



## LABOR AND EMPLOYMENT LAW

# The Employment Non-Discrimination Act of 2009

By James D. Noël III

I decided to write this article on the Employment Non-Discrimination Act (ENDA) of 2009 (H.R. 2981), because it seems to me that it is now more likely to be approved and signed into law than were its many prior versions. Passage of this bill appears more likely now because ENDA makes a number of concessions to the opponents of equal rights for persons of all types of sexual orientation and President Barack Obama spent much of his career fighting to strengthen civil rights: as a community organizer, civil rights lawyer, Illinois state senator, U.S. senator, and now as President.

There have been many unsuccessful attempts to prohibit discrimination based on sexual orientation. In addition, the courts have repeatedly held that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on gender orientation. President Obama's stated support of ENDA and the fact that the Democrats have a majority in the House of Representatives and the Senate make it more likely that this bill will be passed.

It is important for the ENDA to be approved, even though, since the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), more federal courts are finding that Title VII prohibits discrimination based on stereotypes of what is considered proper behavior and appearance for persons of a certain gender. Federal courts are also finding that *Price Waterhouse* is not a valid ground on which the courts bootstrap a prohibition against sexual orientation

into Title VII. As a general rule, the courts have refused to grant protection against discrimination based on sexual orientation under the Constitution or other federal statutes.

### What is the State of Federal Jurisprudence Regarding Discrimination Based on Sexual Orientation?

Federal courts of appeals have consistently held that Title VII does not proscribe discrimination solely because of sexual orientation, because the statute does not recognize gays, lesbians, or transsexuals as a protected class. *See Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2nd Cir. 2005); *Simonton v. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001), *cert. denied*, 534 U.S. 1155 (2001); *Wrightson v. Pizza Hut Inc.*, 99 F.3d 138, 143 (4th Cir.1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Ulane v Eastern Airlines Inc.*, 742 F.2d 1081, 1085–86 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Williamson v. A.G. Edwards & Sons Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979). *See also Medina v. Income Support Div., State of N.M.*, 413 F.3d 1131 (10th Cir. 2005). Although the federal courts have held that Title VII does not offer protection on the basis of sexual orientation, current case law allows a claim to be brought

under Title VII by a person who has suffered an adverse employment action because the individual does not match a stereotype associated with his or her protected group. That case law has its genesis in *Price Waterhouse*.

The case of *Price Waterhouse* involved a female accountant who had been denied promotion to partnership because she was too “macho,” had been “overcompensated for being a woman,” should take “a course in charm school,” was “somewhat masculine,” and was “a lady using foul language.” *Price Waterhouse v. Hopkins*, *supra*, 490 U.S. at 235. Her supervisors told her that she would improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry.” A plurality of the U.S. Supreme Court found that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250. The Court concluded that this type of “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.” *Id.* at 252. Thus, federal courts have allowed claims under Title VII when the plaintiffs have alleged discrimination because their behavior did not conform to gender stereotypes. “Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.” *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2nd Cir. 2005). See also *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119–20 (2nd Cir. 2004) (quoting *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), which involved male employees who had harassed one of the plaintiffs for wearing earrings and exhibiting characteristics that did not comport to the views of masculinity or to the behavior of other male employees and had also harassed a teenage boy based on impermissible gender stereotyping), *vacated on other grounds*, 523 U.S. 1001 (1998). Cf. *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 263 (3rd Cir. 2001) (“Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotyping holding into question.”).

In *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005), *cert denied*, 546 U.S. 1003 (2005), a transgender police officer in Cincinnati had been demoted from a sergeant’s training program, and he alleged that his demotion was attributable to not conforming to male stereotypes. A stereotyping verdict was upheld, because prohibited gender discrimination under Title VII occurs when someone is required to conform to stereotypes applicable to one’s sex. See also *Kay v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 8521 (E.D. Pa. May 16, 2003) (co-workers’ perceptions that the plaintiff was “miss prissy” or less than a “real man” were sufficient evidence of gender stereotyping, but the claim was dismissed for failure to establish that harassment was severe and pervasive), *aff’d*, 142 Fed. Appx. 48 (3rd Cir. 2005); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002) (defendant’s summary judgment motion was denied because the plaintiff’s evidence suggested that she was harassed because of

stereotypes: she was lesbian and dated other women; she was ridiculed for wearing shoes that a co-worker believed were men’s shoes; and she was subjected to comments such as “I thought you were the man,” “I thought you wore the pants,” and “Who wears the d\*\*\* in the relationship?”); *EEOC v. Trugreen Ltd. P’ship*, 1999 U.S. Dist. LEXIS 9368, at \*22 (W.D. Wis. Mar. 23, 1999) (the employer treated the employee adversely, because the employee “did not exhibit his masculinity in a way that met [the employer’s] conception of how a man should behave”).

The case of *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) involved a lieutenant in the city’s fire department who was a transsexual and alleged that he had female mannerisms and appearance. The court ruled that this argument was sufficient to plead a claim of sex stereotyping under *Price Waterhouse v. Hopkins*.

In *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001), Antonio Sanchez sued his employer after his male co-workers and a male supervisor verbally harassed him for being effeminate. Sanchez claimed that his co-workers in the restaurant teased him on a daily basis for carrying his tray “like a woman” and called him a “faggot” and a “f\*\*\*\*\* female whore.” Sanchez argued that “the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.” The Ninth Circuit Court of Appeals agreed, concluding that the plaintiff had met his burden of proof by showing that the harassment was “because of” his sex. The court relied on *Price Waterhouse and Oncale v. Sundowner Offshore Svcs. Inc.*, 523 U.S. 75 (1998). In *Oncale*, the U.S. Supreme Court held that the prohibition against discrimination “because of sex” found in Title VII protects both men and women. The Court further stated that sexual harassment by members of the same sex is actionable regardless of whether one of the parties to the harassment is homosexual. The Court ruled that such harassment simply must be directed at the victim “because of” his or her sex to make it a violation. While acknowledging that Title VII did not initially intend to target harassment of men by other men, the Supreme Court explained that “statutory prohibitions often go beyond the principal evil to cover reasonable comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

In *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252 (1st Cir. 1999), the First Circuit Court of Appeals mentioned that Title VII claims may exist for gay employees who are discriminated against because they do not meet “stereotyped expectations of masculinity,” but the same court upheld summary judgment for the employer because this issue was raised for the first time on appeal. Footnote 4 of the ruling states in part that whether a sexual stereotyping claim may be brought under Title VII “is no longer open” and “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, ... a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.” See also *Centola v. Potter*, 183 F. Supp. 2d 403, 407 (D. Mass. 2002) (denying the defendant’s

summary judgment motion because evidence of gender stereotyping showed that the plaintiff's co-workers taped pictures of Richard Simmons in pink hot pants to the plaintiff's workspace, asked if the plaintiff would be marching in a gay parade and whether he had AIDS, called him "sword swallower," uttered anti-gay epithets, and placed cartoons mocking gay men in his workspace).

However, as previously stated, some courts have held that a claim based on gender stereotyping under *Price Waterhouse* cannot be used "to bootstrap protection for sexual orientation into Title VII." *Simonton, supra*, at 38. For example, in *Dawson v. Bumble & Bumble*, an openly lesbian female was fired by an avant-garde hairstyling salon that regularly employed individuals who were not sexually stereotypical—including a female to male transsexual, an openly bisexual individual, numerous openly gay employees, and lesbian employees with "very androgynous looks." *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2nd Cir.). The court rejected the plaintiff's sexual stereotyping theory to the extent that it was a bootstrap to insert protection for sexual orientation into Title VII. The court recognized that the plaintiff had alleged that she did not conform to traditional expectations of the way a woman should look, but the court found that there was no substantial evidence that the plaintiff had been subjected to any adverse employment action as a result of appearance and not sexual orientation. See also *Hamm v. Weyanwega Milk Prods. Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) ("sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the [*Price Waterhouse*] case, be evidence of sex discrimination").

The *Price Waterhouse* decision is narrower than its language suggests and, as such, "when an admitted homosexual brings suit under a gender stereotype theory, courts scrutinize such claim to ensure that it is not used to bootstrap protection for sexual orientation into Title VII." *Lynch v. Baylor Univ. Med. Ctr.*, 2006 U.S. Dist. LEXIS 62408 (N.D. Tex. 2006).<sup>1</sup> In *Martin v. New York State Dept. of Correctional Svcs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002), the employer was granted summary judgment on the plaintiff's claim of gender stereotyping, because the harassment endured by the plaintiff—a homosexual male—was related to his sexual orientation and not to his gender.

All these court decisions clearly show that there is a need to approve the Employment Non-Discrimination Act.

### **What Has Happened with Legislation to Amend Title VII to Include Discrimination Based on Sexual Orientation?**

Several attempts to amend Title VII to include protection against discrimination based on sexual orientation have failed,<sup>2</sup> and prior versions of the ENDA have not been signed into law.<sup>3</sup> Moreover, Congress has not acted on the 2009 version of the ENDA since July 2009. In June, the bill was referred to the Committee on Education and Labor as well as to the Committees on House Administration, Oversight and Government Reform, and the Judiciary, for a period to be subsequently determined by the speaker of the house. The bill was referred to each committee for consideration of such provisions as fall within the jurisdiction of the commit-

tee concerned. On July 23, 2009, the ENDA was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary.

### **What are the Significant Provisions of the ENDA?**

A discussion of the most important provisions of the ENDA must start with the purposes of the legislation. Section 2 of H.R. 2981 states that the ENDA is designed to achieve the following objectives:

- to address the history and widespread pattern of irrational discrimination on the basis of sexual orientation or gender identity by employers in the private sector as well as local, state, and federal government employers;
- to provide for a comprehensive federal prohibition of employment discrimination on the basis of sexual orientation or gender identity;
- to establish meaningful and effective remedies for employment discrimination on the basis of sexual orientation or gender identity; and
- to invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to § 8 of Article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.

The ENDA defines the term "employee" to include the definitions of employee under §§ 701(f) and 717(a) of the Civil Rights Act of 1964, § 302(a)(1) of the Government Employee Rights Act of 1991, and § 101 of the Congressional Accountability Act of 1995. The provisions of the ENDA that apply to an employee or individual do not apply to a volunteer who receives no compensation.

The ENDA defines the term "employer" to include the definitions of employer under § 701(h) of the Civil Rights Act of 1964, § 302(a)(1) of the Government Employee Rights Act of 1991, and § 101 of the Congressional Accountability Act of 1995. The term "employer" does not include a bona fide private membership club (other than a labor organization) that is exempt from taxation under § 501(c) of the Internal Revenue Code of 1986. However, a state will not be immune under the Eleventh Amendment to the Constitution from a suit brought in a federal court of competent jurisdiction for a violation of the ENDA. Moreover, receipt or use of federal financial assistance for any program or activity of a state will constitute a waiver of sovereign immunity, under the Eleventh Amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity.

The ENDA defines "gender identity" as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." This definition is similar to definitions and characterizations of prohibited gender stereotyping, but it also includes a definition of "sexual orientation" as "homosexuality, heterosexuality, or bisexuality."

The ENDA prohibits discrimination "because of such in-

dividual's actual or perceived sexual orientation or gender identity." One would expect that the case law on stereotyping will be useful in determining what is a "perceived sexual orientation or gender identity."

ENDA makes various concessions to those who have objected to civil rights legislation in the past. These concessions are listed as follows:

- It does not provide for any preferential treatment or quotas.
- It does not include disparate impact claims but, rather, only includes disparate treatment claims.
- It does 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 either § 702(a) or § 703(e)(2) of the act.
- The term "employment" does not apply to the relationship between the United States and members of the armed forces.
- It maintains laws creating a special right or preference concerning the employment of veterans.
- The statute does not require a covered entity to treat an unmarried couple in the same manner as it treats a married couple, as defined in § 7 of Title I, U.S. Code (referred to as the Defense of Marriage Act) for purposes of employee benefits.

The Employment Non-Discrimination Act sets rules and policies that employers should adopt and follow. Employers are not prohibited "from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity." They are not banned "from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that rules and policies on sexual harassment, including when adverse action is taken, are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity." In addition, employers are allowed to deny "access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later." The statute does not require employers to construct new or additional facilities. Finally, employers may set reasonable dress and/or grooming standards during hours at work, provided that these standards are "not prohibited by other provisions of Federal, State, or local law, provided that 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 for the gender to which the employee has transitioned or is transitioning."

Under the ENDA, the Equal Employment Opportunity Commission will "not collect statistics on actual or perceived sexual orientation or gender identity from covered entities, or compel the collection of such statistics by covered entities." The statute also provides for lawsuits for equitable relief against state officials in "the official capacity of the official by any employee or applicant for employment who has complied with the applicable procedures." Under the ENDA, courts "may award to the prevailing party those costs authorized by section 722 of the Revised Statutes of the United States (42 U.S.C. 1988)." Finally, in an action or administrative proceeding against the United States or against an individual state for a violation of the ENDA, "remedies (including remedies at law and in equity, and interest) are available for the violation to the same extent as the remedies are available for a violation of title VII by a private entity except that: punitive damages are not available; and compensatory damages are available to the extent specified in section 1977A(b) of the Revised Statutes (42 U.S.C. 1981a(b))."

The ENDA includes a provision that allows a court to grant attorneys' fees and experts' fees as part of the trial costs.

In conclusion, the current version of the Employment Non-Discrimination Act of 2009 has attempted to reconcile the views of proponents of equal rights for persons of all types of sexual preferences and the views of opponents to this and other civil rights laws. Like a good settlement in litigation, neither side will feel that it has received what it wanted when the ENDA becomes law. **TFL**

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## Endnotes

<sup>1</sup>No F. Supp. 2d citation is available. See 2006 WL 2456493.

<sup>2</sup>For example, H.R. 655, 101st Cong. (1989); S. 464, 100th Cong. (1987); H.R. 230, 99th Cong. (1985); H.R. 8269, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 2998, 95th Cong. (1977); H.R. 14752, 93d Cong. (1974).

<sup>3</sup>These include S. 1284, 107th Cong. (2000); H.R. 2692, 107th Cong. (2000); S. 1276, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999); S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997); S. 2056, 104th Cong. (1996); S. 932, 104th Cong. (1995); H.R. 1863, 104th Cong. (1995); H.R. 4636, 103d Cong. (1994); S. 2238, 103d Cong. (1994).