

New Federal Initiatives Project

The Employment Non-Discrimination Act

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March 23, 2010



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for Law and Public Policy Studies*

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The “Employment Non-Discrimination Act” (“ENDA”) would amend Title VII of the 1964 Civil Rights Act to add “sexual orientation” and “gender identity” to the list of statuses protected from employment discrimination. ENDA has been introduced in various forms since the 1970s.¹ With the recent shift in party control of Congress and the backing of President Barack Obama,² ENDA has new prospects for passing the 111th Congress and becoming law.³

ENDA’s proponents assert that the bill promotes the goal of embracing diversity in the workplace. Proponents also argue that sexual orientation is protected under the U.S. Constitution’s guarantees of equal protection and due process. Without a federal statute, victims of discrimination are subject to a patchwork of state law protections that provide uneven and often insufficient protection, hence the need for a national standard in the form of ENDA. Critics argue that antidiscrimination laws promote *intolerance* of faith if they are not accompanied by meaningful exemptions for religious organizations and other faith-based employers with religiously grounded moral objections to homosexual conduct. Without strong exemptions, religious organizations will be required, as a condition of seeking workers to carry out their faith-based missions, to affirm conduct that is in diametric opposition to the moral principles of their faith. Critics assert that unlike other established statutory protections such as race and gender, legal protections for sexual orientation inevitably clash with the right to free exercise and expression of religion, including the right to believe and express that homosexual conduct is sinful. In the words of the Supreme Court, protecting expressive associations from antidiscrimination laws “is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas.”⁴

ENDA History

Until 2007, ENDA versions provided that the Act “shall not apply to a religious organization,” with additional minimal language sometimes employed to define “religious organization.”⁵ In the 110th Congress, Rep. Barney Frank (D-Mass.) introduced a version (H.R. 2015) that included a significantly narrower exemption.⁶ After a hearing in the House Labor and Education Committee and opposition from religious freedom organizations,⁷ the committee took no further action.

Instead, efforts turned to another Frank bill, H.R. 3685, that contained the exemption for “religious organizations,” but defined the term to mean

- (A) a religious corporation, association, or society; or
- (B) a school, college, university, or other educational institution or institution of learning, if--
 - (i) the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society; or
 - (ii) the curriculum of the institution is directed toward the propagation of a particular religion.

H.R. 3685RH, Sec. 3(8). The Majority insisted that Section 3’s definition of “religious organization” was congruent with the Title VII exemption:

This definition of a religious organization is taken directly from Title VII’s descriptions of religious organizations exempt from that law’s religious discrimination prohibitions. If

an organization qualifies for Title VII's religious exemption from religious discrimination claims, it would qualify for ENDA's religious organization exemption as well.⁸

The Minority complained, "H.R. 3685 revises the religious exemption, ostensibly to conform to the exemption under Title VII. The new provision, however, still fails to protect many religious organizations that would qualify for an exemption under Title VII."⁹

The bill passed the Labor and Education Committee along party lines, with four Republican amendments offered and rejected.¹⁰ Two amendments offered by Rep. Mark Souder (R-Ind.) would have eliminated the protection for "perceived" sexual orientation and permitted employers to condition employment on being married or being eligible to marry.¹¹ A third Souder amendment would have prohibited retaliation against an employee who refused to sign an employer's anti-discrimination or anti-harassment policy or refused to participate in diversity training because such policy is against the individual's religious beliefs regarding homosexual conduct.¹² The fourth amendment, offered by Rep. Pete Hoekstra (R-Mich.), would have expanded the religious exemption to include institutions that maintain a faith-based mission. The committee noted:

H.R. 3685 adopts Title VII's definition of a religious organization and thereby imports long-standing existing law on who is or is not a religious organization. The scope of its religious exemption is to those organizations who are covered by Title VII's exemption, no more and no less.¹³

After the bill passed the committee, several amendments were offered on the floor. A friendly amendment offered by Rep. George Miller (D-Calif.), a co-sponsor of the bill, directly incorporated the language of Title VII's religious discrimination exemptions:

This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2)).¹⁴

Rep. Souder offered an amendment to strike paragraph (3) of section 8(a), which prohibited employers from conditioning employment on a person being married or being eligible to be married.¹⁵ The amendment passed overwhelmingly, by a vote of 325-101.¹⁶ A third amendment offered by Rep. Tammy Baldwin (D-Wisc.), to add "gender identity" to the bill's protections, was withdrawn by unanimous consent after discussion.¹⁷ Thus amended, the bill passed the House by a vote of 235-184, but the Senate took no action.¹⁸

The effort to pass an ENDA bill has been renewed in the 111th Congress, with two new versions of ENDA having been introduced by Rep. Frank on June 19, 2009 (H.R. 2981) and June 24, 2009 (H.R. 3017), and a third bill in the Senate by Sen. Jeff Merkley (D-Ore.) (S. 1584), all of which recapitulate the exemption for religious institutions based on Title VII's exemptions as previously set out in H.R. 3685 (110th Cong.).¹⁹ All three versions also add "gender identity" as a protected status, and provide that ENDA provides no protection against discrimination based on "unmarried" status, with "marriage" defined by reference to the federal Defense of Marriage Act.²⁰

ENDA Analysis

The first exemption incorporated into ENDA, Section 2000e-1(a), is a general exception for religious hiring by religious entities. It provides that Title VII "shall not apply to... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a

particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” This provision has been quite broadly construed, and its protections for hiring based upon religious status or beliefs have been routinely applied to churches, faith-based ministries, parachurch ministries and religious educational institutions.²¹ Difficult issues continue to arise in the courts regarding an institution’s eligibility for the exemption, and these frequently require an analysis of the institution’s religious beliefs and practice.²²

The second exemption, Section 2000e-2(e)(2), protects religious hiring in sectarian education by providing, “[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.”²³ There is a paucity of case law interpreting the provision, likely because many consider it redundant of the general exemption provided in 2000e-1(a). What precedent exists suggests that analysis under this provision follows one or both of two distinct lines of inquiry; the “control or support test” and the “curriculum” test. The former test is more commonly applied, with varied results.²⁴ The Ninth Circuit utilized the curriculum test in *EEOC v. Kamehameha Schools/Bishop Estate*, but interpreted “curriculum” narrowly in light of its context in 2000e-2(e)(2) and its ordinary meaning to be “limited to coursework and required school activities,” and held that nothing in the school’s curriculum justified the school’s assertion that its teachers had to be of the Protestant faith.²⁵

These statutory exemptions derive from First Amendment principles that proponents argue protect the autonomy of churches and faith-based organizations to define their religious mission and character by selecting employees that agree with their religious views. Although the Supreme Court has unanimously approved the broad exemption provided in 42 U.S.C. § 2000e-1, it has also taken pains to point out that

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.²⁶

Non-profit religious corporations assert this burden is difficult to bear, and is magnified greatly by the approach of some courts in treating the constitutional defense to a Title VII suit against a religious organization as a matter for proof on the merits rather than a jurisdictional issue.²⁷ By expanding Title VII and yet relying solely on Title VII’s existing religious organization definition, ENDA could thus lead to a substantial increase in litigation.

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Related Links

Employee Non-Discrimination Act as introduced in the United States Senate in the 111th Congress (S. 1584)

<http://www.opencongress.org/bill/111-s1584/text>

Employee Non-Discrimination Act as introduced in the United States House of Representatives in the 111th Congress (H.R. 3017)

<http://www.opencongress.org/bill/111-h3017/text>

“Bad ENDA: More Bad Legislation,” by Roger Clegg, President and General Counsel of Center for Equal Opportunity, *National Review Online*, May 9, 2002
<http://old.nationalreview.com/clegg/clegg050902.asp>

“ENDA: Work Place is the Wrong Place for Sexual Politics,” American Family Association, September 3, 2009
<http://www.afa.net/Detail.aspx?id=2147486631>

¹ See, e.g., S. 1705, § 9 (introduced Oct. 2, 2003); H.R. 3285, § 9 (introduced Oct. 8, 2003); H.R. 2692, § 9 (introduced July 31, 2001); S. 869, § 9 (introduced June 10, 1997); H.R. 4636 § 6(a) (introduced June 23, 1994). A recitation of the history of ENDA-like legislation, beginning with the first effort by Rep. Bella Abzug of New York in 1975, may be found at http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110RHAit&refer=&r_n=hr406p1.110&item=&sel=TOC_3501&.

² According to the White House web site, “President Obama also continues to support the Employment Non-Discrimination Act and believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity.” White House, *Issues – Civil Rights*, http://www.whitehouse.gov/issues/civil_rights/.

³ This brief paper discusses only the religious exemptions provided in recent versions of ENDA. There are other, equally serious concerns that ENDA presents from the standpoint of public policy and practical implementation that are beyond the scope of this paper, but should also be carefully considered.

⁴ *Boy Scouts v. Dale*, 530 U.S. 640, 647-48 (2000) (upholding right of Boy Scouts to dismiss scoutmaster who promoted homosexual agenda notwithstanding antidiscrimination law). Many conservative religious organizations believe that all acts of sexual conduct outside traditional marriage are sinful, including heterosexual fornication and adultery as well as homosexual conduct. Arguably, this type of policy is not a form of “sexual orientation” discrimination. Compare *Christian Legal Society v. Walker*, 453 F.3d 853, 860 (7th Cir. 2006) (Christian Legal Society “requires its members and officers to adhere to and conduct themselves in accordance with a belief system regarding standards of sexual conduct, but its membership requirements do not exclude members on the basis of sexual orientation.”) with *Christian Legal Soc. Chapter of University of California v. Kane*, No. C 04-04484 JSW, 2006 WL 997217, at *7, n.2 (N.D. Cal. April 17, 2006) (“Although CLS argues that it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct, this is a distinction without a difference.”) (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring)), *aff’d on other grounds*, 2009 WL 693391 (9th Cir. March 17, 2009)).

⁵ See generally n.2, *supra*.

⁶ H.R. 2015 provided, in section 6:

(a) In General – This Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.

(b) Certain Employees – For any religious corporation, association, educational institution, or society that is not wholly exempt under subsection (a), this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.

(c) Conformity to Religious Tenets- Under this Act , a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenets that such corporation, association, institution, or society declares significant. Under this Act , such a declaration by a religious corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review. Any such declaration made for purposes of this Act shall be admissible only for proceedings under this Act.

⁷ See generally, *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. (2007) (Comments of Alliance Defense Fund, Concerned Women for America, Center for Law and Religious Freedom of the Christian Legal Society, American Center for Law & Justice, General Conference of Seventh-Day

Adventists, Union of Orthodox Jewish Congregations, National Conference of Catholic Bishops, American Association of Christian Schools, Traditional Values Coalition, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council and others), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf.

⁸ H.R. 3685RH, “Section-By-Section Analysis,” available at http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110jUvSC&refer=&r_n=hr406p1.110&item=&sel=TOC_104577&

⁹ H.R. 3685RH, “Minority Views,” available at http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110jUvSC&refer=&r_n=hr406p1.110&item=&sel=TOC_129849&

¹⁰ H.R. 3685, available at http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110X5NC4&refer=&r_n=hr406p1.110&item=&sel=TOC_3501& (Committee Action Including Legislative History and Votes).

¹¹ *Id.*

¹² *Id.* *Ref. Altman v. Minn. Dept. of Corr.*, 251 F.3d 1199 (7th Cir. 2001) (conduct of correctional employees in silently reading their Bibles during mandatory “diversity training” session regarding homosexual activity in the workplace involved First Amendment protected speech on matter of public interest and concern).

¹³ *Id.*

¹⁴ H.R. 3685, Sec. 6 (Introduced in the House).

¹⁵ See H.R. 3685, “Amendments to H.R. 3685”.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ H.R. 3685, available at <http://www.thomas.gov/cgi-bin/bdquery/D?d110:1:/temp/~bdZ59n:@@R/bss/d110query.html> (Major Actions).

¹⁹ *See generally*, H.R. 3017; H.R. 2981; and S. 1584.

²⁰ In all three bills, the religious exemption is contained in Section 6, and the provision excluding coverage based on marital status is contained in Section 8(b)(c).

²¹ *See, e.g., EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154 (W.D. Wash. 1992) (denominational retirement home held exempt); *Saeemodarae v. Mercy Health Services*, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (Catholic hospital exempt); *McClure v. Salvation Army*, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff’d*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, *reh. denied*, 409 U.S. 1050 (Salvation Army held to be a religious corporation); *Spencer v. World Vision, Inc.* 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (World Vision held exempt); *Gosche v. Calvert High School*, 997 F. Supp. 867 (N.D. Ohio 1998), *aff’d*, 181 F.3d 101 (1999) (religious school could dismiss a music teacher for an adulterous relationship because a religious school could make adherence to the moral standards of the church a requirement of continued employment); *LeBoon v. Lancaster Jewish Community Center Ass’n*, 503 F.3d 217 (3rd Cir. 2007), *cert. denied*, 128 S.Ct. 2053 (2008) (Jewish community center exempt); *Curay-Cramer v. Ursuline Academy*, 344 F. Supp. 2d 923 (D. Del. 2004), *aff’d but criticized*, 450 F.3d 130 (3rd Cir. 2006).

²² *Compare Stately v. Indian Community School of Milwaukee, Inc.*, 351 F. Supp. 2d 858 (E.D. Wis. 2004) (school based on traditional Indian spiritual and cultural principles raised doubt whether district court had jurisdiction over terminated teacher’s Title VII claim where school presented evidence that, although school supported various religions, Native American religions were non-exclusive); *Fike v. United Methodist Children’s Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982), *aff’d on other grounds*, 709 F.2d 284 (4th Cir. 1983) (Methodist children’s home was a secular organization and not exempt; the direction given the day-to-day life for the children at the home was practically devoid of religious content); *Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (only the relationship between a church and its minister is exempt; relationship between a religious educational institution and its faculty is not exempt); and *Vigars v. Valley Christian Center of Dublin*, 805 F. Supp. 802 (N.D. Cal. 1992) (librarian’s allegation that she was fired from parochial school because of her out-of-wedlock pregnancy, if proven, would establish Title VII violation; fact that school’s dislike of pregnancy outside of marriage stemmed from religious belief did not automatically exempt termination decision from Title VII scrutiny).

²³ *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 464 (9th Cir. 1993) (amended on denial of rehearing), *cert. denied* 510 U.S. 963 (1993) contains a recitation of the legislative history of Sec. 2000e-2(e)(2).

²⁴ *Compare Myers v. Chestnut Hill College*, No. 95-6244, 1996 WL 67612 (E.D. Pa. February 13, 1996), citing *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991) (defendant is a “private Catholic college for women ... which is operated by the Catholic Order of the Sisters of St. Joseph,” and thus, as a Catholic college operated by a particular religion or religious organization, association or society it clearly fell within the first part of the exemption); *Siegel*

v. Truett-McConnell College, Inc., 13 F. Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (1995) (“In determining whether a college or school qualifies for the 2000e-2 exemption, all religious and secular characteristics must be weighed and considered.... Only those institutions with extremely close ties to organized religion will be covered.”); *Hall v. Baptist Memorial Health Care Corp.*, 27 F. Supp. 2d 1029 (W.D. Tenn. 1998), *aff'd*, 215 F.3d 618 (2000) (college of nursing and health science was a “religious educational institution,” where it was founded by sectarian organizations, avowed mission was to provide quality baccalaureate and continuing education in a Christian atmosphere, hosted various religious functions, had many ties to Baptist churches, and purposes and programs of the college were permeated with a conviction to adhere to Christian principles, though curriculum was primarily secular in nature); and *Killinger v. Samford University*, 917 F. Supp. 773 (N.D. Ala. 1996), *aff'd*, 113 F.3d 196 (1997) (university with long history of Baptist connection was exempt despite professor's contention that he was lured to faculty by promise that university wanted to foster diversity and liberality in theological thought, and that university committed itself to diversity by accepting bequest conditioned upon university recruiting and maintaining faculty with diverse points of view in Protestant tradition).

²⁵ *EEOC v. Kamehameha Schools/Bishop Estate, supra*, n.17, 990 F.2d at 466.

²⁶ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

²⁷ *See Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002) (Title VII claim against church by fired lesbian youth minister; review of ministerial exception defense regarded as an element of plaintiff's case rather than jurisdictional and incorporated into analysis of merits); *accord Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996 (D. Kan. 2004) (treating ministerial exception as non-jurisdictional in sex discrimination suit against church).