Statement of

Camille A. Olson
Seyfarth Shaw LLP

Before the United States House of Representatives
House Committee on Education and Labor

Hearing on H.R. 3017
Employment Non-Discrimination Act of 2009

September 23, 2009

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105-2930
415/397-2823 FAX 415/397-8549

CHICAGO
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603-5577
312/460-5000 FAX 312/460-7000

NEW YORK
620 Eighth Avenue
New York, New York 10018
212/218-5500 FAX 212/218-5526

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916/448-0159 FAX 916/558-4839

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210
617/946-4800 FAX 617/946-4801

WASHINGTON, D.C.
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202/463-2400 FAX 202/828-5393

LOS ANGELES
2029 Century Park East, Suite 3300
Los Angeles, California 90067
310/277-7200 FAX 310/201-5219

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713/225-2300 FAX 713/225-2340

ATLANTA
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404/885-1500 FAX 404/892-7056

LOS ANGELES (DOWNTOWN)
333 Hope Street, #3900
Los Angeles, California 90071
213/270-9600 FAX 213/270-9601

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
32-2-647-60-25 FAX 32-2-640-70-71

Statement of

Camille A. Olson
Seyfarth Shaw LLP

Before the United States House of Representatives
House Committee on Education and Labor

Hearing on H.R. 3017
Employment Non-Discrimination Act of 2009

September 23, 2009

Good morning, Chairman Miller, Ranking Member Kline, and Members of the Committee. My name is Camille A. Olson, and I am pleased to present this testimony addressing H.R. 3017, the Employment Non-Discrimination Act of 2009 ("H.R. 3017" or "ENDA"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with ten offices nationwide, and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with equal employment opportunities, as well as other labor and employment matters affecting employees in their workplaces.[1]

I. Introduction

I am the Chairperson of Seyfarth Shaw's Labor and Employment Department's Complex Discrimination Litigation Practice Group. I have practiced in the areas of employment discrimination counseling and litigation defense for over twenty years in Chicago, Illinois. I am a member of both the California and Illinois bars. Members of our firm, along with our training subsidiary, Seyfarth Shaw at Work, have written a number of treatises on employment laws; advised thousands of employers on compliance issues; and trained tens of thousands of managers and employees with respect to compliance with their employer's policies relating to equal employment

[1] I would like to acknowledge Seyfarth Shaw attorneys Annette Tyman and Sam Schwartz-Fenwick for their invaluable assistance in the preparation of this testimony.

opportunities and non-harassment in the workplace, as well as the requirements of state and federal employment laws. We have also actively conducted workplace audits and developed best practices for implementation of new policies addressing employer obligations on a company-wide, state-wide, and/or nationwide basis (depending on the particular employment practice at issue).

My personal legal practice specializes in equal employment opportunity compliance – counseling employers as to their legal obligations under federal and state law, developing best practices in the workplace, training managers and supervisors on the legal obligations they have in the workplace, and litigating employment discrimination cases. I also teach equal employment opportunity law at Loyola University School of Law in Chicago, Illinois. I am a frequent lecturer and have published numerous articles and chapters on various employment and discrimination issues. For example, in 2009 I co-edited a book now in its Sixth Edition entitled *Guide to Employment Law Compliance* for Thompson Publishing Group; and, in late 2008 and 2009, I, along with other Seyfarth Shaw partners, have conducted numerous webinars, teleconferences, and full-day seminars across the country for employers and the Society for Human Resource Management on an employer's new obligations under the recently passed amendments to the Americans with Disabilities Act, 42 U.S.C. §§ 12101 – 12213 (1994) ("ADA").[2] I am also a member of the United States Chamber of Commerce's Policy Subcommittee on Equal Employment Opportunity, and I am a member of the Board of Directors of a number of business and charitable institutions.

II. Summary of Testimony

Today, I have been invited to discuss with you the impact of the Employment Non-Discrimination Act of 2009 in the employment context, separate and apart from my relationship with the above-noted institutions, clients, and associations. I strongly support equal opportunities in employment, and, in particular, ensuring that employment decisions are based upon an individual's qualifications for a job (including education, experience, and other relevant competencies), as well as other legitimate non-discriminatory factors. Similarly, I believe that fair and consistent application of workplace practices and policies is instrumental to an employer's success as an employer of choice in the community.[3]

---

[2] The amendments to the ADA are contained in the Americans with Disabilities Act Amendments Act, 42 U.S.C. § 12101, et seq. and 29 U.S.C. § 705 (2008) that became effective January 1, 2009.

[3] Seyfarth Shaw is a nationwide employer of over 1650 persons providing services through employees primarily engaged to work in seven states from coast to coast. Seyfarth Shaw's non-discrimination policy, applicable to all employees, states as follows: "Seyfarth Shaw is committed to the principles of equal employment opportunity. Firm practices and employment decisions, including those regarding recruitment, hiring, assignment, promotion and compensation, shall not be based on any person's sex, race, color, religion, ancestry or national origin, age, disability, marital status, sexual orientation, gender identity or expression, veteran status, citizenship status, or other protected group status as defined by law. Sexual harassment or harassment based on other protected group status as defined by law is also prohibited."

My purpose in providing this testimony is not to comment positively or negatively on whether this Committee or Congress should enact H.R. 3017 into law as sound public policy. Rather, my testimony is provided as a summary distillation of my legal analysis of certain provisions of H.R. 3017[4], especially in the context of other federal non-discrimination in employment legislation, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. It is also provided to highlight certain practical uncertainties sure to be faced by employers attempting to comply with its provisions, and by employees attempting to understand their rights and obligations under ENDA compounded by certain ambiguities in the current language. As such, this testimony is provided in the hopes that this information will result in clarification of certain H.R. 3017 provisions, as well as clarifications for the benefit of employees and employers alike. If H.R. 3017 passes; such clarifications would minimize confusion and litigation over the meaning of certain provisions, and enable employers to conform with congressional intent as expressed through H.R. 3017's plain language. This would also better track the protections afforded to other protected groups under Title VII, as amended, and related federal employment discrimination statutes.

As drafted, H.R. 3017 clearly provides the following:

- H.R. 3017 prohibits employers from discriminating against an individual based on that person's actual or perceived sexual orientation or gender identity with respect to employment decisions and other terms, conditions, and privileges of employment.[5]

- H.R. 3017 prohibits employers from discriminating against employees or applicants by limiting, segregating, or classifying them on the basis of their actual or perceived sexual orientation or gender identity in a way that adversely affects them.[6]

- H.R. 3017 prohibits employers from discriminating against an individual based on the perceived or actual sexual orientation or gender identity of a person with whom that person associates.[7]

- H.R. 3017 prohibits employers from retaliating against an individual based on the individual's opposition to an unlawful employment practice, or for participating in a charge, investigation, or hearing.[8]

---

[4] My testimony addresses issues under H.R. 3017 generally, as they apply to private sector employers. It does not specifically address H.R. 3017's provisions relating to religious organizations (Section 6), to the armed forces (Section 7), or to local, state, or federal governments (Section 3(a)(4)((b-d)).

[5] H.R. 3017, Section 4 (a)(1).

[6] H.R. 3017, Section 4(a)(2).

[7] H.R. 3017, Section 4(e).

- H.R. 3017 does not prohibit an employer from enforcing rules and policies that do not intentionally circumvent its purposes.[9]

- H.R. 3017 does not require an employer to treat an unmarried couple in the same manner as a married couple for employee benefits purposes.[10] The term "married" as used in H.R. 3017 is defined in the Defense of Marriage Act, 1 U.S.C. § 7 et seq.

- H.R. 3017 requires that an employee notify the employer if the employee is undergoing gender transition and requests the use of shower or dressing areas that do not conflict with the gender to which the employee is transitioning or has transitioned. An employer may satisfy the employee's request in one of two ways, through either providing access to the general shower or dressing areas of the gender the employee is transitioning to or has transitioned to; or by providing reasonable access to adequate facilities that are not inconsistent with that gender.[11]

- H.R. 3017 does not require employers to build new or additional facilities.[12]

- H.R. 3017 does not require or permit employers to grant preferential treatment to an individual because of the individual's actual or perceived sexual orientation or gender identity.[13]

- H.R. 3017 does not require or permit an employer to adopt or implement a quota on the basis of actual or perceived sexual orientation or gender identity.[14]

- H.R. 3017 allows employers to continue to require an employee to adhere to reasonable dress and grooming standards compliant with other applicable laws consistent with the employee's sex at birth, so long as an employee who has notified their employer that they have undergone or are

[8] H.R. 3017, Section 5.

[9] H.R. 3017, Section 8(a)(1).

[10] H.R. 3017 Section 8(b).

[11] H.R. 3017, Section 8(a)(3).

[12] H.R. 3017, Section 8(a)(4).

[13] H.R. 3017, Section 4(f)(1).

[14] H.R. 3017, Section 4(f)(2).

undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.[15]

- H.R. 3017 requires employers to post notices that describe its provisions.[16]

- H.R. 3017 would be effective six months following the date of its enactment, and it does not apply to conduct occurring prior to its effective date.[17]

However, as drafted, H.R. 3017 creates the following ambiguity and uncertainty:

- Whether Title VII and ENDA will provide duplicate causes of action for sex stereotyping;

- Whether disparate impact claims are available under ENDA;

- Whether ENDA was intended to provide more robust remedies for attorney's fees than those available under Title VII;

- Determining what triggers an employer's affirmative obligations with regard to shared facilities and application of its dressing and grooming standards;

- Whether "certain shared facilities" include restrooms; and

- Whether employers are required to modify existing facilities.

III. The Employee Non-Discrimination Act of 2009

A. Existing Protections Against Sex Discrimination in Employment

Existing federal employment laws prohibit discrimination on the basis of an individual's sex. Under federal law it is unlawful to:

[15] H.R. 3017, Section 8(a)(5).

[16] H.R. 3017, Section 13.

[17] H.R. 3017, Section 17.

- Discriminate against a person because she is a female;[18]
- Discriminate against a person because he is a male;
- Discriminate against a person because she is pregnant;[19]
- Discriminate against a person by sexually harassing a member of the opposite sex based on his or her sex;[20]
- Discriminate against a person by sexually harassing a member of the same sex based on his or her sex;[21] and
- Discriminate against a person due to gender stereotyping because of his or her sex.[22]

No federal law, however, prohibits employers from discriminating against employees based on their sexual orientation or gender identity.[23] Courts have recognized the difficulty that they often face in determining under Title VII whether certain conduct is "because of the individual's sex" as opposed to their sexual orientation or gender identity. For example, the Seventh Circuit Court of Appeals has described the various factual settings raised by these cases as obligating them to "navigate the tricky legal waters of male-on-male sex harassment."[24] As a result, some

[18] *See* Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); *see also* The Equal Pay Act of 1963, 29 U.S.C. § 206(d) et seq.

[19] *See* Pregnancy Discrimination Act of 1978, amending Title VII § 2000e(k).

[20] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

[21] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (male employee alleging he was sexually harassed by his male supervisor and two male co-workers, none of whom were alleged to be gay, alleges same-sex sexual harassment which is a violation of Title VII).

[22] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (female employee alleging she was denied a promotion as a result of being described as being "macho," "overcompensating for being a woman," and being given advice to "take a course at charm school," and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for promotion stated a cause of action under Title VII for sex discrimination because she did not conform to the stereotypes associated with being a woman).

[23] See, e.g., *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.,* 224 F.3d 704 (7th Cir. 2000) (the protections of Title VII do not permit claims based on an individual's sexual orientation); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate Title VII when it terminated a transgendered employee finding that discrimination against a transsexual is not "discrimination because of sex").

[24] See, e.g., *Hamm v. Weyauwega Milk Prods., Inc.* 332 F.3d 1058, 1061 (7th Cir. 2003) (sexual orientation not covered by Title VII).

courts have reached inconsistent results as to whether similar factual situations are covered by Title VII's prohibition against sex discrimination where there is evidence that the discrimination was "because of . . . sex." For instance, some courts have found that males who behave femininely or who dress in women's clothing are not protected by Title VII, while others conclude that they are protected by Title VII.[25]

A number of jurisdictions have enacted legislation prohibiting discrimination based on sexual orientation and/or gender identity. To date, twelve states and the District of Columbia prohibit discrimination based on gender identity and sexual orientation.[26] Twenty states and the District of Columbia prohibit discrimination based on sexual orientation.[27] The legal obligations imposed by such state laws differ from state to state.

B. Summary of Federal Legislative Efforts to Enact ENDA

Legislation to prohibit employment discrimination on the basis of sexual orientation was first introduced in 1994 before the 103rd Congress.[28] Since then, legislation has been introduced in almost every session of Congress to address this topic. In 2007, protections on the basis of gender identity were included for the first time.[29] Although hearings were held, the legislation proposed in 2007 did not garner enough support for passage by the House. Later that year, legislation that included only a prohibition against discrimination on the basis of sexual orientation was introduced and passed by the United States House of Representatives.[30]

---

[25] Compare *Etsitty*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate Title VII when it terminated a transgendered employee finding that discrimination against a transsexual is not "discrimination because of sex") and *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (concluding a transgender plaintiff could bring a claim of sex discrimination claim under Title VII) and *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.C. Cir. 2008) (employer violated Title VII when it rescinded an employment offer upon learning the employee was transgendered); s*ee also Hamm*, 332 F.3d at 1066 (Judge Posner's concurring opinion describing case law in this area as having "gone off the tracks" under Title VII) and *Nichols v. Azteca Rest. Enters., Inc. and The Legacy of Price Waterhouse v. Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 Ala. L. Rev. 193, Fall 2002, and *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, Apr. 2007.

[26] These jurisdictions include California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia.

[27] These jurisdictions include those set forth directly above, as well as Connecticut, Hawaii Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

[28] Human Rights Campaign, Timeline: The Employment Non-Discrimination Act, http://www.hrc.org/issues/workplace/5636.htm (last visited Sept. 20, 2009).

[29] H.R. 2015.

[30] H.R. 3685.

Many of H.R. 3017's provisions track the language of Title VII, the principal equal employment opportunity statute that employers have used as their guidepost in developing appropriate policies and practices regarding non-discrimination in employment. For example, H.R. 3017 references existing provisions of Title VII to define certain terms, such as employee, employer, and employment agencies; and to reference specific enforcement powers, procedures, and remedies.[31]

The language contained in H.R. 3017 demonstrates the significant examination and debate that has taken place over the years concerning the extension of protections in employment to individuals on the basis of sexual orientation and/or gender identity. Indeed, certain changes from the current version as compared to earlier bills reflect an understanding of the need to provide clarity in the workplace to ensure compliance with the legislation, by carefully describing the obligations of employers and employees. Some examples of those earlier clarifications that are currently part of H.R. 3017 are set forth below:

- ENDA – 2007, Section 8(b) specifically allowed states to pass a law or establish a requirement impacting employee benefit provisions notwithstanding the federal scheme preempting such state laws. H.R. 3017 eliminates this language and affirmatively clarifies that: "Nothing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits."[32] Accordingly, ENDA of 2009 preserves the Employee Retirement Income Security Act ("ERISA") preemption of the field of regulation of employee benefit plans – an issue that was a source of significant concern in 2007.[33]

- ENDA – 2007, Section 5 prohibited retaliation against an individual for opposing any practice made unlawful by the Act, or against an individual who made a charge or who provided testimony under the Act.[34] Given that the concept of retaliation is a well understood principle in employment law, legal practitioners suggested that language track the language already available under existing laws, to minimize confusion and litigation.

[31] See, e.g., H.R. 3017, Section 3 (Definitions – partial); Section 4 (Employment Discrimination Prohibited – partial); Section 5 (Retaliation Prohibited); Section 10 (Enforcement – partial); and Section 13 (Posting Notices).

[32] H.R. 3017, Section 8(b).

[33] Compare H.R. 2015, Section 8(b) with H.R. 3017, Section 8(b).

[34] H.R. 2015.

ENDA – 2009 includes revised retaliation language that parallels the well established language prohibiting retaliation contained in Title VII.[35]

- ENDA – 2007, Section 8(a)(1) provided:

  IN GENERAL – Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not 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.[36]

  Practitioners urged drafters to insert the word "intentionally" before the phrase, "circumvent the purposes of this Act" to ensure that Section 8(a)(1) would not be used to unintentionally incorporate concepts of disparate impact claims into ENDA. H.R. 3017 has been revised to include the word "intentionally."

- ENDA – 2007, Section 17 provided that ENDA would take effect sixty days after the date of enactment. H.R. 3017 provides for its effective date to be six months after the date of enactment. This six-month lead time will be particularly helpful to employers to allow sufficient time to make necessary revisions to their policies, practices, and procedures. This will also provide adequate time for employers to train managers, human resource professionals, and employees to ensure compliance with a new federal law.

C. H.R. 3017 Requires Clarification

As described in Section III.B. above, H.R. 3017 has clarified certain provisions to provide certainty regarding many of the new obligations ENDA would impose upon employers. Notwithstanding these clarifications, certain ambiguities remain that warrant further discussion and analysis. These ambiguities are described below in two sections. Section 1 addresses general ENDA points requiring clarification. Section 2 addresses specific points with regard to the application of specific provisions of ENDA regarding an employer's facilities and policies to an employee's gender identity protections, and specifically to individuals who have undergone or are undergoing gender transition.

[35] Compare H.R. 2015, Section (b) with H.R. 3017, Section 5.

[36] Compare H.R. 2015, Section 5 with H.R. 3017, Section 5.

1. General Points Requiring Clarification

a. Whether Title VII and ENDA Will Provide Duplicate Causes of Action for Sex Stereotyping

ENDA is the only federal legislation, that, if enacted, would expressly prohibit discrimination or retaliation on the basis of sexual orientation[37] and gender identity.[38] While courts have made clear that no federal cause of action exists for discrimination on the basis of an individual's sexual orientation or gender identity, as noted on pages 6-7, *supra*, some federal courts have inconsistently extended Title VII protections to factual situations brought on the basis of sex-stereotyping that more accurately involve claims of sexual orientation and/or an individual's gender identity.

If enacted in its current form, these same factual scenarios would clearly be actionable under ENDA given its broad definition of gender identity. What is sex-stereotyping if it is not discrimination based upon an individual's "appearance, or mannerisms or other gender-related characteristics . . . with or without regard to the individual's designated sex at birth"?[39] These concepts are overlapping, thus, certain factual situations that some courts have found actionable under Title VII would most assuredly be actionable under ENDA.

Moreover, with regard to the relationship between ENDA and other laws, Section 15 of ENDA specifically provides as follows:

> This 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.

Given this language, it is clear that ENDA, as currently drafted, serves only to add protections on the basis of sexual orientation and gender identity and that it does not replace any claims that would otherwise be actionable under Title VII.

Yet, such a reading of the two statutes would lead to the unintended consequence of a potential dual recovery by a successful plaintiff filing claims under both Title VII and H.R. 3017 for the same alleged wrongful conduct. As such, it is critical that ENDA include language which makes clear that it is the exclusive federal remedy for any alleged conduct on the basis of sexual orientation or gender identity as

[37] Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality." H.R. 30l7, Section 3(9).

[38] Gender identity is defined 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." H.R. 3017, Section 3(6).

[39] H.R. 3017, Section 3(6); *see also Price Waterhouse*, 490 U.S. 228.

those terms have been defined. Accordingly, I urge this Committee to carefully consider the interplay between ENDA and Title VII to ensure that there is not an unintended duplication of remedies and that congressional intent be made abundantly clear in this regard.

b. Disparate Impact Claims Are Not Available Under H.R. 3017

Disparate treatment claims are actionable under H.R. 3017.[40] H.R. 3017 prohibits intentional discrimination only.[41]

In contrast, disparate impact claims are not available under H.R. 3017.[42] In other words, H.R. 3017 does not provide individuals with a remedy for alleged discrimination that is based on a rule or policy that does not intentionally circumvent ENDA, so long as the rules and policies are applied equally to all individuals regardless of their sexual orientation or gender identity.

The most familiar statutory definition of a disparate impact claim is in Title VII.[43] Thus, to ensure that disparate impact claims are appropriately defined, *and properly excluded from ENDA*, a reference to Title VII's statutory definition of a disparate impact claim should be included in ENDA. The current language leaves some ambiguity. For example, Section 4(g) of ENDA provides as follows:

> Disparate Impact — Only disparate treatment claims may be brought under this Act.

Thus, while Section 4(g) is entitled "Disparate Impact," the text of the provision does not explicitly prohibit disparate impact claims. Rather, the provision instead affirmatively states that only disparate treatment claims may be brought under ENDA. Accordingly, this Committee should also consider adding a provision that explicitly excludes disparate impact claims for sexual orientation and gender identity claims to ensure that congressional intent is clear as to the claims that are exempted from H.R. 3017.

c. The Remedies Available Under H.R. 3017 Should Parallel Those Available Under Title VII

H.R. 3017, Section 10(b)(1) specifically provides that the procedures and remedies applicable are those set forth in Title VII (42 U.S.C. § 2000e et seq.). Despite this provision, Section 12 of ENDA expands the remedies with respect to attorney's fees

[40] H.R. 3017, Section 4(g).

[41] H.R. 3017, Section 8(a)(1).

[42] *Id.*

[43] 42 U.S.C. § 2000e-2(k).

for claims arising under ENDA beyond those currently available under Title VII. Specifically, Section 12 provides as follows with regard to attorney's fees:

> Notwithstanding any other provision of this Act, in an action or ***administrative proceeding*** for a violation of this Act, ***an entity described in section 10(a) (other than paragraph (4) of such section)***, in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. The Commission and the United States shall be liable for the costs to the same extent as a private person.[44]

In contrast, Title VII provides as follows with regard to attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[45]

Specifically, H.R. 3017, Section 12, expands the remedies that would otherwise be available under Title VII by permitting a prevailing party in an "administrative proceeding" to recover a "reasonable attorney's fee (including expert fees) as part of the costs." Although it is unclear who is a "prevailing party" under ENDA, employees who receive a finding of substantial evidence from the Equal Employment Opportunity Commission ("EEOC") or another administrative agency as described in Section 10(a) may arguably be entitled to attorney's fees. This is a significant expansion of the remedies available under Title VII.

This inconsistency between ENDA and Title VII would mean that a plaintiff who alleges discrimination on the basis of sexual orientation or gender identity would be entitled to greater remedies than a plaintiff who alleges discrimination on the basis of race, color, religion, sex, or national origin. Moreover, other employment discrimination statutes, such as the ADA, adopts Title VII's remedies. ENDA, in contrast, as discussed, would add new remedies.

Moreover, the very nature of the investigative proceeding at the administrative agency phase demonstrates why an award of attorney's fees would not be appropriate. First, EEOC decisions are not considered "final orders" subject to appeal, thus an

---

[44] H.R. 3017, Section 12. Attorney's Fees (emphasis added).

[45] Title VII § 2000e-5(k). Attorney's Fees; Liability of Commission and United States for Costs (emphasis added).

employer would be deprived of its due process rights to contest any such award. In fact, the EEOC is not required to provide documented reasons for its decisions. Accordingly, an employer may not be provided a written basis for the EEOC's decision. Moreover, information submitted at the EEOC phase is produced to assist the EEOC in its investigation, and is not subject to the Federal Rules of Evidence.

The second significant departure contained in ENDA as compared to Title VII relates to who is granted the authority and discretion to grant such awards. As noted above, under ENDA, courts and administrative agencies, such as the EEOC, are granted the authority to award attorney's fees. In contrast, Title VII appropriately limits the authority to grant such remedies to the courts. Courts, and not administrative agencies, are best positioned to decide who is a "prevailing party" under the law. Such decisions should be made only after careful consideration and review of the admissible evidence as presented by both the plaintiff and the employer.

For these reasons, this Committee should undertake a careful examination of Section 12 of ENDA to ensure that the remedies available to a plaintiff under ENDA are consistent with provisions under Title VII, consistent with H.R. 3017's expressed congressional intent.

2. Specific Provisions Requiring Clarification Regarding Gender Identity

Among other protections, H.R. 3017 makes it a violation of federal law for an employer to "discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity."[46] With respect to transgendered individuals, H.R. 3017 further provides as follows:

> [Section 8(a)(3)] CERTAIN SHARED FACILITIES – Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of 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.[47]

[46] H.R. 3017, Section 4(a)(1).

[47] H.R. 3017, Section 8(a)(3) (emphasis added).

> [Section 8(a)(5)] DRESS AND GROOMING STANDARDS – Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards 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.[48]

Thus, in addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers. Specifically, employers are required to adjust their policies, practices, or procedures with regard to "certain shared facilities" and "dress and grooming standards" for a subset of individuals who have either "undergone" or who are "undergoing" transition to a gender other than their gender at birth."[49] These affirmative obligations present unique issues in the workplace that merit further consideration and reflection.

a. What Triggers an Employer's Affirmative Obligation?

The first issue that requires additional consideration relates to the use of the phrases, "upon notification" and "notified the employer." As an initial matter, it is unclear whether these similar, though different, phrases mean the same thing. For the sake of clarity, one phrase should be selected and used consistently throughout to avoid confusion.

Second, the terms "notification" and "notified" are vague terms that should be modified to clarify what the employee is required to do before an employer's obligations are triggered. For instance, does the employee have to notify the employer in writing or does a verbal conversation satisfy the employee's obligation to notify? Is the employee's own statement sufficient or is it permissible for an employer to request confirmation from a third-party professional before it is required to amend its policies, procedures, or practices for the requesting individual? Are the employer's obligations to modify its existing policies triggered immediately upon notification? And if not, how soon is the employer required to act? Should the employee be required to provide sufficient lead time to allow the employer the opportunity to make adjustments as appropriate? And if so, how much time is necessary? These questions are not currently addressed in H.R. 3017.

---

[48] H.R. 3017, Section 8(a)(5) (emphasis added).

[49] *Id.* at Section 8(a)(3) and 8(a)(5).

b. Who Is Covered by Sections 8(a)(3) and 8(a)(5)?

Sections 8(a)(3) and 8(a)(5) are applicable to only a subset of employees that are otherwise covered under ENDA. Specifically, these sections are applicable to those individuals that have "undergone" or who are "undergoing gender transition." Absent from ENDA, however, is a definition of the phrases "undergone," "undergoing," or "gender transition." These undefined phrases are particularly problematic given that "gender transition" is a broad term used to describe a combination of social, medical, and legal steps that an individual may choose to undergo in their decision to align their bodies with their core gender identity.[50]

For instance, social steps in the process might include asking to be referred to by a different name or different pronouns (i.e., "she" instead of "he" or vice versa).[51] Such steps may also involve an employee using clothing or accessories traditionally worn by individuals of the sex the employee wishes to be perceived as, or taking on mannerisms associated with a particular gender.[52]

Certain employees may also choose to take medical steps to further modify their appearance. Such medical interventions may include hormonal therapies and/or surgery to further modify their physical appearance or attributes.[53] Finally, transitioning individuals may utilize courts or other agencies to achieve legal recognition of their new name and/or gender.[54] Thus, the term "gender transition" implicates a wide range of steps that employees may be said to have "undergone" or be "undergoing."

As previously stated, one of the social steps in the gender transition process may include the use of clothing, make-up, or accessories commonly associated with an individual's true identity rather than with his or her gender at birth. As currently written, "undergoing" may be so broadly interpreted as to cover any employee who presents in a gender non-conforming manner on a single day.

Such distinctions on issues that most employers may not fully comprehend may be cause for significant concern and confusion in the employer community. Thus, defining more specifically those individuals who can make requests under Sections 8(a)(3) and 8(a)(5) should be clearly defined in ENDA.

---

[50] Transgender Visibility Guide: A Note on Transitioning, available at http://www.hrc.org/issues/transgender/13105.htm. (last viewed Sept. 21, 2009); *see also* The Transsexual Person in Your Life, Responses To Some Frequently Asked Questions/Frequently Held Concerns, available at http://www.tsfaq.info/. (last viewed Sept. 21, 2009).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

c. Do "Certain Shared Facilities" Include Restrooms?

Section 8(a)(3) implicates a common, yet controversial, issue related to transitioning employees. Specifically, which "certain shared facilities" should transitioning employees use, and when is it appropriate for these employees to begin using shared facilities designated for members of the "opposite sex." Though entitled "Certain Shared Facilities," Section 8(a)(3) provides only limited guidance on this issue. As written, it applies only to "shared shower or dressing facilities in which being seen unclothed is unavoidable."[55] In such shared facilities, an employer who has been notified that an employee has or is undergoing gender transition has the following two options: (1) to allow the transitioning employee access to the shared facilities designated for the gender to which the individual is transitioning; or (2) to provide the transitioning employee with "reasonable access to adequate facilities" that are not inconsistent with the gender to which they are transitioning.

Glaringly absent from ENDA, however, is guidance for employers with respect to bathrooms or restrooms. Indeed, far more prevalent in the workplace than "shared shower or dressing facilities in which being seen unclothed is unavoidable" are restrooms. The same privacy issues that give rise to the use of "shared showers or dressing facilities" are applicable to some bathrooms where being seen unclothed is also unavoidable. Employers should be provided the same flexibility that H.R. 3016 provides employers with respect to shared shower or dressing facilities by expressly permitting employers to decide which restrooms transitioning employees will have access to so long as they are permitted "reasonable access to adequate" restrooms.

Moreover, because the definition of "gender identity" in H.R. 3017 is broader than the subgroup of individuals who have or who are undergoing gender transition, it should also be clarified to expressly state whether an employer has any obligation to allow anyone other than transgendered employees access to shared facilities that are designated for use by only members of one particular sex. Given that restroom accommodations may be perhaps one of the most controversial issues employers will be required to face if ENDA is enacted in its current form, congressional guidance on this point may be helpful to employers who will be required to implement policies, practices, and procedures consistent with ENDA.

[55] H.R. 3017, Section 8(a)(3).

d. Are Employers Required to Modify Existing Facilities Under ENDA?

Section 8(a)(4) of ENDA provides as follows:

> ADDITIONAL FACILITIES NOT REQUIRED – Nothing in this Act shall be construed to require the construction of new or additional facilities.[56]

Given the language in the text, it is clear that ENDA does not require an employer to construct new or additional facilities. Left unanswered, however, is whether employers are nonetheless required to *modify* existing facilities. Clarification concerning this issue is critical so as to have certainty with respect to the scope of an employer's obligations under ENDA.[57]

IV. Conclusion

In conclusion, I believe that the issues raised herein should be considered and addressed as the Committee considers the Employment Non-Discrimination Act of 2009. Chairman Miller, Ranking Member Kline, and Members of the Committee, I thank you for the opportunity to share my thoughts with you today. Please do not hesitate to contact me if I can be of further assistance in suggesting ways in which to improve ENDA's language to ensure that it meets congressional objectives.

[56] H.R. 3917, Section 8(a)(4).

[57] If ENDA were clarified to require an employer to undertake such affirmative obligations with respect to modification of existing facilities, it is critical to also provide guidance on when those obligations are triggered and when they must be completed.