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## CRACKS IN THE SHIELD: THE NECESSITY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

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## CRACKS IN THE SHIELD: THE NECESSITY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

### Cover Page Footnote

J.D., William S. Boyd School of Law, University of Nevada, Las Vegas, 2015; B.A., University of Oregon, 2011. Many thanks to Ann McGinley for her indispensable comments and advice through the writing process.

# CRACKS IN THE SHIELD: THE NECESSITY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

James Bolotin \*

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### I. INTRODUCTION: ENDA’S PROPOSED PROTECTIONS AND 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 in compensation or terms of employment because of race, color, religion, sex, or national origin.<sup>1</sup> Congress banned limiting or classifying employees or applicants in any way that may adversely affect their status.<sup>2</sup> This was a monumental change, giving federal protection to classes of people that had traditionally suffered workplace discrimination.

However, the statute lacks explicit protection for individuals based on sexual orientation, and the majority of courts have refused to define sex as including sexual orientation.<sup>3</sup> Interpreting the “sex” protected by Title VII as 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.<sup>4</sup> Some courts, however, following the *Price*

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<sup>1</sup> 42 U.S.C. § 2000e-2 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 714 (2010).

<sup>4</sup> *Id.*; see also *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (holding that Title VII protection cannot be extended to discrimination against sexual preference), *abrogated by*, *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864 (9th Cir. 2001).

*Waterhouse v. Hopkins* standard, have extended prohibition against discrimination based on “sex” to include gender and its stereotypes.<sup>5</sup>

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 protect gays and lesbians, as the basis of the discrimination “occurs because of the sex or gender of the harasser and of the victim.”<sup>6</sup> Others argue that winning a case under existing Title VII provisions is possible as long as plaintiffs use a sex stereotyping argument, “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.”<sup>7</sup>

While scholars argue that Title VII should or already does protect against discrimination based on sexual orientation, Congress has regularly considered legislation that would answer this question unequivocally. Such legislation, which would explicitly ban discrimination on the basis of sexual orientation, has been repeatedly introduced and rejected since 1974, and is currently under consideration in the latest form of the Employment Non-Discrimination Act (ENDA).<sup>8</sup>

Though there have been amendments to Title VII, including the sex discrimination provisions, they have not been helpful to sexual minorities. In 1972, Congress passed the Equal Employment Opportunity Act, which “enabled the [Equal Employment Opportunity Committee] to bring enforcement litigation in federal court and extended Title VII’s coverage to public employers.”<sup>9</sup> This amendment arose because, despite Title VII, “discrimination against women continue[d] to be widespread, and [was] regarded by many as either morally or physiologically justifiable.”<sup>10</sup> While many women were optimistic in 1964, “Title VII’s promise had not been realized in the context of sex.”<sup>11</sup> The amendment successfully eliminated arguments from employers who discriminated against women in order to

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<sup>5</sup> Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

<sup>6</sup> McGinley, *supra* note 3, at 716.

<sup>7</sup> Clare Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 92 (2007).

<sup>8</sup> H.R. 14752, 93d Cong. (1974); H.R. 1755, 113th Cong. (2013).

<sup>9</sup> See Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1346 (2012) (discussing the expansion of the EEOC’s power under the Equal Employment Opportunity Act).

<sup>10</sup> *Id.* (alteration in original) (quoting H.R. REP. NO. 92-238, at 5 (1971), *reprinted in* 1972 U.S.S.C.A.N. 2137, 2141).

<sup>11</sup> *Id.* at 1347.

“preserve conventional sex roles and maintain the traditional family structure.”<sup>12</sup>

While eliminating some discrimination, the Equal Employment Opportunity Act did not expand protection for those 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 mostly overruled certain Supreme Court decisions that had “weakened the scope and effectiveness” of Title VII, and added remedies such as compensatory and punitive damages as well as the ability to request a jury trial.<sup>13</sup> It did not add any explicit protection for sexual minorities.<sup>14</sup>

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

Part II considers the history of Title VII’s “because of sex” protection, which 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 then looks at a string of unsuccessful cases where homosexuals or other sexual minorities (lesbians, gays, bisexuals, transgender, and intersex individuals) attempted to bring claims of discrimination under Title VII.<sup>15</sup> 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, succeeded in ways that could help those claiming discrimination based on sexual orientation.<sup>16</sup>

Part III discusses the states that have addressed this issue by passing legislation to ban discrimination on the basis of sexual orientation and/or gender identity. The paper analyzes examples of state statutes, examining the similarities and differences in various

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<sup>12</sup> *Id.*

<sup>13</sup> Linda Urbanik, *Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act—Does it Apply Retroactively?*, 24 LOY. U. CHI. L.J. 109, 109-10 (1992).

<sup>14</sup> *Id.*

<sup>15</sup> See generally McGinley, *supra* note 3, at 713 (describing the classes of the sexual minority).

<sup>16</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (establishing the *Price Waterhouse* sex stereotyping framework).

statutes. It concludes that, overall, state legislation is successful in combatting this type of employment discrimination; however, a national law could be equally beneficial, if not more so, because state laws would benefit from federal clarification.

Part IV analyzes a proposed federal ban on discrimination based on sexual orientation. This part begins with a history of past legislative attempts, followed by an examination of the current form of ENDA and its prospects of success in Congress. After discussing the exact language of ENDA, Part IV considers the likely effects of ENDA on a national scale, and concludes that the overall effects of passing ENDA would be positive. Lastly, Part IV recommends some amendments and changes to ENDA that could further assure its positive effects, and cure problematic issues that have arisen in states with similar legislation.

## II. HISTORICAL TREATMENT

Congress passed Title VII in 1964, making it illegal for an employer to discriminate against an individual based on his or her sex.<sup>17</sup> The “because of sex” provision immediately caused debate within the country among employers seeking to limit the statute to biological sex-based “employment practices that sorted men and women into two perfectly sex-differentiated groups.”<sup>18</sup> During this period, members of Congress, who originally favored including the “because of sex” provision in the statute, opposed this stance, 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.”<sup>19</sup> Thus, opinions in Congress split between interpreting “sex” in the broad sense, as discussed in the previous sentence, and the narrow sense, conflating “sex” with biological sex.<sup>20</sup> Without much else in the way of congressional intent available, 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 insinuated that the judicial system would lean towards the narrow meaning of “sex,” even if it was just a slight tilt of the scales.<sup>21</sup> In

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<sup>17</sup> See 42 U.S.C. § 2000e-2 (2012).

<sup>18</sup> Franklin, *supra* note 9, at 1334.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Jeremy Byellin, *Today in 1971: The Supreme Court Decides its First Title VII Sex Discrimination Case*, LEGAL SOLUTIONS BLOG (Jan. 25, 2013),

*Phillips v. Martin Marietta Corp.*, the Fifth Circuit upheld summary judgment for an employer who disqualified women with preschool age children from employment, holding that the plaintiff “was not refused employment because she was a woman nor because she had pre-school age children. It [was] the coalescence of these two elements that denied her the position she desired.”<sup>22</sup> The Fifth Circuit operated under the interpretation of sex as “women vis-à-vis men,” and held that “[w]hen another criterion of employment [wa]s added to one of the classifications listed in the Act, there [wa]s no longer apparent discrimination based solely on race, color, religion, sex or national origin.”<sup>23</sup> The Supreme Court, in a per curiam opinion, overturned this ruling, holding that “the Civil Rights Act of 1964 requir[ed] that persons of like qualifications be given employment opportunities irrespective of their sex.”<sup>24</sup> The Court further found that the Circuit Court “erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children.”<sup>25</sup>

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.<sup>26</sup> This rigid reading appears at odds with the goals of some of the original proponents of including a ban on sex discrimination in Title VII.<sup>27</sup> Though later courts claimed that this reading was “deeply rooted in the American legal tradition,” it only stemmed from Title VII’s passage seven short years before *Phillips*.<sup>28</sup> 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.”<sup>29</sup> Proponents of including “sex” in Title VII 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.”<sup>30</sup>

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<http://blog.legalsolutions.thomsonreuters.com/legal-research/today-in-1971-the-supreme-court-decides-its-first-title-vii-sex-discrimination-case/>.

<sup>22</sup> *Phillips v. Martin Marietta Corp.* (*Phillips I*), 411 F.2d 1, 4 (5th Cir. 1969), vacated, *Phillips v. Martin Marietta Corp.* (*Phillips II*), 400 U.S. 542 (1971).

<sup>23</sup> *Phillips I*, 411 F.2d at 3-4.

<sup>24</sup> *Phillips II*, 400 U.S. at 544.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 543-44.

<sup>27</sup> Franklin, *supra* note 9, at 1326-29.

<sup>28</sup> *Id.* at 1379-80.

<sup>29</sup> *Id.* at 1380.

<sup>30</sup> *Id.* at 1357-58.

Strict construction of the statute is especially visible where the Court suggests that a bona fide occupational qualification (BFOQ) exception, which “permits discrimination in cases where such discrimination is ‘reasonably necessary to the normal operation’ of a business,” might exist on remand.<sup>31</sup> This would allow employers 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.”<sup>32</sup> Justice Marshall, in his concurrence, was 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 discrimination.”<sup>33</sup> 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.<sup>34</sup>

It appeared that the majority stance in the Court was the one that viewed the prohibition “because of sex” as a prohibition of 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 VII<sup>35</sup> supplied hope for those who favored a broader reading that included protection against sex-role stereotypes.<sup>36</sup> Homosexuals and other sexual minorities, whose workplace protection seems dependent on a reading of Title VII that goes past biological sex and prohibits sex stereotyping, fall into this group. Thus, shortly after *Phillips*, cases started arriving in federal circuit courts, arguing that discrimination based on sexual orientation was “because of sex.”<sup>37</sup>

Unfortunately for sexual minorities, the early cases followed *Phillips*’ per curium interpretation, with the circuits viewing

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<sup>31</sup> *Id.* at 1315 (citation omitted).

<sup>32</sup> *Id.* at 1356 (quoting *Phillips v. Martin Marietta Corp. (Phillips II)*, 400 U.S. 542, 544 (1971)).

<sup>33</sup> *Phillips II*, 400 U.S. at 545 (Marshall, J., concurring).

<sup>34</sup> *Id.* (quoting EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 1(a)(1)(ii) (1972)).

<sup>35</sup> See Franklin, *supra* note 9, at 1326-29 (acknowledging the general lack of legislative history for the enactment of Title VII’s prohibition on sex discrimination, but discussing the various statements from proponents of the amendment in the congressional record).

<sup>36</sup> *Id.* at 1357-58.

<sup>37</sup> See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 328-29 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), *overruled by*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).



discrimination “because of sex” as discrimination based on biological sex, and not including a ban on discrimination against sexual minorities.<sup>38</sup> 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 prohibit employers from discriminating against transsexuals.<sup>39</sup> The Circuit Court mentioned amendments to Title VII that ban discrimination based on “sexual preference,” but considered 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.<sup>40</sup> The Ninth Circuit used this perceived intent to decline extending Title VII to consider transsexuals a protected class, calling it a situation that Congress “clearly did not contemplate.”<sup>41</sup>

A year later, the Fifth Circuit reached a similar conclusion in *Smith v. Liberty Mutual Insurance Co.*, reading even more strongly into Congress’s supposed intent.<sup>42</sup> In *Smith*, an employer rejected a male applicant because the interviewer considered him “effeminate.”<sup>43</sup> 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.”<sup>44</sup> 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.<sup>45</sup> The court made this decision in spite of arguments from the plaintiff that the employer discriminated against him for being “womanly.”<sup>46</sup> On top of this, the plaintiff argued that beyond the employer’s personal opinion of the plaintiff’s manliness, the employer preferred females for the position over males.<sup>47</sup> This is a situation where the plaintiff alleged activity that should have been actionable, regardless of the statute’s interpretation, as the discrimination was based on biological sex.

Two years after *Holloway*, the Ninth Circuit Court again encountered the “because of sex” interpretation problem in *DeSantis v. Pacific Telephone & Telegraph Co.*, and read the statute in the same

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<sup>38</sup> See, e.g., *Holloway*, 566 F.2d at 662 (limiting the “because of sex” language to exclude transsexuals).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 664.

<sup>42</sup> *Smith*, 569 F.2d at 326-27.

<sup>43</sup> *Id.* at 326.

<sup>44</sup> *Id.* at 327.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

way.<sup>48</sup> In a case dealing with employment discrimination because of the plaintiffs' homosexuality, the court bluntly affirmed *Holloway*, holding that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."<sup>49</sup> The court, like those discussed above, based its reasoning on Congress's refusal to enact explicit protections, even though "[s]everal bills have been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference.'"<sup>50</sup>

As time passed, little changed when plaintiffs tried to stretch Title VII's protection to include discrimination because of sexual orientation, or "preference," as the courts described it.<sup>51</sup> Even in more modern cases, courts are unwilling to read wholesale protection against discrimination based on sexual orientation into Title VII, and plaintiffs will likely lose if they allege discrimination "because of sex" based on their sexual orientation or gender identity.<sup>52</sup>

In 1984, the Seventh Circuit gave deference to the decisions in *DeSantis*, *Holloway*, and *Smith*, as well as Congress' alleged intent, when it ruled against a transsexual female in her employment discrimination case.<sup>53</sup> In *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit discussed how Congress might amend Title VII in the future to protect transsexuals (and likely homosexuals and other sexual minorities) from employment discrimination.<sup>54</sup> However, the court was steadfast that the judicial system should not initiate the change, writing that "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."<sup>55</sup>

A relatively recent change stems from the key 1998 case of *Oncala v. Sundowner Offshore Services*, 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."<sup>56</sup> *Oncala* established three

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<sup>48</sup> See *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 329.

<sup>51</sup> See, e.g., *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001); *Ulane v. Eastern Airlines, Inc.*, 743 F.2d 1081 (7th Cir. 1984); *DeSantis*, 608 F.2d at 329-30; *Smith*, 569 F.2d at 328; *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

<sup>52</sup> See *Ulane*, 743 F.2d at 1084; *Bibby*, 260 F.3d at 259.

<sup>53</sup> *Ulane*, 743 F.2d at 1084-86.

<sup>54</sup> *Id.* at 1085-86.

<sup>55</sup> *Id.* at 1087.

<sup>56</sup> Diefenbach, *supra* note 7, at 42.

arguments that plaintiffs could use to prove same-sex sexual harassment.<sup>57</sup> These “evidentiary routes” include providing “credible evidence that the harasser was homosexual,” that the harassment was 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 by offering “direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”<sup>58</sup>

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.<sup>59</sup> Though most courts hold that these “evidentiary routes” are not exclusive, “they have for the most part adhered to these categories in making their decisions.”<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup>

The *Oncale* decision has spurned successful modern cases for sexual minority plaintiffs. 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.”<sup>63</sup> Combined, *Oncale* and *Price Waterhouse* create opportunities for plaintiffs that may not fit under the biological sex interpretation of Title VII, examples of which are discussed below.

While Congress and the courts refuse to adopt explicit protection for sexual minorities in employment, more recent cases illustrate clever arguments from lawyers and judges that have led to favorable language, and even victories, for such plaintiffs.<sup>64</sup> In a 2001 case, the Third Circuit again denied a homosexual plaintiff’s

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<sup>57</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998).

<sup>58</sup> *Id.*

<sup>59</sup> See Diefenbach, *supra* note 7, at 42.

<sup>60</sup> *Id.* at 43.

<sup>61</sup> *Oncale*, 523 U.S. at 81.

<sup>62</sup> *Id.*

<sup>63</sup> See Diefenbach, *supra* note 7, at 42.

<sup>64</sup> See, e.g., *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 259 (3rd Cir. 2001) (creating a mechanism for future homosexual plaintiffs to prevail in employment discrimination cases).

discrimination claim, this time in the context of same-sex sexual harassment.<sup>65</sup> However, while holding that “Title VII does not prohibit discrimination based on sexual orientation,” and ruling against the plaintiff, the Third Circuit outlined ways, depending on the “evidentiary routes” from *Oncale*, that, if plead correctly, a plaintiff belonging to a sexual minority could win a Title VII case:

[T]here 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.<sup>66</sup>

The court explained that there might be other ways for a homosexual plaintiff to prove discrimination because of sex, in addition to the argument discussed above in *Oncale*, but failed to describe these other routes.<sup>67</sup>

The Court ultimately found for the employer because the plaintiff’s claim alleged sexual orientation as the basis for discrimination, when Congress only prohibited sex discrimination based on biological sex.<sup>68</sup> However, this holding was one of the first indicators that the tide may be shifting for sexual minorities in the workplace, as the court outlined possible winning arguments in addition to proclaiming that “harassment on the basis of sexual orientation has no place in our society.”<sup>69</sup>

In 2001, the Ninth Circuit abrogated its ruling in *DeSantis* with *Nichols v. Azteca Restaurant Enterprises, Inc.*, holding that *DeSantis* could not stand as good law where it conflicted with *Price Waterhouse*.<sup>70</sup> Thus, in *Nichols*, discriminatory attacks on a male plaintiff’s “feminine mannerisms” were just as actionable as discrimination against the female plaintiff in *Price Waterhouse* for supposed “macho” characteristics.<sup>71</sup>

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<sup>65</sup> *Id.* at 259.

<sup>66</sup> *Id.* at 261, 264.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 265.

<sup>69</sup> *Id.* at 264-65.

<sup>70</sup> *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001).

<sup>71</sup> *Id.* at 874.

In *Nichols*, the court held that a male 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.”<sup>72</sup> Thus, it was no longer legal under Title VII to discriminate against a male because he appears effeminate, an opposite conclusion than the one the court reached twenty-two years earlier in *DeSantis*.<sup>73</sup>

In another Ninth Circuit opinion, *Rene v. MGM Grand Hotel, Inc.*, the court further departed from its historical treatment of “because of sex” discrimination when it held that the plaintiff, a homosexual male butler who worked 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.<sup>74</sup> Though the plaintiff worked in a same-sex workforce, the plurality, basing its opinion on *Oncale*, held that the nature of the harassment, which included “offensive sexual touching,” was actionable under Title VII.<sup>75</sup>

Due to the nature of the complained behavior, the court held that the “plaintiff’s sexual orientation was not relevant . . . and a reasonable jury could conclude . . . that the harassment occurred because of sex.”<sup>76</sup> 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.”<sup>77</sup> The concurrence agreed that the plaintiff should defeat summary judgment, but instead based its opinion on “[the] rule that bars discrimination on the basis of sex stereotypes,” as seen in *Price Waterhouse* and *Nichols*.<sup>78</sup> 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*, not only ruling for a transsexual plaintiff on the theory of sex stereotyping, but including language that opposed the longstanding “congressional intent” arguments against protecting sexual minorities from discrimination.<sup>79</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 875.

<sup>74</sup> *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064, 1068 (9th Cir. 2002).

<sup>75</sup> *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.”).

<sup>76</sup> McGinley, *supra* note 3, at 742.

<sup>77</sup> *Id.*

<sup>78</sup> *Rene*, 305 F.3d at 1069.

<sup>79</sup> *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

This case involved a male-to-female transsexual who originally applied, interviewed, and accepted a job as a male, yet was denied the job when the employer learned of her plans to transition to a female.<sup>80</sup> While *Schroer* recognized that sex stereotyping existed in the case, whether the employer made its decision because the plaintiff was “an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual,” the court also concluded that the plaintiff should win under the plain language of “because of sex.”<sup>81</sup> Dismissing the arguments raised in almost all earlier cases, the court was not persuaded that Congress’s denial of Title VII amendments 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.”<sup>82</sup> Finding this to be “judge-supposed legislative intent over clear statutory text,” the court found other reasonable interpretations for this legislative history.<sup>83</sup> Notably, the court found that members of Congress could feel that earlier courts “interpreted ‘sex’ in an unduly narrow manner,” and that “because of sex” should already include protection against this type of discrimination.<sup>84</sup> Seriously doubting the strength of precedent, the court found that the employer’s refusal to hire the plaintiff “after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”<sup>85</sup>

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.<sup>86</sup> The court held that, “[a]s long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence that a reasonable jury could conclude such that harassment or discrimination occurred ‘because of sex,’ the case is not appropriate for summary judgment.”<sup>87</sup> The Fifth Circuit reached a similar conclusion to preclude summary judgment in a same-sex harassment case in 2012.<sup>88</sup>

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<sup>80</sup> *Id.* at 295-300.

<sup>81</sup> *Id.* at 305-06.

<sup>82</sup> *Id.* at 307-08.

<sup>83</sup> *Id.* at 307.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 308 (emphasis added).

<sup>86</sup> *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3rd Cir. 2009).

<sup>87</sup> *Id.*

<sup>88</sup> *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 188 (5th Cir. 2012) (finding that the plaintiff presented sufficient evidence to prove that the harassment from the plaintiff’s supervisor was sexual in nature, and that the harassment was severe and

While it appears that some circuits are willing to read some breadth into Title VII's ban on sex discrimination, other circuits are opposed to this interpretation.<sup>89</sup> 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.<sup>90</sup> 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 status as a sexual minority, in order to receive Title VII protection in the absence of explicit protection.<sup>91</sup>

First posited in *Simonton v. Runyon*,<sup>92</sup> the anti-bootstrapping argument was the basis for ruling against the plaintiff in *Dawson v. Bumble & Bumble*.<sup>93</sup> The Second Circuit stood firmly on its own precedent that “Title VII does not prohibit harassment or discrimination because of sexual orientation.”<sup>94</sup> Therefore, anything 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 protected class.”<sup>95</sup> Similarly, in *Vickers v. Fairfield Medical Center*, the Sixth Circuit, relying on language from *Dawson*, used the anti-bootstrapping argument to grant summary judgment against a plaintiff who based his claim on accusations of homosexuality from his coworkers.<sup>96</sup>

Taking all of this judicial history into account, circuit courts today are expanding their reading of Title VII to supply possible avenues for sexual minorities to seek relief for employment discrimination, relying on *Oncale* and *Price Waterhouse*. Conversely, other circuits, namely the Second Circuit, see these decisions as undesirable, considering these decisions a work-around to established case law.<sup>97</sup> This circuit-split leaves plaintiffs in a state of uncertainty.

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pervasive; the evidence included repeated sexual touching, including touching plaintiff's rear end, as well as sexual text messages).

<sup>89</sup> See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005) (opposing a broader interpretation).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

<sup>93</sup> *Dawson*, 398 F.3d at 217.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 217-18.

<sup>96</sup> *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

<sup>97</sup> See *Dawson*, 398 F.3d at 218.

In the face of this uncertainty, it is 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 rulings based on *Price Waterhouse* appear to protect only effeminate men or masculine women, and leave the door open for discrimination against those in the sexual minority that fall within classic gender stereotypes (i.e. masculine men and effeminate women). Even if *Schroer* is the correct interpretation and Title VII already includes protection under the “because of sex” language, as long as circuits are splitting, plaintiffs will never have a dependable federal cause of action.

### III. STATE ANTI-DISCRIMINATION LAWS AND ISSUES

In response to the lack of protection in the federal courts, many states have enacted laws to protect sexual minorities from employment discrimination.<sup>98</sup> As of 2013, twenty-one states and the District of Columbia have enacted statutes prohibiting discrimination based on sexual orientation.<sup>99</sup> Of those states, seventeen also prohibit discrimination based on gender identity.<sup>100</sup> In addition to these states, twelve others have “an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation.”<sup>101</sup> Moreover, “at least 225 cities and counties prohibit employment discrimination on the basis of gender identity.”<sup>102</sup>

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<sup>98</sup> See McGinley, *supra* note 3, at 728.

<sup>99</sup> See SARAH WARBELOW, HUMAN RIGHTS CAMPAIGN FOUND., EQUALITY FROM STATE TO STATE 2013 12 (2013), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/equalitystatetostate\\_2013.pdf#\\_\\_utma=149406063.87606283.1424944960.1424945041.1424945061.3&\\_\\_utmb=149406063.1.10.1424945061&\\_\\_utmc=149406063&\\_\\_utmz=149406063.1424945061.3.3.utmcsr=google|utmccn=\(organic\)|utmcmd=organic|utmctr=\(not%20provided\)&\\_\\_utmv=-&\\_\\_utmj=264664335](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/equalitystatetostate_2013.pdf#__utma=149406063.87606283.1424944960.1424945041.1424945061.3&__utmb=149406063.1.10.1424945061&__utmc=149406063&__utmz=149406063.1424945061.3.3.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utmj=264664335). The author includes the following list of states that have enacted protective legislation: California (1992, 2003), Colorado (2007), Connecticut (1991, 2011), Delaware (2009, 2013), District of Columbia (1977, 2006), Hawaii (1991, 2011), Illinois (2006), Iowa (2007), Massachusetts (1989, 2012), Maine (2005), Maryland (2001), Minnesota (1993), New Hampshire (1998), New Jersey (1992, 2007), New Mexico (2003), New York (2003) Nevada (1999, 2011), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007), Washington (2006), and Wisconsin (1982). *Id.*

<sup>100</sup> *Id.* (noting that, of the 21 states listed above, Maryland, New Hampshire, New York, and Wisconsin limit their protection to sexual orientation).

<sup>101</sup> *Id.*

<sup>102</sup> *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN (JAN. 28, 2015),



Many of these state regulations, however, differ in their language, what they protect, and which types of employees they protect.<sup>103</sup> The next discussion seeks to illustrate the differences by examining a handful of state laws.

In California, it is unlawful:

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 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.<sup>104</sup>

Thus, California's non-discrimination provision covers both sexual orientation, and gender identity and expression.<sup>105</sup> Perhaps the most interesting part of 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.<sup>106</sup> The inclusion of both infers that California 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.<sup>107</sup>

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.<sup>108</sup> The California cases that have dealt with sexual minority plaintiffs suing under these provisions, known as the Fair Employment and Housing Act (FEHA), have said little about these new protections, and seem to accept sexual

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<http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.

<sup>103</sup> See, e.g., WARBELOW, *supra* note 99, at 32-38 (describing a number of drastically different anti-discrimination bills).

<sup>104</sup> CAL. GOV'T CODE § 12940 (2014) (emphasis added).

<sup>105</sup> *Id.*

<sup>106</sup> See discussion *supra* Part I.

<sup>107</sup> See 42 U.S.C. § 2000e-2 (2012).

<sup>108</sup> *Id.*

minorities as a protected class, instead moving straight to the merits of the case.<sup>109</sup>

In Oregon and Nevada, we see a similar protection implemented, again writing the protection into the already established Title VII protected classes.<sup>110</sup> However, a couple of things differ from California. Oregon makes it unlawful:

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.<sup>111</sup>

It also prohibits discrimination against an individual in compensation, or in terms, conditions or privileges of employment, if based on the same protected characteristics.<sup>112</sup> The statute only lists sexual orientation in its protected "because of" provisions, and only includes "sex" as opposed to California's "sex" and "gender," which could cause some to believe that Oregon only protects against discrimination based on biological sex and sexual orientation.<sup>113</sup> However, Oregon clarifies its meaning of "sexual orientation" in the definitions section, defining it as "an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity."<sup>114</sup>

Thus, while the text of Oregon's non-discrimination statute appears to protect sexual orientation, but not gender identity, Oregon defines "sexual orientation" to include gender identity, thereby protecting all sexual minorities.<sup>115</sup> Furthermore, this definition of "sexual orientation" appears to codify some of the sex stereotyping language of *Price Waterhouse* when it qualified the category to protect

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<sup>109</sup> See, e.g., *Hope v. California Youth Auth.*, 134 Cal. App. 4th 577, 587 (Cal. Ct. App. 2005); *Murray v. Oceanside Unified School Dist.*, 79 Cal. App. 4th 1338, 1347 (Cal. Ct. App. 2000).

<sup>110</sup> See NEV. REV. STAT. § 613.330 (2011); OR. REV. STAT. § 659A.030 (2013).

<sup>111</sup> OR. REV. STAT. § 659A.030(a).

<sup>112</sup> OR. REV. STAT. § 659A.030(b).

<sup>113</sup> *Id.*

<sup>114</sup> OR. REV. STAT. § 174.100(6).

<sup>115</sup> *Id.*

“regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.”<sup>116</sup>

Meanwhile, Nevada takes a more conservative approach to including sexual minorities as a protected class, simply adding both sexual orientation and gender identity in the text as protected classes.<sup>117</sup> The rest of the statute reads identical to Title VII, though a later section 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.<sup>118</sup>

No helpful case law exists to determine how local courts have interpreted these statutes; perhaps because both states have independent administrative agencies, the Bureau of Labor and Industries (BOLI) in Oregon,<sup>119</sup> and the Nevada Equal Rights Commission (NERC),<sup>120</sup> to address such actions. These agencies provide administrative remedies, exhaustion of which “is necessary to prevent the courts from being inundated with frivolous claims.”<sup>121</sup> In one Oregon case, though brought as a retaliation claim, the Court of Appeals, like the California courts, treated sexual orientation as a protected class, and applied the substantive retaliation law to find for the plaintiff, concluding that the “plaintiff opposed sexual orientation discrimination and was fired as a result.”<sup>122</sup>

Elsewhere, we continue to see state non-discrimination laws, with different language, yet similar intent and effect, other than the divide among states regarding gender identity protection. Maine, for example, follows the same approach as Oregon, including sexual orientation in its protected classes, and then expounding upon sexual orientation in a definition section to include gender identity.<sup>123</sup> 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.<sup>124</sup> The plaintiff successfully defeated summary judgment by proving a

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<sup>116</sup> *Id.*

<sup>117</sup> See NEV. REV. STAT. § 613.330 (2011).

<sup>118</sup> NEV. REV. STAT. § 613.350.

<sup>119</sup> See *A.L.P. Inc. v. Bureau of Labor & Indus.*, 984 P.2d 883, 884 (Or. Ct. App. 1999).

<sup>120</sup> See *Pope v. Motel 6*, 114 P.3d 277, 280 (Nev. 2005).

<sup>121</sup> *Id.*

<sup>122</sup> *Wilmoth v. Ann Sacks Tile & Stone, Inc.*, 197 P.3d 567, 577 (Or. Ct. App. 2008).

<sup>123</sup> ME. REV. STAT. tit. 5, § 4553(9-C) (2012).

<sup>124</sup> *Cookson v. Brewer Sch. Dep’t.*, 974 A.2d 276, 284 (Me. 2009).

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.”<sup>125</sup>

Another case, relating to public accommodations rather than employment, held that a school violated the Maine Human Rights Act by requiring a transgender girl use the unisex staff bathroom rather than the girl’s bathroom.<sup>126</sup> Maine’s public accommodation statute only lists sexual orientation discrimination in its prohibitions.<sup>127</sup> The Supreme Judicial Court of Maine, however, following the state’s statutory definition section, held that the school’s decision “constituted discrimination based on [plaintiff’s] sexual orientation.”<sup>128</sup> This decision illustrates another difference between Maine and other states, where 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.”<sup>129</sup>

New Jersey, on the other hand, employs the same statutory method as Nevada, simply listing sexual orientation and gender identity as protected classes in its Title VII-style statute.<sup>130</sup> In a case prior to enactment of the current statute, a New Jersey court indicated that it viewed sexual orientation discrimination and gender discrimination as separate protections, unlike the Oregon and Maine statutes.<sup>131</sup> 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 a homosexual or bisexual or perceived to be homosexual or bisexual,”<sup>132</sup> the Court held that she could succeed on a claim of sex discrimination because “sex discrimination under the [New Jersey Law Against Discrimination] includes gender discrimination so as to protect [a] plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”<sup>133</sup>

Wisconsin, “the first state legislature in the nation to prohibit discrimination on the basis of sexual orientation,” did so by passing

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<sup>125</sup> *Id.*

<sup>126</sup> *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014).

<sup>127</sup> ME. REV. STAT. tit. 5, § 4592(1).

<sup>128</sup> *Doe*, 86 A.3d at 606.

<sup>129</sup> *Id.* at 604.

<sup>130</sup> See N.J. STAT. § 10:5-12 (2014).

<sup>131</sup> See *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 372 (N.J. Super. Ct. App. Div. 2001).

<sup>132</sup> *Id.* at 371.

<sup>133</sup> *Id.* at 373.

Chapter 112, also known as the Wisconsin Act, in 1981.<sup>134</sup> Although Wisconsin's codified non-discrimination statutes use language practically identical to Title VII, including sex and the types of discriminatory actions prohibited by the statute, they do not mention sexual orientation.<sup>135</sup> Instead, Wisconsin includes an “exceptions and special cases” section in the statute to explain that prohibited discrimination “because of sex” includes discrimination based on sexual orientation.<sup>136</sup> Interestingly enough, though Wisconsin was the first state to protect against discrimination based on sexual orientation, it does not protect gender identity.<sup>137</sup>

With the inclusion of sexual orientation in its “because of sex” definition, Wisconsin has laws at odds with the majority of federal court precedent, which interpret sex to mean biological sex.<sup>138</sup> By expanding the “because of sex” definition to include sexual orientation, but explicitly excluding gender identity, Wisconsin opens up its own statute to possibilities of broader or narrower interpretation. An expansion to protection will likely be given, however, because of the policy statement preceding the statute, calling for it to be “liberally construed” to meet its 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.”<sup>139</sup> So far, it appears that Wisconsin courts, similar to the 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.<sup>140</sup> However, due to the lack of case law, it does not appear that Wisconsin courts have heard gender identity discrimination cases. Thus, the opportunities to expand the law are unfounded.

The major takeaway from these laws, especially Wisconsin's unique application, is that uncertainty still looms for plaintiffs, even in states that have non-discrimination protections. Together these different state laws create an “uneven patchwork of protection against

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<sup>134</sup> See William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 93 (2007).

<sup>135</sup> See WIS. STAT. §§ 111.321-.322 (2010).

<sup>136</sup> WIS. STAT. § 111.36(1)(d)(1).

<sup>137</sup> See WARBELOW, *supra* note 99, at 12.

<sup>138</sup> See discussion *supra* Part I.

<sup>139</sup> WIS. STAT. § 111.31.

<sup>140</sup> See *Bowen v. Labor & Indus. Review Comm'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).

discrimination.”<sup>141</sup> The lack of case law makes it difficult to see the problems first hand, but it takes little to imagine, given the federal court rulings compared to the statutes. In this handful of states alone, we see a state that considers “gender” and “sex” to be different,<sup>142</sup> states that believe sexual orientation includes gender identity,<sup>143</sup> and states that have added gender identity separately.<sup>144</sup>

While it is a welcome change to see states prohibiting discrimination against sexual minorities, minefields now exist for practitioners and plaintiffs to navigate. 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 Act[s].”<sup>145</sup> Now, states must depend on their judges to interpret statutes based on Title VII, without the benefit of federal precedent, as Title VII does not include many of the protections found in modern state statutes. In fact, states that expand the “because of sex” definition now face an interpretation outlawed by federal circuits, so they must base their conclusions on textual interpretation, in effect creating their own common law.

Then, there are the states that do not protect individuals at all, allowing people with protection in one state to be discriminated against when seeking employment in a neighboring state.<sup>146</sup> This is why members of Congress continue to introduce federal legislation banning employment discrimination against sexual minorities, and why legislation is necessary to create a dependable legal system aimed at equality in the workplace.<sup>147</sup>

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<sup>141</sup> See McGinley, *supra* note 3, at 729.

<sup>142</sup> See CAL. GOV'T CODE § 12940 (2014).

<sup>143</sup> See OR. REV. STAT. § 659A.030 (2013); ME. REV. STAT. tit. 5, § 4553(9-C) (2012).

<sup>144</sup> See N.J. STAT. § 10:5-12 (2014); NEV. REV. STAT. § 613.330 (2011).

<sup>145</sup> Byrd v. BT Foods, Inc., 948 So.2d 921, 925 (Fla. Dist. Ct. App. 2007) (discussing HIV discrimination that looked to Title VII for help construing the Florida Civil Rights Act); see also Hess v. Multnomah Cnty., 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); Snell v. Montana-Dakota Utils. Co., 643 P.2d 841 (Mont. 1982) (discussing how the Montana Human Rights Act is modeled after Title VII, thus explaining why federal case law is helpful).

<sup>146</sup> See, e.g., WARBELOW, *supra* note 99, at 12. Here, the author includes a map of the United States, illustrating protective versus non-protective states. *Id.*

<sup>147</sup> H.R. REP. NO. 110-406, at 19-23 (2007).

#### IV. ENDA: PAST, PRESENT, AND FUTURE, AND ITS EFFECT ON THE STATES

While 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 forty years.<sup>148</sup> The first attempt came from Representative Bella Abzug, a Democrat from New York known for her “activism and pioneering spirit.”<sup>149</sup> Representative Abzug introduced the Equality Act in 1974, the first bill of its kind, which would have added sexual orientation and marital status to the protected classes under Title VII.<sup>150</sup> The bill failed to make it out of committee, and died without going to a vote.<sup>151</sup> Representative Abzug returned the next year, again offering an amendment to Title VII, this time garnering four cosponsors; however, this bill met the same fate.<sup>152</sup> Congress referred it to committee, where they took no action, and the bill died.<sup>153</sup>

Since Representative Abzug’s attempts in the mid-1970s, members of Congress have made multiple attempts to amend Title VII to include protections based on sexual orientation.<sup>154</sup> From 1975 to 1993, a Democratic legislator introduced a Civil Rights Amendment Act almost every other year.<sup>155</sup> While some of these attempts garnered more cosponsors than others, and some even made it through committee, each met the same fate and died in committee or subcommittee.<sup>156</sup>

After dealing with failure for nearly twenty years, supporters of rights for sexual minorities “switched tactics by introducing the stand-alone Employment Non-Discrimination Act [(ENDA)] in 1994.”<sup>157</sup> Senator Edward Kennedy, a Democrat from Massachusetts, introduced the bill in the Senate, while Representative Gerry Studds, also a

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<sup>148</sup> See Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 8-9 (2009).

<sup>149</sup> Kathy Rodgers, *Bella Abzug: A Leader of Vision and Voice*, 98 COLUM. L. REV. 1145 (1998).

<sup>150</sup> See Weinberg, *supra* note 148, at 8.

<sup>151</sup> *Id.*

<sup>152</sup> See H.R. REP. NO. 110-406, at 2.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 2-5.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Weinberg, *supra* note 148, at 9.

Democrat from Massachusetts, introduced the bill in the House.<sup>158</sup> This legislation had more success than any of the previous attempts, making it to a hearing with the Senate Labor and Human Resources Committee before suffering the same fate as previous proposals.<sup>159</sup>

In 1995, Senator Kennedy reintroduced ENDA in the Senate.<sup>160</sup> Though this version only protected sexual orientation, it was a monumental step because it was brought to a vote.<sup>161</sup> On September 10, 1996, the Senate voted for the first time on “the idea of a Federal non-discrimination clause protecting gays and lesbians in employment,” losing by only one vote.<sup>162</sup> Ironically, on the same day that the Senate almost passed employment discrimination protection for homosexuals, it successfully passed the Defense of Marriage Act (“DOMA”), which was at the opposite end of the gay rights spectrum, as it limited “marriage under federal law to a union only between a man and a woman.”<sup>163</sup>

Though the Senate did not pass ENDA, between 1996 and 2007, members of Congress continued to introduce legislation, albeit without protection for gender identity or transgendered individuals, all of which failed to pass.<sup>164</sup> In 2007, Representative Barney Frank, a sexual minority himself,<sup>165</sup> reintroduced ENDA in the House of Representatives.<sup>166</sup> This version was more inclusive than previous drafts, including sexual orientation, both actual and perceived, as well as gender identity.<sup>167</sup> The bill 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.<sup>168</sup>

After serious opposition from religious and employer groups, and a survey of House members,<sup>169</sup> Representative Frank realized that

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<sup>158</sup> See H.R. REP. NO. 110-406, at 5-6.

<sup>159</sup> *Id.* at 6.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Weinberg, *supra* note 148, at 10.

<sup>164</sup> *Id.*

<sup>165</sup> See David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 553 n.172 (1994).

<sup>166</sup> McGinley, *supra* note 3, at 729.

<sup>167</sup> *Id.*

<sup>168</sup> Weinberg, *supra* note 148, at 10-11.

<sup>169</sup> McGinley, *supra* note 3, at 729.



the bill, as written, would fail.<sup>170</sup> As a result, he and other supporters compromised, eliminating the gender identity provisions as well as the accommodations for dressing and showering.<sup>171</sup> Though this dismayed the sexual minority community,<sup>172</sup> the compromised bill that defined “sexual orientation” as “homosexuality, heterosexuality, or bisexuality,”<sup>173</sup> passed the House by a vote of 235 to 184.<sup>174</sup> Unfortunately, though it made it onto the Senate calendar, the Senate never took action, and, once again, ENDA failed to reach the President’s desk.<sup>175</sup> Representative Frank subsequently introduced gender identity inclusive versions of ENDA to Congress in 2009 and 2011.<sup>176</sup> Senator Jeff Merkley of Oregon proposed similar versions in the Senate, only to have them go the way of past attempts.<sup>177</sup>

This brings us to the current version of the bill, the Employment Non-Discrimination Act of 2013.<sup>178</sup> On April 25, 2013, Senator Merkley and Representative Jared Polis of Colorado introduced identical bills in the Senate and the House, respectively.<sup>179</sup> The 2013 Act states its purpose plainly at the beginning—“to prohibit employment discrimination on the basis of sexual orientation or gender identity.”<sup>180</sup> This shows that the current legislation accords with the latest failed attempts at ENDA, in that it includes both sexual orientation and gender identity.

The proposed Act goes deeper into its purposes in the second section, citing policy considerations such as addressing historical patterns of discrimination against these groups, and providing an “explicit, comprehensive Federal prohibition” against this type of discrimination.<sup>181</sup> The comprehensive prohibition entails “reinforcement [of] the Nation’s commitment to fairness and equal

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<sup>170</sup> Weinberg, *supra* note 148, at 11.

<sup>171</sup> McGinley, *supra* note 3, at 730.

<sup>172</sup> Letter from United Opposition to Sexual-Orientation Only Non-Discrimination Legislation, to Madam Speaker and Representatives (Oct. 1, 2007), *available at* [http://www.thetaskforce.org/static\\_html/enda07/tools/united\\_enda\\_materials\\_1.pdf](http://www.thetaskforce.org/static_html/enda07/tools/united_enda_materials_1.pdf).

<sup>173</sup> McGinley, *supra* note 3, at 730.

<sup>174</sup> Weinberg, *supra* note 148, at 12.

<sup>175</sup> *Id.*

<sup>176</sup> *See* H.R. 1397, 112th Cong. § 4(a)(1) (2011); H.R. 3017, 111th Cong. § 4(a)(1) (2009).

<sup>177</sup> *See* S. 811, 112th Cong. § 4(a)(1) (2011); S. 1584, 111th Cong. § 4(a)(1) (2009).

<sup>178</sup> *See* S. 815, 113th Cong. (2013); H.R. 1755, 113th Cong. (2013).

<sup>179</sup> *Id.*

<sup>180</sup> H.R. 1755 § 2(2).

<sup>181</sup> *Id.*

opportunity in the workplace consistent with the fundamental right of religious freedom.”<sup>182</sup>

Much of the bill follows Title VII, even referring to it for its definitions of “employee” and “employer.”<sup>183</sup> Just as in Title VII, the 2013 ENDA covers employers who have fifteen 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.<sup>184</sup> Furthermore, it applies to government employees, but exempts private membership clubs that are exempt from taxation.<sup>185</sup> The two most important definitions in the bill, which are missing from Title VII, are gender identity and sexual orientation.<sup>186</sup> Like prior versions, ENDA defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality,”<sup>187</sup> and defines “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.”<sup>188</sup>

After the definition section comes the most important part of the bill, the types of prohibited discrimination.<sup>189</sup> Nearly identical to the text of Title VII, this Act 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.<sup>190</sup> The difference is that the protected classes here are solely sexual orientation or gender identity.<sup>191</sup> This current ENDA includes protections for actual and perceived sexual orientation as well as gender identity, aligning it with the last two failed attempts and Representative Frank’s 2007 bill.<sup>192</sup> The “actual or perceived” language is vital for these types of bills, as this discrimination is often

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<sup>182</sup> S. 815 §§ 2(1),(2),(4); H.R. 1755 §§ 2(1),(2),(4).

<sup>183</sup> S. 815 §§ 3(a)(4)-(5); H.R. 1755 §§ 3(a)(3)-(4).

<sup>184</sup> S. 815 § 3(a)(5) (2013); H.R. 1755 § 3(a)(5).

<sup>185</sup> S. 815 § 3(a)(5) (2013); H.R. 1755 § 3(a)(5).

<sup>186</sup> *See* S. 815 §§ 3(a)(7),(a)(10); H.R. 1755 §§ 3(a)(7),(a)(10).

<sup>187</sup> S. 815 § 3(a)(10); H.R. 1755 § 3(a)(10).

<sup>188</sup> S. 815 § 3(a)(7); H.R. 1755 § 3(a)(7).

<sup>189</sup> *See* S. 815 § 4; H.R. 1755 § 4.

<sup>190</sup> S. 815 §§ 4(a)(1)-(2); H.R. 1755 §§ 4(a)(1)-(2).

<sup>191</sup> *See* S. 815 §§ 4(a)(1)-(2); H.R. 1755 §§ 4(a)(1)-(2).

<sup>192</sup> *See* H.R. 1397, 112th Cong. § 4(a)(1) (2011); H.R. 3017, 111th Cong. § 4(a)(1) (2009); McGinley, *supra* note 3, at 731.

based on perception, such as someone being “effeminate,” regardless of whether one’s sexual orientation or gender identity differs from the employer.<sup>193</sup>

Strangely enough, while the bill parallels Title VII, it explicitly forbids disparate impact claims stating that “only disparate treatment claims may be brought under this Act.”<sup>194</sup> 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.”<sup>195</sup> Perhaps to appease the opponents of the 2007 ENDA, this version includes a broad exemption for religious organizations, as well as an assurance that “employment” does not include the members of the armed forces.<sup>196</sup>

Omitted from the revised 2007 ENDA,<sup>197</sup> this bill includes a provision that allows 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*.<sup>198</sup>

However, the 2013 ENDA 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,”<sup>199</sup> any such provision is noticeably absent in the current ENDA.<sup>200</sup>

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<sup>193</sup> See *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326 (5th Cir. 1978).

<sup>194</sup> S. 815 § 4(g); H.R. 1755 § 4(g).

<sup>195</sup> 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, 508 (2011).

<sup>196</sup> S. 815 § 6, 7; H.R. 1755 § 6, 7.

<sup>197</sup> McGinley, *supra* note 3, at 730.

<sup>198</sup> S. 815 § 8(a); H.R. 1755 § 8(a) (emphasis added).

<sup>199</sup> H.R. 1397 112th Cong. § 8(a)(3) (2011); H.R. 3017 111th Cong. § 8(a)(3) (2009).

<sup>200</sup> S. 815 § 8(a); H.R. 1755 § 8(a).

Similarly, the rest of the 2013 ENDA leaves out parts of the construction section from previous bills regarding employee benefits and marriage, though the marriage exclusion is likely due to the repeal of DOMA.<sup>201</sup> The only other part from past ENDAs retained in the 2013 construction section is a provision explaining that construction of new facilities is not required to comply with the Act.<sup>202</sup>

The last notable feature of the 2013 ENDA, another common feature of previous attempts, is the explanation of ENDA's relationship to other laws.<sup>203</sup> 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."<sup>204</sup> 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.<sup>205</sup>

The 2013 version of ENDA has taken a monumental step towards becoming law, and assuring sexual minorities equal rights in the workplace. As mentioned earlier, a version of ENDA previously passed a House vote, but it did not include protections for gender identity.<sup>206</sup> In fact, no bill including gender identity had ever reached a vote.<sup>207</sup> At least not until November 7, 2013, when the Senate voted to approve the gender identity inclusive 2013 ENDA, by a vote of 64 to 32.<sup>208</sup> 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."<sup>209</sup>

Given President Obama's support for ENDA, this Senate passage seems like a victory for sexual minorities; however, ENDA

<sup>201</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013) (finding that DOMA is unconstitutional).

<sup>202</sup> S. 815 § 8(b); H.R. 1755 § 8(b).

<sup>203</sup> See H.R. 3017 § 15; H.R. 1397 § 15.

<sup>204</sup> S. 815 § 15; H.R. 1755 § 15.

<sup>205</sup> McGinley, *supra* note 3, at 732.

<sup>206</sup> *Id.* at 730.

<sup>207</sup> See *supra* notes 148-80 and accompanying text (noting the nonexistence of a congressional bill that establishes protections based on gender identity).

<sup>208</sup> U.S. SENATE ROLL CALL VOTES 113TH CONGRESS – 1ST SESSION (NOV. 7, 2013, 1:51 PM), *available at* [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00232](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232).

<sup>209</sup> Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES (Nov. 7, 2013), [http://www.nytimes.com/2013/11/08/us/politics/senate-moves-to-final-vote-on-workplace-gay-bias-ban.html?hp&\\_r=0](http://www.nytimes.com/2013/11/08/us/politics/senate-moves-to-final-vote-on-workplace-gay-bias-ban.html?hp&_r=0).

faces one more serious hurdle.<sup>210</sup> Speaker of the House, John Boehner, decides which bills should face a vote in Congress, and he has repeatedly stated his opposition to ENDA.<sup>211</sup> Representative Boehner believes that ENDA would “increase frivolous litigation and cost American jobs.”<sup>212</sup> As long as Representative Boehner opposes the bill, ENDA will not come up for a vote or pass during this congressional session.

Amidst this opposition, Democrats are not sitting quietly. On March 18, 2014, “220 lawmakers signed a letter to President Barack Obama urging him to use executive authority to ban workplace discrimination against lesbian, gay, bisexual, and transgender employees of federal contractors.”<sup>213</sup> While such action would not implement full ENDA provisions, requiring federal contractors to follow its rules would set a positive example for private employers, and hopefully sway movement towards a full passage. Once again, while all of this is in flux, we will likely see ENDA die before it reaches the President’s desk. Opinions are changing, as evidenced by the bill’s smooth passage in the Senate. However, as President Obama says, one person belonging to “one party in one house of Congress” may stand in the way of “millions of Americans who want to go to work each day and simply be judged by the job they do.”<sup>214</sup>

The passage of ENDA would have an enormous effect on the country, as sexual minorities face “widespread discrimination and harassment in the workplace.”<sup>215</sup> 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.”<sup>216</sup> With the identifying gay, lesbian, and bisexual population hovering around 3.5 percent, and the total United States population around 317 million people, anywhere from 1,664,250 to

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Matthew Brown, *Employment Non-Discrimination Act Passes the Senate*, 23 No. 12 IND. EMP. L. LETTER 4 (2013).

<sup>213</sup> Amanda Terkel & Jennifer Bendery, *Democratic Support Grows for Obama to Sign ENDA Executive Order*, HUFFINGTONPOST.COM (Mar. 21, 2014, 5:59 pm), [http://www.huffingtonpost.com/2014/03/20/democrats-enda-executive-order\\_n\\_5002868.html](http://www.huffingtonpost.com/2014/03/20/democrats-enda-executive-order_n_5002868.html). This letter was signed by 168 Representatives and 52 Senators. *Id.*

<sup>214</sup> Peters, *supra* note 209.

<sup>215</sup> Lee Badgett et al., *An Executive Order to Prevent Discrimination Against LGBT Workers*, THE WILLIAMS INST., at 2 (Feb. 19, 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTExecutiveOrder-Feb-2013.pdf>.

<sup>216</sup> *Id.*

4,770,850 people have experienced discrimination in employment at some point in their lives.<sup>217</sup> With even more likely victims out there who do not identify with one of these sexual orientations, it is possible that these numbers are even higher. Furthermore, the problem is more widespread in the transgender community, with “90 percent of transgender people report[ing] some form of harassment or mistreatment on the job or report[ing] having taken some action such as hiding who they are to avoid it.”<sup>218</sup>

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 only if they live in a state with such non-discrimination protections.

As evidenced above, federal courts are unwilling to expand protections under Title VII to include protection for sexual minorities. While some courts have opened the door by allowing certain “sex stereotyping” arguments, or going against federal precedent by including “because of sex” discrimination, these courts are in the minority. Additionally, these courts face opposition from federal circuits that argue that Title VII is under attack by improper “bootstrapping” of the law. Although sexual minorities are not completely without hope, as many states have their own laws protecting sexual minorities, these protections exist in a minority of states, and are inconsistent in how and who they protect. States differ in their definitions of sex, sexual orientation, and gender identity, and some only protect sexual orientation, while remaining silent on gender identity.<sup>219</sup>

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

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<sup>217</sup> See Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>; Robert Schlesinger, *The 2014 U.S. and World Populations*, U.S. NEWS (Dec. 31, 2013), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2013/12/31/us-population-2014-317-million-and-71-billion-in-the-world>.

<sup>218</sup> Badgett, *supra* note 215, at 2.

<sup>219</sup> See *Hope v. California Youth Auth.*, 134 Cal. App. 4th 577, 587 (Cal. Ct. App. 2005); *Murray v. Oceanside Unified Sch. Dist.*, 79 Cal. App. 4th 1338, 1347 (Cal. Ct. App. 2000); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014); *Cookson v. Brewer Sch. Dep't.*, 974 A.2d 276, 284 (Me. 2009); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 372 (N.J. App. Div. 2001); *Wilmoth v. Ann Sacks Tile & Stone, Inc.*, 197 P.3d 567, 577 (Or. Ct. App. 2008); *Bowen v. Labor & Indus. Review Comm'n*, 730 N.W.2d 164, 170 (Wis. Ct. App. 2007).

gender identity. Because employers want to avoid liability, it is possible that the limited case law in states with protections for sexual minorities indicates the laws' success. Perhaps as employers learn of the prohibitions, and thus are careful not to discriminate against these protected classes, the amount of cases brought to determine whether or not someone is protected have dwindled.

It is for these reasons that federal legislation, such as the current Employment Non-Discrimination Act, is necessary. We have reached a point where victims of this discrimination deserve a 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."<sup>220</sup> With no federal legislation, and limited or no state legislation, little prevents employers from discriminating against sexual minorities. Left to federal courts to make nuanced arguments, or to individual states where each protection is different, victims will be uncertain whether they can make a prima facie case, let alone explain the merits of their situation. This frustrates the purpose of Title VII.

The opposing argument is becoming increasingly convoluted. Even if protection is possible under current law, it is time to stop arguing whether a court should hear from a homosexual or transgendered plaintiff. Instead, we should move to a body of law where individuals can get through the door of every court and have a judge listen to their story. Furthermore, federal legislation would resolve state discrepancies. It would also allow for a larger body of case law, making Title VII cases persuasive authority for cases under ENDA. Congress could even improve current legislation and state laws by including a larger definitions section to 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 could potentially protect sexual minorities, federal legislation will be a speedier and more reliable solution to employment discrimination against sexual minorities.

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<sup>220</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

