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The Unprecedented & Extraordinary Breadth of S. 1284

The ENDA-Scope

The Employment Non-Discrimination Act (ENDA), S. 1284, has been ordered reported from the Committee on Health, Education, Labor, and Pensions. ENDA's stated purpose is "to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation" [§2(2)]. That is a modest description of a bill that portends vast and extraordinary consequences.

A substantially similar (but not identical) bill of the same name was defeated by one vote in the Senate on September 10, 1996. The vote was 49 to 50 — with 85 percent of Republicans voting *against* it and 89 percent of Democrats voting *for* it. That 1996 vote on ENDA was a trade-off for a clean vote on the Defense of Marriage Act (DOMA), Pub. L. 104-199.

ENDA forbids discrimination in employment on the basis of "sexual orientation" [§4(a)], which the bill defines as "homosexuality, bisexuality, or heterosexuality" whether "real or perceived" [§3(9)]. ENDA also applies to one's "associates" [§4(e)]. Therefore, ENDA covers —

- an individual's *real* (actual) homosexual orientation, bisexual orientation, or heterosexual orientation;
- an individual's *perceived* homosexual orientation, bisexual orientation, or heterosexual orientation (whether the perception accords with reality or not);
- the real or perceived homosexual orientation, bisexual orientation, or heterosexual orientation of **any other individual with whom the first individual now associates**; and
- the real or perceived homosexual orientation, bisexual orientation, or heterosexual orientation of **any other individual with whom the first individual formerly associated**.

ENDA's scope is extraordinary and unprecedented. Not content to cover something as difficult to define as "sexual orientation," the bill also covers both reality and perception, and one's associates both past and present. ENDA extends to applying, hiring, promoting, assigning, firing, compensating, training, and every other term, condition, or privilege of employment. The bill covers unions and employment agencies and public employers and every private employer that has 15 or more employees [§§3(2)-(6) & §4]. Therefore, **in addition to millions of government employees in thousands of government offices, ENDA also will apply to some 94 million private-sector employees who work for 866,000 companies in about 2.2 million places of business.**

ENDA raises some absolutely fundamental questions, *e.g.*, **is ENDA's command of nondiscrimination compatible with marriage?** It will be alleged that a workplace rule that favors marriage (*e.g.*, a rule that allows only spouses to accompany employees on a three-day company retreat) discriminates on the basis of sexual orientation. Does it matter that some heterosexuals are not married (so that their disability under the rule must be based on something more than their heterosexuality), and that some homosexuals are married (so that they have no disability under the rule irrespective of their homosexuality)?

Homosexuals may marry, but, throughout the United States, they – like heterosexuals – must marry someone of the opposite sex. Is that discrimination on the basis of “sexual orientation”? Is ENDA compatible with the Defense of Marriage Act which merely codifies the age-old understanding of marriage? DOMA says, “[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. §7. Remember, too, that the bill protects “bisexuality,” an “orientation” that necessarily implies more than one partner of more than one sex.

Under ENDA, **what is the relationship between “sexual orientation” and sexual behavior?** The act speaks to “sexual *orientation*,” but it is sexual *behavior* that is at the heart of ENDA. For example, must every employer who has religious or moral scruples about homosexuality treat the celibate or continent homosexual exactly the same as the promiscuous homosexual? Would a willingness to hire the former but not the latter be discrimination on the basis of sexual orientation in violation of ENDA? They both have the same *orientation*; it is *behavior* that the employer finds relevant.

One study “found that 43 percent of male homosexuals estimated having sex with 500 or more different partners and 28 percent with 1,000 or more different partners. Seventy-nine percent said that more than half of these partners were strangers, and 70 percent said that more than half were men with whom they had sex only once.” J. Satinover, *Homosexuality and the Politics of Truth* 55 (1996), citing Bell & Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 308 (1978). **Is this kind of dangerously promiscuous behavior included within ENDA's definition of “homosexuality”?**

Does “sexual orientation” include social or political factors? Can an employer give time off to attend a “Promise Keepers” rally but not the “Gay Pride March”? Is marching for “gay pride” part of one's “sexual orientation”? **Does “sexual orientation” encompass a person's lifestyle, speech, mannerisms, or dress?** If a woman shows up at work wearing a tee-shirt that says, “Lesbian Avengers — We Recruit” (which is a slogan we did *not* make up), can her employer send her home to change, or is her tee-shirt protected as part of her “sexual orientation”? What if the second clause of the slogan accurately describes what the woman attempts at her workplace, *i.e.*, to acquire lesbian acolytes? Is that activity protected under the bill? Even if the objects of her attention are young children or adolescents?