so, because there are many instances where the state laws are different and would benefit from federal clarification.

\textsuperscript{13} See McGinley, *supra* note 2, at 713.

\textsuperscript{14} *Price Waterhouse*, *supra* note 4.
Part III analyzes a proposed federal ban on discrimination based on sexual orientation. This begins with a history of past legislative attempts, before examining the current form of ENDA and its prospects of success in Congress. After discussing the exact language of ENDA’s proposed protections, this Part considers the likely effects of ENDA on a national scale upon passage, and concludes that the overall effects of passing legislation similar to ENDA will be overwhelmingly positive. Lastly, this Part recommends some amendments and changes to ENDA that could further assure its positive effects, and cure problematic issues that have arisen in states with their own legislation.

**Part 1: Historical Treatment**

Congress passed Title VII in 1964, making it illegal under federal law for an employer to discriminate against an individual based, amongst other things, on his or her sex. The “because of sex” provision immediately caused debate within the country, with employers seeking to limit the reach of the statute to purely biological sex-based “employment practices that sorted men and women into two perfectly sex-differentiated groups.”\(^{15}\) During this same period, there was opposition to this stance from the members of Congress who originally favored including the “because of sex” provision in the statute, arguing that “Title VII barred employment practices that reflected and reinforced traditional conceptions of women's sex and family roles, regardless of whether those practices sorted men and women along biological sex lines.”\(^{16}\) Thus, the political opinions in Congress divided between interpreting “sex” in the broad sense, as discussed in the previous sentence, and the narrow sense, conflating “sex” with

\(^{15}\) See Franklin, *supra* note 8, at 1334.

\(^{16}\) *Id.*
biological sex. Without much else in the way of congressional intent available as to the meaning of “because of sex”, it was up to the courts to interpret the exact meaning of “because of sex.”

The first sex discrimination case to reach the Supreme Court seemed to insinuate that the judicial system would lean towards the narrow meaning of “sex”, even if it was just a slight tilt of the scales.\textsuperscript{17} In \textit{Phillips v. Martin Marietta Corp.}, the Court of Appeals for the Fifth Circuit upheld summary judgment for an employer who disqualified women with preschool age children from employment, holding that plaintiff “was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired.”\textsuperscript{18} The Fifth Circuit operated under the interpretation of sex as meaning “women vis-à-vis men” and held that “when another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin.”\textsuperscript{19} The Supreme Court, in a per curium opinion, overturned this ruling, holding that, “the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.”\textsuperscript{20} The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men-each having pre-school-age children.”\textsuperscript{21}

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\textsuperscript{18}411 F.2d 1, 4 (5th Cir. 1969).
\textsuperscript{19}Id. at 3-4.
\textsuperscript{21}Id. at 544.
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While the overturning of summary judgment was a victory for the female plaintiff in *Phillips*, the Court seemed to see “sex” as a reference to biological sex, speaking only of how the policy affected men and women differently. This rigid reading of the statute appears at odds with the goals of some of the original proponents of including a ban on sex discrimination in Title VII. Though courts claimed that this reading of the statute was “deeply rooted in the American legal tradition”, it really only stems from Title VII’s passage seven short years before the decision in *Phillips*. This reading was promulgated by arguments from employers and conservatives who feared that Title VII “would upend traditional gender norms and sexual conventions, and disrupt forms of regulation that defined what it meant to be a man or a woman.” The proponents of including “sex” in Title VII during its discussion in Congress did not foresee this strict reading, believing that they were supporting a law that would be a “check on the enforcement of sex-role stereotypes that had historically limited men’s and women’s opportunities.”

The strict construing of the statute is especially visible in the portion of the *Phillips* opinion that suggests that a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the business might exist on remand allowing the employer to have different hiring policies for men and women if “such conflicting family obligations [are] demonstrably more relevant to job performance for a woman than for a man.” Justice Marshall, in his concurrence, was very wary of this reading, fearing that the Court was “fall[ing] into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for

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22 Id. at 543-544.
23 See Franklin, supra note 8, at 1326-1329.
24 Id. at 1379-1380.
25 Id. at 1380.
26 Id. at 1357-1358.
27 See Phillips, supra note 20, at 543-544.
discrimination.”28 He argued that the limited reading of Title VII was not in line with Congress’s intent to ban the use of “stereotyped characterizations of the sexes,” which goes beyond a strictly male and female dichotomy.29

It appeared that the majority stance in the courts was one that viewed the prohibition “because of sex” as one that prohibited employment decisions based on whether a person was a man or a woman. However, Justice Marshall’s concurrence and the statements in the congressional record from the proponents of adding “sex” to Title VII30 supplied hope for those that favored a broader reading of Title VII that included protection against sex-role stereotypes.31 Likely to be amongst this group were homosexuals and other sexual minorities whose protection in the workplace seemed dependent on a reading of Title VII that went past biological sex and prohibited the sex stereotyping of which Justice Marshall spoke. It was shortly after Phillips that the first cases started arriving in the federal circuit courts arguing that discrimination based on sexual orientation was “because of sex.”32

Unfortunately for sexual minorities, the early cases followed the per curium interpretation in Phillips, with the circuits viewing discrimination “because of sex” as discrimination based on biological sex and not including a ban on discrimination against sexual minorities. In 1977, in Holloway v. Arthur Andersen & Co., the Ninth Circuit gave deference to the “traditional notions of sex”, holding that Title VII did not

28 Id. at 545.
29 Id.
30 See Franklin, supra note 8, at 1326-1329 (acknowledging the general lack of legislative history as relating to the enactment of Title VII’s prohibition on sex discrimination, but discussing the various statements from proponents of the amendment in the congressional records from when Congress was debating the law).
31 Id. at 1357-1358.
32 Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978); See DeSantis, supra note 3, at 329-330.
prohibit employers from discriminating against transsexuals. The Court mentions amendments introduced to amend Title VII to ban discrimination based on “sexual preference”, but considers the defeat of these amendments as proof that Congress did not intend to expand Title VII beyond protecting people from discrimination for being male or female. The Ninth Circuit used this perceived intent of Congress to decline extending Title VII to consider transsexuals a protected class, calling it a situation that Congress “clearly did not contemplate.”

A year later, in 1978, the Fifth Circuit reached a similar conclusion in Smith v. Liberty Mut. Ins. Co, perhaps even reading more strongly into Congress’s supposed intent. In Smith, an employer rejected a male applicant because the interviewer considered him “effeminate.” The court found for the employer, again basing its decision on congressional intent, which was “only to guarantee equal job opportunities for males and females” The court characterized the plaintiff’s situation as a “questionable application” of Title VII and without more definitive intent from Congress, it refused to “strain” the statute to cover the actions of this employer. The court made this decision in spite of arguments from the plaintiff that the employer discriminated against him for being “womanly.” On top of this, the plaintiff argued that beyond the employer’s personal opinion of the plaintiff’s manliness, the employer

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33 Holloway, supra note 32, at 662.
34 Id.
35 Id. at 664.
36 Smith, supra note 32, at 326-327.
37 Id. at 326.
38 Id. at 327.
39 Id.
40 Id.
simply preferred females for the position over males.\textsuperscript{41} This seems to be a situation where the plaintiff alleged activities that should have been actionable regardless of the statute's interpretation, as this was discrimination based on biological sex.

Returning to the Ninth Circuit, two years after \textit{Holloway}, the court once again encountered the “because of sex” interpretation problem in \textit{DeSantis v. Pacific Tel. & Tel. Co., Inc.} and read the statute the same way as it did in \textit{Holloway}.\textsuperscript{42} In a case dealing with alleged employment discrimination because of the plaintiffs’ homosexuality, the Court bluntly affirmed \textit{Holloway}, holding that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of biological sex and should not be judicially extended to include sexual preference such as homosexuality.”\textsuperscript{43} This court, like those discussed above, based its reasoning on Congress’s intent as evidenced by their refusal to enact explicit protections even though “several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against ‘sexual preference’.”\textsuperscript{44}

As time passed, not much changed when plaintiffs tried to stretch Title VII’s protection against sex discrimination to include discrimination because of a person’s sexual orientation, or “preference” as the courts above described it.\textsuperscript{45} Even in more modern cases, courts are unwilling to read wholesale protection against discrimination based on sexual orientation into Title VII, and plaintiffs will still likely lose if they allege

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\textsuperscript{41} \textit{Id.}
\textsuperscript{42} See \textit{DeSantis, supra note 3}, at 329-330.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.} at 329.
\textsuperscript{45} See \textit{Holloway, supra note 32}, at 662; See \textit{Smith, supra note 123}, at 328; See \textit{DeSantis, supra note 3}, at 330; See \textit{Ulane v. Eastern Airlines, Inc.}, 743 F.2d 1081(7th Cir. 1984); See \textit{Bibby v. Philadelphia Coca Cola Bottling Co.}, 260 F.3d 257 (3rd Cir. 2001).
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discrimination because of sex based on their sexual orientation or gender identity. In 1984, the Seventh Circuit gave deference to the decisions in *DeSantis, Holloway, and Smith*, as well as the intent of Congress in denying amendments proposed since the passage of Title VII that would expressly ban discrimination against homosexuals and sexual minorities, when they ruled against a transsexual female in her employment discrimination case. In *Ulane*, the Seventh Circuit discussed how Congress may amend Title VII in the future to protect transsexuals (and likely homosexuals and other sexual minorities) from employment discrimination. However, the Court was steadfast that the judicial system will not be the ones to effect the change, writing “if the term “sex” as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”

A relatively recent change in the courts stems from the key 1998 case of *Oncale v. Sundowner Offshore Services, Inc.*, where the Supreme Court held for the first time that “sexual harassment in the workplace applied not only to opposite-sex cases, but also to cases in which the harasser and harassee were of the same sex.”* Oncale* established three arguments which plaintiffs could use to prove same-sex sexual harassment. These “evidentiary routes” include providing “credible evidence that the harasser was homosexual,” the harassment is made “in such sex-specific and derogatory terms...to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace,” and offering “direct comparative evidence about how the

46 See *Ulane*, supra note 45; See *Bibby*, supra note 45.
47 *Ulane*, supra note 45, at 1085-1086.
48 Id. at 1086.
49 Id. at 1087.
50 See *Diefenbach*, supra note 6, at 42.
alleged harasser treated members of both sexes in a mixed-sex workplace.”52 While providing these routes, the case provided little direction as to how to apply them or how much evidence was necessary for a plaintiff to be successful.53 While most courts hold that these “evidentiary routes” are not exclusive, “they have for the most part adhered to these categories in making their decisions.”54 The Court’s recognition of the “reasonable person in the plaintiff’s position” standard was the most helpful language regarding the requisite severity for harassment to be actionable discrimination.55 The Court held that “in same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.”56

The Oncale decision has spurned multiple modern cases where sexual minority plaintiffs have actually been winning. Though “not explicitly stated in the Oncale opinion,” an earlier Supreme Court case, Price Waterhouse v. Hopkins, provided additional fuel to the plaintiffs’ fire when it found that “a plaintiff is entitled to relief if the harassment is based on his or her perceived failure to conform to gender stereotypes.”57 The Oncale and Price Waterhouse decisions have combined to create opportunities for plaintiffs in the courts who may not fit under the biological sex interpretation of Title VII, examples of which are discussed in the next paragraph.

While Congress and the courts refuse to adopt explicit protection for sexual minorities in employment, some recent cases (since Oncale and Price Waterhouse) illustrate clever arguments from lawyers and/or judges that have led to favorable

52 Id.
53 See Diefenbach, supra note 6, at 42.
54 Id. at 43.
55 Oncale, supra note 51, at 81
56 Id.
57 See Diefenbach, supra note 6, at 42.
language, and even victories, for plaintiffs belonging to sexual minorities in employment discrimination cases. In a rather recent case from 2001, the Third Circuit once again denied a homosexual plaintiff’s claim of employment discrimination, this time in the context of same-sex sexual harassment.\textsuperscript{58} However, while holding that “Title VII does not prohibit discrimination based on sexual orientation” and ruling against the plaintiff in \textit{Bibby}, the Third Circuit outlined ways, depending on the “evidentiary routes” from \textit{Oncale}, that, if pleaded correctly, a plaintiff belonging to a sexual minority could win a Title VII case:

There are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex – the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim’s noncompliance with gender stereotypes.\textsuperscript{59}

The court explained that there may be other ways for a homosexual plaintiff to prove discrimination because of sex in addition to the argument discussed above in \textit{Oncale}, but failed to describe these other routes.\textsuperscript{60} The Court ultimately held for the employer in \textit{Bibby} as the plaintiff’s claim alleged sexual orientation as the basis for discrimination when Congress has only prohibited sex discrimination as referring to biological sex.\textsuperscript{61} However, this was one of the first indicators that the tide may be shifting positively for sexual minorities in the workplace, as the court outlined possible winning arguments in

\textsuperscript{58} \textit{Bibby}, \textit{supra} note 45.
\textsuperscript{59} \textit{Id.} at 264.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 265.
addition to proclaiming that “harassment on the basis of sexual orientation has no place in our society.”\textsuperscript{62}

In 2001, the Ninth Circuit abrogated its ruling in \textit{DeSantis} (discussed above) in \textit{Nichols v. Azteca Rest. Enterprises, Inc.}\textsuperscript{63}, holding that \textit{DeSantis} could not stand as good law where it conflicts with \textit{Price Waterhouse}.\textsuperscript{64} Thus, in \textit{Nichols}, discrimination consisting of attacks based on the male plaintiff’s “feminine mannerisms” is just as actionable as the discrimination against the female plaintiff in \textit{Price Waterhouse} based on supposed “macho” characteristics.\textsuperscript{65} In \textit{Nichols}, the court held that a male food server was the subject of illegal sex stereotyping when his fellow employees continuously referred to him as “she” and “her” and made fun of him for carrying his tray “like a woman.”\textsuperscript{66} Thus, it was no longer legal under Title VII to discriminate against a male because they appear effeminate, an opposite conclusion than the same court reached 22 years earlier in \textit{DeSantis}.\textsuperscript{67}

In another Ninth Circuit opinion after \textit{Nichols}, that court further departed from the historical treatment of “because of sex” discrimination when a plurality of the court held that the plaintiff in \textit{Rene v. MGM Grand Hotel, Inc.}, a homosexual male who worked as a butler on a floor where “all of the other butlers on the floor, as well as their supervisor, were also male,” successfully defeated summary judgment by arguing under a gender stereotyping theory.\textsuperscript{68} Though the plaintiff worked in a same-sex workforce,

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\textsuperscript{62} \textit{Id.} at 264-265.
\textsuperscript{63} 256 F.3d 864 (9th Cir. 2001).
\textsuperscript{64} \textit{Id.} at 875.
\textsuperscript{65} \textit{Id.} at 874-875.
\textsuperscript{66} \textit{Id.} at 874.
\textsuperscript{67} \textit{Id.} at 875.
\textsuperscript{68} 305 F.3d 1061, 1064, 1068 (9th Cir. 2002).
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the plurality, basing its opinion on Oncale, held that the nature of the harassment, which included “offensive sexual touching,” was actionable discrimination under Title VII.\textsuperscript{69} Due to the nature of the complained behavior, the plurality of the court held that “plaintiff’s sexual orientation was not relevant…and a reasonable jury could conclude … that the harassment occurred because of sex.”\textsuperscript{70} As one scholar notes, however, this opinion “contravenes most other appellate opinions that hold that sexual behavior alone is insufficient to satisfy the ‘because of sex’ requirement.”\textsuperscript{71} The concurrence agreed that the plaintiff should defeat summary judgment, but based their opinion on “the rule that bars discrimination on the basis of sex stereotypes,” as originally seen in Price Waterhouse and more recently in Nichols\textsuperscript{72}, thus the strength of the plurality’s holding is in doubt.

The United States District Court for the District of Columbia went even further in Schroer v. Billington\textsuperscript{73}, not only ruling for a transsexual plaintiff on a theory of sex stereotyping, but even including language that opposes the longstanding “congressional intent” arguments against protecting sexual minorities from discrimination.\textsuperscript{74} This case involved a male-to-female transsexual who originally applied, interviewed, and accepted a job as a male, yet was denied the job upon the employer hearing of her plans to transition to a female.\textsuperscript{75} While Schroer recognized that sex stereotyping existed in the case whether the employer made its decision because the plaintiff was “an insufficiently

\textsuperscript{69} Id. at 1067 (“We are presented with the tale of a man who was repeatedly grabbed in the crotch and poked in the anus, and who was singled out from his other male co-workers for this treatment.”).

\textsuperscript{70} See McGinley, supra note 2, at 742-743.

\textsuperscript{71} Id.

\textsuperscript{72} Rene, supra note 68, at 1069.

\textsuperscript{73} 577 F.Supp.2d 293 (D.D.C. 2008).

\textsuperscript{74} Id. at 308.

\textsuperscript{75} Id. at 295-300.
masculine man, an insufficiently feminine woman, or an inherently gender-
nonconforming transsexual” the court would also conclude that the plaintiff should win
under the plain language of “because of sex.”76 Dismissing the arguments raised in
almost all the earlier cases discussed in this section, the Court was not persuaded that
Congress’s denial of subsequent amendments to Title VII meant that it intended sex to
retain its interpretation of “only prohibit[ing] discrimination against men because they
are men, and discrimination against women because they are women.”77 Finding this to
be “judge-supposed legislative intent over clear statutory text,” the District Court found
it reasonable to reach other interpretations from this legislative history, including that
Members of Congress feel earlier courts “have interpreted “sex” in an unduly narrow
manner” and that “because of sex” should already include protection against this type of
discrimination.78 Seriously doubting the strength of precedents defining “sex” as
meaning purely anatomical sex, this court found that the employer’s refusal to hire
plaintiff in this case “after being advised that she planned to change her anatomical sex
by undergoing sex reassignment surgery was literally discrimination “because of ...
sex.”79

More recently, the Third Circuit overturned summary judgment for an employer,
finding that nothing in Title VII disqualifies a person from bringing a gender
stereotyping claim simply because a person belongs to a sexual minority.80 The Court
held that, “as long as the employee - regardless of sexual orientation – marshals
sufficient evidence that a reasonable jury could conclude that harassment or

76 Id. at 305-306.
77 Id. at 307-308.
78 Id. at 308.
79 Id.
discrimination occurred “because of sex,” the case is not appropriate for summary judgment.” 81 The Fifth Circuit reached a similar conclusion to preclude summary judgment in a same-sex harassment case in 2012. 82

While it appears that some Circuits are becoming more willing to read some breadth into Title VII’s ban on sex discrimination, other Circuits are opposed to this interpretation. The common opposing argument is that sexual minorities are using gender stereotyping under Price Waterhouse to inappropriately “bootstrap” protection for sexual orientation into Title VII under a guise of sex stereotyping. 83 Bootstrapping refers to the theory that sexual minority plaintiffs will emphasize the gender stereotyping part of their case, while distancing themselves from discrimination based on their status as a sexual minority, in order to receive Title VII protection in the absence of explicit protection for sexual minorities. 84 A theory first posited in Simonton v. Runyon 85, the anti-bootstrapping argument was the basis for ruling against the plaintiff in Dawson v. Bumble & Bumble. 86 The Second Circuit stands firmly on its own precedent that “Title VII does not prohibit harassment or discrimination because of sexual orientation.” 87 Therefore, anything that the plaintiff alleged that amounted to discrimination because of her sexual orientation could not “satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a

81 Id.
82 Cherry v. Shaw Coastal, Inc., 668 F.3d 182 (5th Cir. 2012)(Court found that plaintiff presented sufficient evidence that harassment from supervisor was sexual in nature and severe and pervasive. Evidence included repeated sexual touching, including touching plaintiff’s rear end, as well as sexual text messages).
84 Id.
85 Simonton v. Runyon, 232 F.3d 33, 38 (3rd Cir. 2000).
86 Dawson, supra note 83, at 218.
87 Id. at 217
protected class.” The Sixth Circuit, relying on the language from Dawson, similarly used the anti-bootstrapping argument to grant summary judgment against a plaintiff who based his claim on false accusations of homosexuality from his coworkers.

Taking all of this judicial history into account, today we stand in a place where certain circuits are expanding their reading of Title VII to supply, at least, possible avenues for sexual minorities to seek relief for employment discrimination, relying on the decisions in Oncale and Price Waterhouse. Conversely, other circuits (namely the Second Circuit) see these decisions as undesirable, considering these arguments a work-around to established case law interpreting Title VII as strictly excluding protection against discrimination based on sexual orientation. This circuit split leaves plaintiffs in a state of uncertainty. The existence of circuits that are strictly opposed to protecting sexual minorities from discrimination in light of other circuits evolving makes it imperative that Congress, in the absence of a Supreme Court decision, pass legislation like ENDA to protect sexual minorities. Explicit protection is even more necessary given that the rulings in favor of sexual minorities based on Price Waterhouse appear to only protect effeminate men or masculine women, and thus leave the door wide open for discrimination against men and women who, while being a sexual minority, nonetheless fall within classic gender stereotypes (i.e. masculine men and effeminate women). Even if the opinion stated in Schroer is the correct interpretation and Title VII should already include protection under the “because of sex” language, as long as there are circuits that disagree as strongly as the Second Circuit, plaintiffs will never have a dependable federal cause of action.

88 Id. at 217-218
89 Vickers v. Fairfield Medical Center, 453 F.3d 757, 764 (6th Cir. 2006).
Part II: State Anti-Discrimination Laws and Issues

In a response to the lack of protection in the federal courts, many states have taken it upon themselves to enact state laws to protect sexual minorities from employment discrimination.\textsuperscript{90} In total as of 2013, twenty-one States and the District of Columbia have statutes prohibiting discrimination based on sexual orientation\textsuperscript{91} with seventeen also prohibiting discrimination based on gender identity.\textsuperscript{92} In addition to these states with formal statutes applying to public and private employers, twelve states have “an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation.”\textsuperscript{93} Moreover, “at least 190 cities and counties prohibit employment discrimination on the basis of gender identity.”\textsuperscript{94}

All of these state regulations differ somewhat in their language and even in what they protect and which types of employees they protect. The next discussion seeks to illustrate the difference by examining a handful of these state laws. In California, it is an unlawful employment practice:

For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any

\textsuperscript{90} See Mcginley, \textit{supra} note 2, at 728
\textsuperscript{92} \textit{Id.} (Maryland, New Hampshire, New York, and Wisconsin limit their protection to sexual orientation).
\textsuperscript{93} \textit{Id.}
person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.  

California’s non-discrimination provision covers both sexual orientation and gender identity and expression. Perhaps the most interesting language in this provision is that it includes both “sex” and “gender,” which many federal courts, both past and present, find to mean the same thing: biological sex. The inclusion of both infers that California’s congress viewed them as separate protections. The rest of the statute is identical to the provisions of Title VII, even explicitly including training programs as a protected form of employment. California decided to implement its protection for sexual minorities by including them as a protected class, listing their traits in the same line of protected traits as Title VII (race, color, religion, sex, and national origin). The cases that have dealt with sexual minority plaintiffs suing under these provisions, known as the Fair Employment and Housing Act (FEHA), have said very little about interpreting these new protections, and rather seem to accept sexual minorities as a protected class who can make a prima facie case and move to the merits of the case.

In neighboring states Oregon and Nevada, we see a very similar protection implementation, once again writing the protection into the already established Title VII protected classes. However, they do a couple things different from California. Oregon makes it an unlawful employment practice:

96 See supra notes 17-57.
97 See supra note 1.
98 Id.
100 ORS 659A.030(a),(b)(2013).
for an employer, because of an individual’s race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual’s juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to refuse to hire or employ the individual or to bar or discharge the individual from employment,

and also prohibits discrimination against an individual in compensation or in terms, conditions or privileges of employment if based on the same protected characteristics.102 The statute only lists sexual orientation in its protected “because of” provisions and only includes “sex” as opposed to California’s inclusion of “sex” and “gender” in the statute103 which may cause some to believe that Oregon only protects against discrimination based on biological sex and sexual orientation. However, Oregon clarifies its meaning of “sexual orientation” in the definitions section of the Oregon Revised Statutes, defining it as “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity.”104

Thus, while the text of Oregon’s non-discrimination statute appears to protect sexual orientation but not gender identity, Oregon defines orientation as including gender identity, thus protecting all sexual minorities.105 Furthermore, this definition appears to codify some of the sex stereotyping language of Price Waterhouse106 when it qualifies the categories included in sexual orientation by protecting them “regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.”107 Meanwhile,

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102 See supra note 100.
103 See supra note 91.
104 ORS 174.100(6)(2011).
105 Id.
106 See Price Waterhouse, supra note 4.
107 See supra note 104.
Nevada takes a more conservative approach to including sexual minorities as a protected class, by simply adding both sexual orientation and gender identity in the text as protected classes. The rest of the statute reads identically to Title VII, though a later section of the statute includes an exception allowing employers to impose reasonable grooming and dress standards as long as the appearance requirement allows employees to dress consistent with their gender identity or expression.

There is no particularly helpful case law to determine how these states’ local courts have interpreted the statute, but perhaps this is because both states use state agencies, the Bureau of Labor and Industries (BOLI) in Oregon and the Nevada Equal Rights Commission (NERC). These agencies provide administrative remedies, exhaustion of which “is necessary to prevent the courts from being inundated with frivolous claims.” In one case in Oregon, though brought as a retaliation claim, the Court of Appeals of Oregon, like the California courts, treated sexual orientation as a protected class and applied the substantive retaliation law to find for the plaintiff, concluding “that plaintiff opposed sexual orientation discrimination and was fired as a result.”

Elsewhere in the country, we continue to see state non-discrimination laws, with different language, yet with the same intent, and often times the same effect, other than the divide among states regarding gender identity protection. Maine follows the same approach as Oregon, by including sexual orientation in its protected classes, and then

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108 See supra note 100.
109 Id.; See supra note 1.
112 See Pope v. Motel 6, 121 Nev. 307, 311 (Nev. 2005).
113 Id.
114 See supra note 99.
expounding upon sexual orientation in a definition section to include gender identity.116 The Supreme Judicial Court of Maine recognized sexual orientation as a protected class in a case where the superintendent failed to renew the contract of a high school coach, who happened to be a lesbian.117 The plaintiff successfully defeated summary judgment by proving that a genuine issue of material fact existed based on “the timing of the [superintendent’s] decision, relative to when he knew of [plaintiff’s] sexual orientation.”118 Another case, though relating to public accommodations rather than employment, held that a school violated the Maine Human Rights Act by requiring a transgender girl student to use the unisex staff bathroom rather than the girl’s bathroom.119 Maine’s public accommodation statute similarly lists only sexual orientation discrimination explicitly in its prohibitions120, but the Supreme Judicial Court of Maine, following the state’s definition, held that the school’s decision based on plaintiff’s status as a transgender girl “constituted discrimination based on [plaintiff’s] sexual orientation.”121 This decision illustrates another difference between Maine and other states, in that its non-discrimination statute is included in a broader human rights statute that prohibits discrimination based on sexual orientation in employment as well as in public accommodations, educational opportunities, housing and other areas.122

New Jersey on the other hand employs the same statutory method as Nevada, by simply listing sexual orientation and gender identity as protected classes in its Title VII-

118 Id.
119 Doe v. Regional School Unit 26, 2014 ME 11, ¶ 22.
120 5 M.R.S. sec. 4592(1) (2012).
121 Doe supra note 119.
122 Doe supra note 119, at ¶ 12.
In a case prior to the enactment of the current New Jersey statute to explicitly include gender identity, the state’s courts already insinuated that they viewed sexual orientation discrimination and gender discrimination as separate protections, unlike the Oregon and Maine statutes. While a male-to-female transsexual could not “establish a prima facie case for discrimination based on her affectional or sexual orientation because she was not homosexual or bisexual or perceived to be homosexual or bisexual,” the court held that she could succeed on a claim of sex discrimination as “sex discrimination under the [New Jersey Law Against Discrimination] includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”

Wisconsin, “the first state legislature in the nation to prohibit discrimination on the basis of sexual orientation,” did so by passing Chapter 112, also known as the Wisconsin Act, in 1981. While today, Wisconsin’s codified non-discrimination statute uses practically identical language to Title VII in detailing the prohibited bases of discrimination, including sex, and the types of discriminatory actions prohibited by the statute, neither of these sections mentions sexual orientation. Instead, Wisconsin includes an “exceptions and special cases” section of the statute to explain that prohibited discrimination “because of sex” includes discrimination based on sexual orientation. Also interestingly enough, though it was the first state to protect against

125 Id. at 371.
126 Id. at 373.
discrimination based on sexual orientation, Wisconsin is a state that does not protect gender identity\textsuperscript{131} as seen it its absence from the statute.\textsuperscript{132}

With its inclusion of sexual orientation in its “because of sex” definition, Wisconsin inadvertently has laws that are at odds with the vast majority of federal court precedents interpreting sex to mean biological sex.\textsuperscript{133} By expanding the “because of sex” definition to include sexual orientation, but without explicitly excluding gender identity, Wisconsin opens up its own statute to broader or narrower interpretations. An expansion to the statutory protections is even more likely given the broad policy statement preceding the text of the statute calling for the statute to be “liberally construed” to meet the statutes purpose of “encourag[ing] and foster[ing] to the fullest extent practicable the employment of all properly qualified individuals regardless of [...] sex [...] [or] sexual orientation.”\textsuperscript{134} So far, it appears that Wisconsin courts, similar to the other states discussed above, treat sexual orientation discrimination in the same way it treats discrimination against other protected classes, finding the discrimination cognizable and moving to other aspects of the case.\textsuperscript{135} However, due to the lack of case law, it does not appear that the state’s courts have heard cases related to discrimination based on gender identity, and thus the opportunities to expand the law are thus far unfounded.

The major takeaway from these different laws, especially Wisconsin’s unique application as compared to the other statutes discussed above, is that uncertainty still

\textsuperscript{131} See Warbelow, supra note 91.
\textsuperscript{132} See Turner, supra note 127.
\textsuperscript{133} See supra notes 17-57.
\textsuperscript{134} Wis. Stat. § 111.31 (2010).
\textsuperscript{135} See Bowen v. Labor and Industry Review Com’n, 730 N.W.2d 164, 170 (Wis. Ct. App. 2007) (holding that sexual orientation discrimination, just like other types of employment discrimination, requires that only one of the alleged incidents creating a hostile work environment occur during the 300 day filing deadline).
looms for plaintiffs even if a given state has non-discrimination protections. Together these different state laws truly do create an “uneven patchwork of protection against discrimination.” The lack of case law makes it difficult to see the problems first hand, but it takes little imagination, given the federal court rulings compared to these state statutes. Just in this handful of states alone, we can see a state that considers “gender” and “sex” to be different, states that believe that sexual orientation includes gender identity, and states that have added gender identity separately.

While it is a welcome change to see states prohibiting discrimination against sexual minorities, minefields now exist for practitioners and plaintiffs to navigate in their respective jurisdictions. Many state statutes, prior to the inclusion of protections for sexual orientation and gender identity, were “modeled after Title VII, so that federal case law regarding Title VII is applicable to construe the acts.” Now, states must depend on their judges to interpret statutes originally based on Title VII without the benefit of Title VII federal precedent, as Title VII does not include many of the protections in modern state statutes. In fact, states that expand the “because of sex” definition now face an interpretation specifically outlawed by the federal circuits, and thus must base their conclusions completely on textual interpretations of the statute, and in effect create their own common law. Then, of course, there are the states that do not protect individuals at all, leaving open the possibility for people with protection in

136 See McGinley, supra note 2, at 729.
137 See supra note 95.
138 See supra note 100; see also supra note 116.
139 See supra note 101; see also supra note 123.
140 Byrd v. BT Foods, Inc., 948 So.2d 921, 925 (Fla. Ct. App. 2007)(HIV discrimination case that looked to Title VII for help construing the Florida Civil Rights Act); See also Snell v. Montana-Dakota Utilities Co., 643 P.2d 841 (Mont. 1982)(Discussing how the Montana Human Rights act is modeled after Title VII and thus federal case law is helpful); See also Hess v. Multnomah County, 216 F.Supp.2d 1140, 1152 (D. Or. 2001)(Holding that Oregon’s non-discrimination statute mirrors Title VII and thus the legal standards and burdens of proof are the same under both).
one state to be discriminated against when seeking employment right across the border in a different state. It is for these reasons, amongst others, that members of Congress continue to introduce federal legislation formally banning employment discrimination against sexual minorities, and why legislation is necessary to create a dependable legal system aimed at equality in the workplace.\textsuperscript{141}

**Part III: ENDA: Past, Present, and Future and Its Effect on the States**

While currently, explicit protection for sexual minorities in employment only exists at the state level, members of Congress have long recognized the issue, attempting to pass federal legislation to protect these individuals for the last 40 years.\textsuperscript{142} The first attempt came from Rep. Bella Abzug, a Democrat from New York known for her “activism and pioneering spirit.”\textsuperscript{143} Rep. Abzug introduced the “Equality Act” in 1974, a bill, the first of its kind, which would have added sexual orientation and marital status to the protected classes under Title VII.\textsuperscript{144} The bill failed to make it out of committee and died without going to a vote.\textsuperscript{145} Rep. Abzug returned the next year, once again offering an amendment to Title VII, this time garnering four cosponsors to the bill; however this bill once again met the same fate: Congress referred it to committee, where they took no action and the bill died.\textsuperscript{146}

\textsuperscript{144} See Weinberg, supra note 142, at 8.
\textsuperscript{145} Id.
\textsuperscript{146} See supra note 141, at 2.
Since Rep. Abzug’s attempts in the mid-1970s, Members of Congress have made multiple more attempts to amend Title VII to include protections based on sexual orientation. From 1975 to 1993, a Democratic senator and/or member of Congress introduced a “Civil Rights Amendment Act” just about every other year. While some of these attempts garnered more cosponsors than others, and some even made it through one committee, each met the same fate of dying in committee or subcommittee.

After dealing with the failures of these amendments for nearly 20 years, supporters of rights for sexual minorities “switched tactics by introducing the standalone Employment Non-Discrimination Act (ENDA) in 1994.” Senator Edward Kennedy, a Democrat from Massachusetts, introduced the ENDA bill in the Senate, while Rep. Gerry Studds, also a Democrat from Massachusetts, introduced the bill in Congress. This standalone legislation instantly had more success than the any of the previous attempts, making it to a hearing with the Senate Labor and Human Resources Committee before realizing the same fate as previous amendment legislation.

Times changed in 1995 and 1996, when Senator Kennedy once again introduced ENDA in the senate. Though this version of ENDA protected only sexual orientation, it was a monumental step as it was brought before the Senate for a vote. Though it lost by one vote, 49-50, on September 10, 1996, it was the first time that the Senate

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147 See Id. at 2-5.
148 Id.
149 Id.
150 Weinberg, supra note 142, at 9.
151 See supra note 141, at 5.
152 Id.
153 Id. at 6.
154 See Id.
voted on “the idea of a Federal non-discrimination clause protecting gays and lesbians in employment.”

Ironically, on the same day that the Senate almost passed employment discrimination protection for homosexuals, the Senate successfully passed the Defense of Marriage Act (“DOMA”), which was very much at the opposite of the gay rights spectrum as it limited “marriage under federal law to a union only between a man and a woman.”

After this near passage, members of Congress continued to introduce legislation, albeit without protection for gender identity or transgendered individuals, all of which failed between 1996 and 2007. In 2007, Representative Barney Frank, another Democrat from Massachusetts and a sexual minority himself, once again introduced ENDA in the House of Representatives. This version of ENDA started by being more inclusive than previous versions, including sexual orientation, both actual and perceived, as well as gender identity. It also included provisions requiring “adequate shower or dressing facilities to employees who are transitioning,” but did not prohibit employers from “imposing reasonable dress or grooming standards” as long as they allowed employees to follow the grooming standard of the gender with which they identify. After serious opposition from a number of religious and employer groups, and a survey of House members, Rep. Frank realized that this bill would fail to earn

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155 Id.
156 Weinberg, supra note 142, at 10.
157 See Id.
159 See McGinley, supra note 2, at 729.
160 Id.
161 Weinberg, supra note 142, at 11.
162 See McGinley, supra note 2, at 730.
enough support to pass as written.\textsuperscript{163} As a result, Rep. Frank and the bill’s supporters compromised, resulting in an elimination of the gender identity provisions as well as the accommodations for dressing and showering.\textsuperscript{164} Though the removal of gender identity caused much dismay within the sexual minority community\textsuperscript{165}, the compromised bill, defining “sexual orientation” as “homosexuality, heterosexuality, or bisexuality”\textsuperscript{166}, reached a vote on the floor of Congress, and passed by a vote of 235 to 184.\textsuperscript{167} Unfortunately, though it made it onto the Senate calendar, the Senate never took action on the bill after the House vote, and once again ENDA failed to make it to the President’s desk.\textsuperscript{168} Rep. Frank subsequently introduced gender identity inclusive versions of ENDA to Congress in 2009\textsuperscript{169} and 2011\textsuperscript{170}, as did Senator Jeff Merkley of Oregon in the Senate\textsuperscript{171} only to have them go the way of past attempts: death in committee.

This brings us to the present and the current version of the bill, the Employment Non-Discrimination Act of 2013. On April 25, 2013, Senator Merkley and Rep. Jared Polis of Colorado introduced identical bills to the Senate and Congress, respectively.\textsuperscript{172} The 2013 Act states its purpose plainly at the beginning, “to prohibit employment discrimination on the basis of sexual orientation or gender identity.”\textsuperscript{173} This immediately shows that the current legislation is in line with the last two failed attempts

\begin{footnotesize}
\begin{enumerate}
\item See Weinberg, supra note 142, at 11.
\item See McGinley, supra note 2, at 730.
\item United opposition to sexual-orientation-only nondiscrimination legislation, (October 1, 2007) http://www.thetaskforce.org/activist_center/ENDA_oct1_letter.
\item McGinley, supra note 2, at 730.
\item See Weinberg, supra note 142, at 12.
\item Id.
\item S. 815, 113th Cong. (2013); H.R. 1755, 113th Cong. (2013).
\item Id.
\end{enumerate}
\end{footnotesize}
at ENDA in that it includes both sexual orientation and gender identity within its protections. The proposed 2013 Act goes deeper into its purposes in the second section of the bill, basing the act on policy considerations such as addressing historical patterns of discrimination against these groups, providing an “explicit, comprehensive Federal prohibition” against this type of discrimination including enacting meaningful remedies, and “reinforce[ing] the Nation’s commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom.”

Much of the bill follows the language of Title VII, even referring to Title VII for its definitions of employee and employer. Just as in Title VII, ENDA covers employers who have 15 or more employees “for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,” as well as any agent of an employer. Furthermore, ENDA applies to government employees, but exempts private membership clubs that are exempt from taxation. The two most important definitions included in the bill, which obviously are missing from Title VII, are for gender identity and sexual orientation. ENDA defines “sexual orientation”, just like previous versions of ENDA, as meaning “homosexuality, heterosexuality, or bisexuality”, while defining “gender identity” as “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.”

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174 S. 815 § 2(1),(2),(4); H.R. 1755 § 2(1),(2),(4).
175 S. 815 § 3(4),(5); H.R. 1755 § 3(4),(5).
177 S. 815 § 3 (5); H.R. 1755 § 3 (5).
178 Id.
179 See McGinley, supra note 2, at 730.
180 S. 815 § 3(10); H.R. 1755 § 3(10).
181 S. 815 § 3(7); H.R. 1755 § 3(7).
After the definitions section is the most important part of the bill, the actual types of discrimination that this legislation will prohibit. This section is almost identical to the text of Title VII, in that it makes it unlawful to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privilege of employment of the individual” or to “limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee” on the basis of a protected classification. The difference is that the protected classes here are solely sexual orientation or gender identity. This current ENDA includes protections for both actual and perceived sexual orientation and gender identity, putting the bill further in line with the last two failed ENDAs as well as Rep. Frank’s 2007 bill prior to its amendment. The “actual or perceived” language is vital for these types of bills, as many times this discrimination is based on what someone perceives, such as someone being “effeminate”, regardless of whether or not somebody’s sexual orientation or gender identity differ from the employer.

Strangely enough, while the bill is, for the most part, identical to Title VII, it explicitly forbids disparate impact claims, saying “only disparate treatment claims may

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182 S. 815 § 4; H.R. 1755 § 4.
183 See supra note 1.
184 S. 815 § 4(a)(1); H.R. 1755 § 4(a)(1).
185 S. 815 § 4(a)(2); H.R. 1755 § 4(a)(2).
186 See supra notes 184-185.
187 Id.
188 See supra notes 169-170; See McGinley, supra note 2, at 730.
189 See Smith, supra note 32.
be brought under this Act.”\textsuperscript{190} Thus, a claim for discrimination under this bill would require intentional discrimination on the part of the employer, and leads some to believe that this “reinforces the idea that discrimination on the basis of gender identity or sexual orientation is somehow different—and less objectionable—than other forms of discrimination.”\textsuperscript{191} Also, most likely to appease the worries of those who opposed the original 2007 ENDA, this version of the bill includes a broad exemption for religious organizations, as well as an assurance that “employment” does not include the members of the armed forces.\textsuperscript{192}

A point of contention in earlier bills, as it was one of the provisions struck out of the revised 2007 ENDA\textsuperscript{193}, this bill includes the provision allowing employers to impose reasonable dress and grooming standards so long as:

the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.\textsuperscript{194}

However, this new version of the bill alters the rest of the construction section. While the previous two bills had provisions relating to showering and dressing facilities, requiring an employer to provide “reasonable access to adequate facilities that are not inconsistent with the employee’s gender identity”\textsuperscript{195}, any such provision is noticeably

\textsuperscript{190} S. 815 § 4(g); H.R. 1755 § 4(g).
\textsuperscript{191} William C. Sung, Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Gender Stereotypes, Sexual Orientation, and Gender Identity, 84 S. CAL. L. REV. 487, 510 (2011).
\textsuperscript{192} S. 815 §§ 6, 7; H.R. 1755 §§ 6, 7.
\textsuperscript{193} See McGinley, supra note 2, at 730.
\textsuperscript{194} S. 815 § 8(a); H.R. 1755 § 8(a), \textit{(emphasis added)}.
\textsuperscript{195} H.R. 3017 § 8(a)(3); H.R. 1397 § 8(a)(3).
absent in the current ENDA\textsuperscript{196}. Similarly, the rest of the 2013 ENDA leaves out all other parts of the Construction section of the previous bills, regarding employee benefits and marriage, though the marriage exclusion is likely due to the repeal of DOMA since those previous bills.\textsuperscript{197} The only other part from past ENDAs retained in the current ENDA’s Construction section is a provision explaining that construction of new facilities is not required to comply with the new Act.\textsuperscript{198}

The last notable feature of the 2013 ENDA is also a common feature of previous ENDA attempts\textsuperscript{199}, and that is the explanation of ENDA’s relationship to other laws. Section 15 of ENDA states that the Act “shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a state.”\textsuperscript{200} This provision has the practical effect of allowing a plaintiff to retain his or her right to a cause of action under Title VII, for sex stereotyping or disparate impact based on an individual’s sex or gender, even if ENDA passes.\textsuperscript{201}

The 2013 version of ENDA, as introduced by Senator Merkley and explained above, has taken a monumental step towards becoming law, and assuring sexual minorities equal rights in the workplace. As mentioned earlier, a version of ENDA has previously passed a vote in the House of Representatives, but this bill did not include protections for gender identity\textsuperscript{202}, and in fact no bill including gender identity had ever

\textsuperscript{196} S. 815 § 8(a); H.R. 1755 § 8(a).
\textsuperscript{198} S. 815 § 8(b); H.R. 1755 § 8(b).
\textsuperscript{199} H.R. 3017 § 15; H.R. 1397 § 15.
\textsuperscript{200} S. 815 § 15; H.R. 1755 § 15.
\textsuperscript{201} McGinley, supra note 2, at 732.
\textsuperscript{202} Id. at 730.
reached a vote. This was until November 7, 2013, when the Senate voted to approve the gender identity inclusive 2013 ENDA, by a vote of 64 to 32. This marked the first time that a branch of Congress voted “to include gay, lesbian, bisexual and transgender people in the country’s nondiscrimination law.” Given President Obama’s support for ENDA, this passage in the Senate would seem like a victory for sexual minorities; however ENDA faces one more serious hurdle that may be fatal to the bill. Speaker of the House, John Boehner, a Republican from Ohio, is in charge of deciding which bills should face a vote in Congress, and he has repeatedly stated his opposition to the bill. Rep. Boehner bases his opposition on his opinion that ENDA would “increase frivolous litigation and cost American jobs.” While as long as Boehner opposes the bill, ENDA will not come up for a vote and will not pass during this congressional session, Democrats are not sitting quietly. On March 18, 2014, 220 lawmakers (168 Members of Congress and 52 Senators) signed a letter to President Obama “urging him to use executive authority to ban workplace discrimination against lesbian, gay, bisexual and transgender employees of federal contractors.” While such action would not implement full ENDA provisions, requiring federal contractors to follow ENDA’s rules would set a positive example for private employers and hopefully sway movement

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203 See supra notes 142-170.
206 Id.
207 Id.
towards a full passage of ENDA. While all of this is up in the air, we will once again see ENDA die before reaching the President’s desk unless Boehner brings the Act to a vote. Opinions are changing, as evidenced by the bill’s rather smooth passage in the Senate after years of failures and close calls. However, as President Obama says, one person belonging to “one party in one house of Congress” is standing in the way of “millions of American who want to go to work each day and simply be judged by the job they do.”

The passage of ENDA would have an enormous effect on the country, as sexual minorities face “widespread discrimination and harassment in the workplace.” As of 2013, studies show that “15 percent to 43 percent of gay, lesbian, and bisexual people have experienced some form of discrimination and harassment in the workplace.” With the identifying gay, lesbian, and bisexual population hovering around 3.5 percent and the total United States Population being around 317 million people, this means that anywhere from 1,664,250 to 4,770,850 people have experienced discrimination in employment at some point in their lives based on an unprotected characteristic. With even more people who are likely victims of discrimination, yet do not identify with one of these sexual orientations, it is possible that these numbers could be even higher. Furthermore, the problem is even more widespread in the transgender community, with 90 percent of transgender people reporting “some form of harassment

210 Peters, supra note 205.
212 Id.
or mistreatment on the job or report[ing] having taken some action such as hiding who
they are to avoid it.”215 Considering these numbers, there are millions of people facing
employment discrimination, yet most of them have no real chance of successfully
seeking remedies for this action outside of state level protections (and that is if they
happen to live in state with such non-discrimination measures in place).

As evidenced above, federal courts have been very unwilling to expand the
protections under Title VII to discrimination to include protection for sexual minorities.
While some courts have opened the door by allowing certain “sex stereotyping”
arguments, or even going against federal precedent and including discrimination
against sexual minorities in discrimination “because of sex”, these courts are vastly in
the minority. Additionally, these courts also face opposition from some federal circuits
who argue that Title VII is under attack by these supposedly improper “bootstrapping”
uses of the law. Although sexual minorities are not completely out of hope, as many
states have their own laws protecting sexual minorities, these state protections exist in a
minority of the states and are very uneven in how and who they protect against
discrimination. States differ in their definitions of sex, sexual orientation, and gender
identity, and some only protect sexual orientation, while remaining silent on gender
identity.216 Meanwhile, while the law remains fluid, employers have no incentive to
avoid discrimination against sexual minorities, especially in states or municipalities that
protect neither sexual orientation nor gender identity. As employers will likely want to
avoid liability, it is possible that the limited case law in the states with protections for
sexual minorities exemplifies the laws’ success. Perhaps as employers are aware of the

215 Badgett, supra note 211, at 2.
prohibitions and thus are careful not to discriminate against these somewhat newly protected classes, the amount of cases determining whether or not someone is actually protected have dwindled.

It is for these reasons that federal legislation, such as the current Employment Non-Discrimination Act, is necessary. Though it may not be technically necessary, as some blame narrow readings of statutes that should be able to protect sexual minorities, we have reached a point where victims of this discrimination deserve some dependable route to the courts. The Supreme Court has stated that the central purposes of Title VII are “eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”217 With no federal legislation, and many states with limited or no legislation, often times nothing is preventing employers from discriminating against sexual minorities. Left to the Federal Courts to make nuanced arguments, or to the individual states where each protection is different, these plaintiffs are uncertain as to whether they will even be able to make a prima facie case, let alone explain the merits of their situation. All of this frustrates the purpose of Title VII.

The different sides of the argument continue to become more and more convoluted. Even if protection is possible under current law, it is time to stop arguing whether or not a court should hear from a homosexual or transgendered plaintiff. Instead, we should move to a body of law where these individuals can get through the door of every court and have a judge listen to their story to determine whether discrimination actually occurred. Furthermore, federal legislation would solve state discrepancies between those that protect only sexual orientation and those that protect

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all sexual minorities. It would also allow for consideration of a larger body of case law, as past Title VII cases could become persuasive authority for cases under ENDA. Congress could even improve current legislation, as well as state laws, by including a larger definitions section to once and for all settle the interpretive arguments over “sex”, “sexual orientation”, and “gender identity.”

The bottom line is that the time for ENDA is now. Even if current laws can potentially protect sexual minorities, federal legislation will be a speedier and more reliable solution to employment discrimination against sexual minorities.