

# No More Excuses: Making the Case for Equal Employment Laws in Utah

## A Comparative Analysis of Laws, Rhetoric and Arguments on ENDA Legislation

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*Since 1974, members of Congress have been trying to pass legislation that would afford employment non-discrimination protections for gay, lesbian, bisexual, transgender and transsexual employees. This year, the Employment Non-Discrimination Act (ENDA) came closer to becoming law than ever before. However, ENDA's progress has not been achieved easily. Along the way, opposition from conservative individuals, legislators and groups, as well as factions within the queer community, have divided and stalled the progress of federal ENDA legislation. Until all-inclusive ENDA legislation is passed to protect all members of the queer community at the local, state and federal levels, these able and ready members of the workforce will continue to suffer from injurious employment discrimination, at detriment to them as well as state and federal employment markets. For many reasons, now is the time to pass ENDA laws to afford equal employment protections to all workers in Utah.*

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### INTRODUCTION

Since the first version of ENDA was introduced in Congress by Bella Abzug and Ed Koch in 1974, on the fifth anniversary of the Stonewall riots, numerous states have taken initiative prior to federal action in order to afford protections to their employees based on their sexual orientation and/or gender identity. Even so, in America today it is legal to discriminate against and even fire an employee in 33 states for no other reason than their sexual orientation and in 37 states for no reason other than their gender identity. At this time, the State of Utah is counted among the states in both of these categories.

Over the years, marked progress has been made toward passing ENDA legislation that would protect the queer community. With this year's passage in the House and in 1996 with the bill failing to pass by only one vote, there is certainly founded hope by many that federal ENDA legislation will someday pass both houses of Congress and be signed into law by the President; but that day will almost certainly not come during President Bush's term. President Bush, who has only used his veto eight times during his entire time in office thus far, has twice threatened to veto ENDA legislation passed in

any form. With a growing groundswell of municipal and state-level support for equal employment protections for all workers, including those in the queer community, it seems now is a better time than ever before for states to join this growing faction of the overall queer equal rights movement.

The pressing need for states, including Utah, to afford protections to queer employees is made evident with the example of Krystal Etsitty and the thousands of other queer Utahns that are estimated to suffer discrimination in the workplace.

Krystal Etsitty is a transgender person who was born as a biological male and originally named Michael; but now she identifies herself as a woman and states that she has always believed that she was a woman despite her gender assignment at birth. Krystal took a position with the Utah Transit Authority (UTA) approximately four years after she had started taking hormones and transitioning genders. When Krystal told UTA about her transition, she was questioned and then fired for UTA's supposed lack of ability to accommodate Krystal's restroom needs and the potential offense customers might take to sharing public restrooms along her bus routes with her. At the time Krystal's employment was terminated, UTA had received no complaints about Etsitty's per-

formance, appearance, or restroom usage. Krystal sought legal remedy in the courts, but found that she had no legal recourse under existing state or federal law, which does not protect employees on the basis of their sexual orientation or gender identity.

Krystal was fired for who she is, not her ability to perform her work, and sadly, in Utah her case seems to be the rule, not the exception. It is estimated that thousands of other Utah employees are fired or discriminated against in the workplace each year for no other reason than their sexual orientation or gender identity.

This paper aims to examine ENDA legislation on the federal level as well as in states across the nation, including Utah. This paper will review historical data, information and contemporary commentary and provide an analysis of the arguments both for and against sexual orientation and gender identity-inclusive employment non-discrimination legislation. Ultimately, this paper shall illuminate the many reasons why the State of Utah has no good excuse for failing to pass state-level ENDA legislation that will afford employment protections to all of its workers—queer or not.

## TERMS USED IN ENDA

To fully comprehend all of the nuances, distinctions and key contentious pivot points that exist within ENDA legislation and the queer community, certain terms must first be defined.

### DISCRIMINATION

Ironically, *discrimination* was not originally defined in the first major piece of comprehensive legislation that Congress enacted to prevent it: the Civil Rights Act of 1964. Title VII of the Act was enacted by Congress with the stated intent to provide for equality of employment opportunities for all members belonging to certain stated groups (which did not include members of the queer community). However, in subsequent Court decisions and laws, the term has gained substantive meaning.

In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), Chief Justice Berger in his written opinion for the Court defined *discrimination* for the purposes of the Civil Rights Act as business acts or practices that are either overtly discriminatory or fair in form but discriminatory in operation in light of business necessity. Or in other words, “if an employment practice which operates to exclude [a legally-protected group] cannot be shown to be related to job performance, the practice is prohibited” 401 U.S. 424 at 431. As proposed in the full 2007 version of ENDA, H.R. 2015, discrimination would be defined to mean:

... (1) 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 privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity; or (2) 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, because of such individual’s actual or perceived sexual orientation or gender identity

U.S. Congress House Resolution 2015, 2007.

In House Resolution 3685 on the other hand, the definition of discrimination remains almost identical to that stated above, with the omission of the term gender identity where stated in H.R. 2015.

### SEXUAL ORIENTATION

Two other key terms that necessitate definition to further understanding of the concepts discussed herein are *sexual orientation* and *gender identity*. These terms are defined in the proposed ENDA legislation. For the purposes of the Employment Non-Discrimination Act, Congress defines *sexual orientation* as “homosexuality, heterosexuality, or bisexuality” (U.S. Congress House Resolution 2015 § 9, 2007). If the version of ENDA in H.R. 2015 or H.R. 3685 passed, it would be illegal to discriminate against an employee in hiring, firing, promotion, tenure or other employment decisions based on their perceived or actual sexual orientation.

### GENDER IDENTITY

Congress distinguishes *sexual orientation* from its companion term *gender identity* by defining the latter 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” (U.S. Congress House Resolution 2015 § 6, 2007). Gender identity can be self-defined by an individual or perceived, for the purposes of ENDA. If the version of ENDA in H.R. 3685 passed, it would be illegal to discriminate against an employee in hiring, firing, promotion, tenure or other employment decisions based on their perceived or actual gender identity.

## THE NATION

### FEDERAL EMPLOYMENT NON-DISCRIMINATION PROTECTIONS ALREADY IN PLACE

Employment non-discrimination protections in the form of laws and other remedies are already in place at both the national level and in Utah. These measures afford equal employment protections to numerous minority groups whose members have immutable or chosen, temporary or permanent characteristics that place them within those groups.

### ACTS

*The Civil Rights Act of 1964*. Although it was not the first piece of federal-level employment non-discrimination legislation passed by Congress, Title VII of the Civil Rights Act was and remains today, a landmark act of legislation. Title VII prohibits employment discrimination in public employment based on race, color, religion, sex, ethnicity and national origin (EEOC, 2007). These non-discrimination protections

include actual or perceived membership in any of these categories (e.g. “failing to hire an Hispanic person because the hiring official believed that he was from Pakistan, or harassing a Sikh man wearing a turban because the harasser thought he was Muslim”) (EEOC, 2005). The Civil Rights Act also prohibits sexual harassment, which the Act defines as

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. . .when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment

(EEOC, 2002).

*The Civil Service Reform Act of 1978.* Additionally, the Civil Service Reform Act of 1978 was passed, which provides additional employment non-discrimination protections and outlines other prohibited personnel practices. Adjudication and enforcement of this Act in particular falls under the authority of the Federal Office of Personnel Management rather than the EEOC; as the Act applies to federal sector employment only and has not been expanded as the other acts listed herein have. One provision of the Act, codified at 5 U.S.C. § 2302(b)(10), prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants in the federal sector for employment on the basis of conduct that does not adversely affect employee performance (OPM, 1978).

*The Civil Rights Act of 1991.* Late in 1991, Congress enacted the Civil Rights Act of 1991, which Congress passed in order to address several U.S. Supreme Court employment law case decisions whose holdings it disagreed with. One such decision was *Price Waterhouse v. Hopkins* (1989), in which the Court held that even when a plaintiff demonstrates that an “employer was motivated by discrimination, the employer can still escape liability by proving that it would have taken the same action upon lawful motives” (490 U.S. 228 at 239). Another case was *Wards Cove Packing Co. v. Antonio*, in which the Court held that an employer can avoid liability merely “by showing a business justification for the practice causing a disparate impact.” In *Wards Cove*, the Court also placed the burden of proving a lack of business justification for the discrimination upon the plaintiff.

Congress also made changes to existing employment non-discrimination law through the Civil Rights Act of 1991. With the 1991 Act, Congress granted injured parties the right to jury trials, as well as the right to recover compensatory and punitive damages in Title VII and Americans with Disabilities Act lawsuits where intentional discrimination was present, up to statutory maximum damage caps (EEOC, 2007). Congress also provided that in cases where a plaintiff established intentional discrimination as a motivating factor in an employer’s employment decision, that they were entitled to injunctive relief, attorney’s fees, costs and other dam-

ages. With the Civil Rights Act of 1991, Congress delineated exactly what its intent and desires were, which were in opposition to several of the U.S. Supreme Court’s rulings just before that time.

#### EXECUTIVE ORDERS

While not widespread-effectual pieces of legislation, it is worth noting the significance of Executive Orders 13087 and 13152 issued by President William Clinton in 1998 and 2000, respectively. Executive Order 13087 “affirmed the Executive Branch’s longstanding internal policy that prohibits discrimination based upon sexual orientation within Executive Branch civilian employment” (OPM, 1999). The Order added sexual orientation to the list of other categories already protected in Executive Branch civilian employment by Executive Order 11478, signed by President Richard Nixon in 1969, such as race, color, religion and sex. Executive Order 13087 was the first time that a prohibition against employment discrimination based on sexual orientation appeared as a directive from a U.S. President (OPM, 1999). Executive Order 13152 added parental status to the list of categories protected from employment discrimination in Executive Branch civilian employment, which included biological parents, adoptive parents, foster parents, stepparents, custodians, legal wards, persons with in loco parentis rights over other individual(s) and those persons actively seeking legal custody or adoption of another individual (EEOC, 2001).

#### INCOMPLETE PROTECTION

The Acts, Orders and other laws passed by Congress up to this point protect individuals on almost every conceivable basis to varying degrees, including: temporary conditions that inhibit an individual’s ability to fully perform their work as they otherwise could (e.g. pregnancy, as protected by the Pregnancy Discrimination Act of 1978); permanent or immutable conditions, affecting an individual since their birth or that are beyond their control (e.g. race, as protected by the Civil Rights Act of 1964); and characteristics that an individual chooses which place them in one of these legally protected groups (e.g. religion, as protected by the Civil Rights Act of 1964 or parental status, as protected by Executive Order 13152). Of all the aforementioned groups and others Congress or the President have chosen to protect from employment discrimination though, sexual orientation has the least legal protection. Only revocable executive orders protect individuals of alternate sexual orientations from employment discrimination, and even then that protection is solely in Executive Branch civilian employment. Otherwise, on the federal level, sexual orientation and gender identity still remain legally unprotected classes in public or private employment.

### EXECUTIVE ORDERS 13087 AND 13152

The federal government's interpretation of Executive Order 13087 has been that the Order states the Executive Branch's policy as to sexual orientation in Executive Branch civilian sector employment but it does not create any new rights, including enforcement rights, for any Executive Branch employees that are discriminated against due to their perceived or actual sexual orientation (OPM, 1999). The Order can be analogized to *Brown v. Board of Education* (1954) as an action (e.g. Executive Order 13087) or decision (Brown) by one branch of government that, without statutory enforcement powers or support from the Legislative Branch, that has nothing more than a statement of policy that the respective branches wished to see enacted. On May 28, 2000, the date that President William Clinton signed Executive Order 13152 into effect, he stated to this effect:

[t]oday I have signed an Executive Order entitled Further Amendment to Executive Order 13087, Equal Employment Opportunity in the Federal Government. The Order provides a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation in the federal civilian workforce. . . The Executive Order states Administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act

(EEOC, 2000).

President Clinton went on in the statement to "call upon Congress to pass this important piece of civil rights legislation [ENDA] which would extend these basic employment discrimination protections to all gay and lesbian Americans" (EEOC, 2000). Congress has attempted to pass federal ENDA legislation every year since President Clinton's statement in May, 2000.

### THE CIVIL SERVICE REFORM ACT OF 1978

Interpretation of 5 U.S.C. § 2302(b)(10) of the Civil Service Reform Act of 1978 by the federal government's Office of Personnel Management has been that the statute prohibits discrimination based upon sexual orientation as previously defined, but not gender identity. Section 5 U.S.C. § 2302(b)(10) of the Civil Service Reform Act of 1978 has been interpreted to prohibit any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants in the federal sector for employment on the basis of conduct that does not adversely affect employee performance (OPM, 1978). Such characteristics or "conduct that does not adversely affect employee performance" have been held to include sexual orientation. That being said, this has not actually afforded queer workers with adequate employment discrimination protections in the federal sector. For if it had, the federal ENDA debate would be largely moot.

Although this statute is in place, and Congress has published its beliefs in regard to these executive orders that "the United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation" (71 C.F.R. § 139, 2007), queer federal employees still lack full employment non-discrimination rights and protections that all of the other named groups in Congressionally-passed legislation enjoy. So long as Congress continues its failure to pass legislation that would extend employment non-discrimination protections on the basis of sexual orientation or gender identity beyond the Executive Branch, those in these groups remain unprotected. For, as President Clinton said, an Executive Order without associated Congressional action "cannot create. . . [such] rights" (EEOC, 2000).

### THE CIVIL RIGHTS ACTS OF 1964 AND 1991

The U.S. Supreme Court and several Courts of Appeal across the nation have interpreted the Civil Rights Acts of 1964 and 1991 as not providing workers with employment non-discrimination protections based on their sexual orientation or gender identity.

Nationally, the U.S. Supreme Court unanimously held in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998), that Title VII of the Civil Rights Act of 1964 does not prohibit all verbal or physical harassment in the workplace, nor does it bar all forms of discrimination "because of" sex, including discrimination motivated by sexual orientation.

In a case closer to home, the Tenth Circuit Court of Appeals held in *Etsitty v. Utah Transit Authority* 2007 WL 2774160, that Title VII of the Civil Rights Acts of 1964 and 1991 does not protect individuals on the basis of their gender identity. In its Etsitty opinion, the Court cited *Ulane v. E. Airlines, Inc.*, 742 F. 2d 1081, 1085 (1994), another case in which the Court held that "Title VII's prohibition against workplace discrimination on the basis of 'sex' does not include transsexuals [or transgender individuals] because it only protects against discrimination against 'women because they are women and men because they are men.'"

These court cases' holdings are representative of a general judicial sentiment and interpretation that Title VII of the Civil Rights Acts of 1964 and 1991 do not include employment non-discrimination protections for individuals based on their sexual orientation or gender identity.

### THE STATES

There are no federal laws that explicitly prohibit discrimination against GLBT individuals in employment. However, many states have taken action to afford employment non-discrimination protections to all of their workers in spite of the absence of federal legislation to provide the same.



## DIFFERING LEVELS AND TYPES OF STATE PROTECTION

While the types and levels of rights states afford to individuals based on their sexual orientation or gender identity differ, many states agree on the importance of equal opportunity and non-discrimination in employment. While the states' size, location, demographics, ideological and political stances all vary widely, they all share a common, uniting theme: equality.

### SEXUAL ORIENTATION PROTECTIONS

To date, 17 states and the District of Columbia prohibit discrimination based on sexual orientation in either public or both public and private jobs. These progressive, equality-minded states are: California, Connecticut, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington and Wyoming. An additional 7 states prohibit discrimination based on sexual orientation in public employment (not private) only: Colorado, Delaware, Indiana, Louisiana, Michigan, Montana, Pennsylvania and Wisconsin (National Gay and Lesbian Task Force, 2007).

### GENDER IDENTITY PROTECTIONS

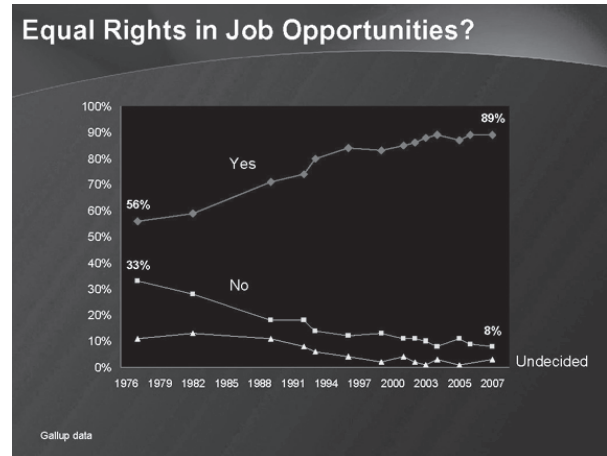
While transgender/transsexual people and individuals of alternative gender identities have existed in society for as long as history records, they have never gained the widespread acceptance (if it can be called that) or legal protection that gay, lesbian and bisexual individuals have. Only 13 states and the District of Columbia have passed laws that explicitly prohibit discrimination based on an individual's gender identity or expression in either public or private employment. Those fair-minded, egalitarian states are: California, Colorado, Hawaii, Iowa, Illinois, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington (National Gay and Lesbian Task Force, 2007).

## PUBLIC OPINION

Numerous polls at the state and national levels indicate strong support for equal employment rights for all workers, straight and queer alike. Additionally, polls point to a high level of concern and priority among Utahns and Americans on the whole, regarding jobs, employment and the economy.

According to nationwide Gallup polls conducted numerous times since 1977, "support for equal rights in job opportunities [for members of the queer community] generally has increased dramatically, from 56% in 1977 to 89% in 2007" (Gallup, 2007).

Additionally, data from nationwide polls conducted by the Pew Research Center for the People and the Press corroborates the Gallup poll results; finding support for equal employment protections for workers of all sexual orientations and gender identities has almost doubled since the introduction of proposed ENDA legislation in the 1970s.



Here in Utah, in a statewide poll conducted by the Utah Foundation, 47 percent of respondents in a statewide survey of priorities and concerns leading into the 2004 election indicated that Utah's job market, economy and wages were of greatest concern to them. These local survey results align Utah with yet another poll on the subject, a national poll conducted by NPR in November 2003; which found 44% of survey respondents felt that jobs, employment and the economy were the top issues of concern (Utah Foundation, 2004).

Both at home and across the nation, these polls show that jobs, employment and the economy are top-priority issues for many people and that under the umbrella of these concerns, there are strong feelings that all employees—queer or not—deserve equal employment protections and treatment under the law.

## UTAH SPECIFICALLY

### ADMINISTRATION, ENFORCEMENT AND EDUCATION

The Utah Antidiscrimination and Labor Division's (UALD) Employment Discrimination is responsible for the administration and enforcement of the Utah Antidiscrimination Act of 1965, U.C.A. § 34A-5, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and Title VII of the Civil Rights Acts of 1964 and 1991. The Division receives, mediates (for early resolution), investigates, and resolves charges of employment discrimination. It also acts as a resource to employees and employers concerning laws which prohibit employment discrimination, conducts seminars, and utilizes other teaching methods to make employers aware of conditions which lead to employment discrimination (UALD, 2007).

### CURRENT EMPLOYMENT NON-DISCRIMINATION PROTECTIONS

The Utah Antidiscrimination Act of 1965. The Utah Antidiscrimination Act of 1965 prohibits employment discrimination on the basis of race, color, national origin, gender, religion, age, disability status, pregnancy, childbirth, or pregnancy-related conditions. The far-from-comprehensive

Act does not prohibit discrimination on the basis of sexual orientation or gender identity.

*Other Laws.* Utah currently does not have any statewide laws that prohibit discrimination on the basis of sexual orientation or gender identity. However, in Utah's largest, most equality-minded city and capitol, Salt Lake City, there once was a city ordinance on the books that prevented public employment discrimination on the basis of sexual orientation. Sadly, the ordinance was on the City's book for less than a month.

From late December 1997 to mid-January 1998, Salt Lake City protected employees from discrimination based on their sexual orientation; but the Salt Lake City Council repealed the ordinance less than a month after its passage. The *Salt Lake City Weekly* newspaper even went so far as to call the short life of the ordinance and its eventual repeal "an outcome of Mormon politics" because of the documented urgings of Latter-Day Saint Church Leaders for their followers to attend the Salt Lake City Council meeting and urge for the ordinance's immediate repeal (Biele, 1998). However, Mayor Ralph Becker has proposed several measures, including the reinstatement of the ordinance or passage of a law whose provisions would provide essentially the same protections for all of Salt Lake City's workers, regardless of their sexual orientation or gender identity (Becker, 2007).

#### LOOKING FORWARD: PROPOSED LEGISLATION IN UTAH

Proposed House Bill 89 (GS 2008). In the 2008 General Session of the Utah State Legislature, Representative Christine Johnson, representing District 25 in Utah's Salt Lake and Summit Counties, proposed House Bill 89; which would define gender identity and sexual orientation, include *sexual orientation* and gender identity as a prohibited bases for discrimination in employment in a manner consistent with the Utah Antidiscrimination Act, and prohibit quotas or preferences on the basis of a job applicant's sexual orientation or gender identity.

While H.B. 89 would add sexual orientation and gender identity to the list of categories protected from employment discrimination, the bill does exempt religious organizations and businesses with fewer than 15 employees from compliance. The bill is the first of its kind in Utah.

In an interview with Utah's *Deseret Morning News* newspaper, Representative Johnson acknowledged that even with the exemptions for religious organizations and small business that "the bill will be a tough sell in Utah" because "[m]ost lawmakers [in Utah] are members of the [LDS] Church, which considers acting on homosexual feelings a sin" (Vergakis, 2008). Still, Representative Johnson, one of three openly-gay members of the Utah Legislature, says that "it's time Utah's lesbian, gay, bisexual and transgender community fights back against years of hostility, highlighted by a ban on gay marriages and attempts to eliminate gay-straight alliances in public schools" (Vergakis, 2008).

In a hearing by the Utah House of Representatives'

Business and Labor Committee, H.B. 89 encountered thoughtful debate indicative of a more accepting, open-minded legislature than has generally made decisions affecting the GLBTQ community. The Committee decided to hold H.B. 89 over for in-depth, interim study to be completed after the 2008 General Legislative Session. This is a better result that many in the queer community expected. As Utah GLBTQ-rights advocacy group Equality Utah's Executive Director Mike Thompson put it:

after an amazing introduction by Rep. Johnson and solid testimony in support of H.B. 89 Antidiscrimination Act Amendments, the committee leadership decided to hold the bill for further discussion. This is HUGE for the first effort on this bill. Just as easily, the heavily conservative committee could have voted down the legislation

(Vanderhooft, 2008).

The *Future of H.B. 89*. So, what now? Does H.B. 89 really stand a chance of passage in the next or subsequent Utah legislative sessions? The answer to that question is "perhaps, but more likely in its 'good' form rather than its 'perfect' form first, if at all."

On the national legislative stage, in Congress, ENDA legislation has encountered the same types of arguments, questions and opposition that were raised and seen by legislators considering state-level employment non-discrimination protections. One might expect then that attempts to pass employment non-discrimination legislation in Utah might meet the same or similar ends as proposed national ENDA legislation, even if by different means. Stated another way, where members of Congress from across the nation, on both sides of the ideological and political divide had questions, concerns and reservations about passing employment protections for transgender and transsexual individuals into law, and failed to pass a bill with such proposed protections as a result, it makes sense to expect Utah's legislators to feel and act similarly. For these reasons, it is likely that if employment non-discrimination protections are passed to protect GLBTQ employees in Utah at all, that such legislation will pass first in a form that does not include transgender and transsexual individuals.

While H.B. 89 did in the 2008 Legislative General Session and will likely continue to encounter such opposition, doubt and challenges and in the future, passage of the legislation is still a possibility. As Mike Thompson put it, the fact that H.B. 89 was not immediately killed and that the Committee went so far as to hold the bill for further discussion is a testament to the increasing open-mindedness in and thoughtful consideration that the members of the Utah Legislature gave the legislation; as well as evidence of the possibility that equal employment protections for all could someday be a reality in Utah.

In a pro-business, pro-family, predominantly religious, conservative state such as Utah, it will take at least a few things to get ENDA legislation passed here. Some of those

requisite things might include reframing of the ENDA debate to focus on the personal aspects of GLBTQ persons' suffering from employment discrimination in Utah rather than the moral questions surrounding sexual orientation and gender identity; as well as evidence that ENDA legislation would not cause any of the other purported harms that ENDA opponents claim it will. Another important factor will be the composition of the Utah Legislature at the time that the measure is voted on. The more open-minded and sympathetic legislators are to the equal employment rights movement at the time that such legislation is voted on, the more likely its passage will be.

### RHETORIC FROM BOTH SIDES

Since the initial introduction of federal ENDA legislation in Congress in 1974, there has been commentary for and against the passage of such legislation on either the federal or state level, coming from both sides. To "the left," or more Democratic and liberal values side, there has been strong support for the passage of ENDA legislation at the federal and state levels; which has only been hindered by divisions within that side of the ideological spectrum itself. To "the right," or more Republican and conservative values side, there has been strong opposition to passage of ENDA legislation at the federal level but some support for passage at the state level in selected states.

This section will examine, analyze and critique the commentary coming from each respective ideological camp, "the left" and "the right"; as well as the arguments both for and against passage of ENDA legislation generally.

### THE LEFT

#### SOME PROTECTIONS ARE BETTER THAN NO PROTECTIONS

According to the *Washington Post*, Congress has an unofficial saying about passing legislation: "Don't let the perfect be the enemy of the good" (Murray, 2007). Some GLBTQ legislators, activists, persons and groups are apparently unfamiliar with the saying, as their desire to pass the perfect at expense of the would-be-good has, at least during this session, of Congress cost them both. The "perfect" legislation referred to here is federal ENDA legislation including protections based on gender identity, or transgender and transsexual people, and the "good" being legislation that only includes protections based on sexual orientation, or for gays, lesbians and bisexual persons.

In the most recent, 110th session of Congress, both the "perfect" and the "good" forms of federal ENDA legislation were proposed. Initially, the "perfect" form of ENDA, House Resolution (H.R.) 2015, was proposed, but it was later amended to the lesser-inclusive "good" form of ENDA, also known as H.R. 3685. After H.R. 2015 encountered fierce opposition from Democratic and Republican legislators alike who opposed protections for transgender and transsexual

workers, an alternate version of the legislation, H.R. 3685, was introduced in place of H.R. 2015, this time only providing protection against employment discrimination based on sexual orientation. H.R. 3685 passed the House of Representatives by a vote of 235-184 (with 16 Representatives abstaining), but not without a battle. Even then, H.R. 3685 passed the House only after fierce debate, two successful amendments and a withdrawn one.

The Congressional ENDA debate even divided openly gay and pro-gay, heterosexual legislators against one another. Four pro-gay Democrats voted against the amended H.R. 3685 because it lacked anti-discrimination protections for the transgender/transsexual community. Moreover, openly-lesbian U.S. Representative Tammy Baldwin (D-WI) introduced an amendment to attempt to restore gender identity protections in H.R. 3685 (essentially changing the bill back to its H.R. 2015 form), but after introducing the amendment, she eventually withdrew it (Wright, 2007).

Currently, ENDA supporters stand divided on whether some protections are better than no protections, or whether it is better to legislate ENDA protections in a piecemeal fashion, adding protections for "controversial" segments of the GLBTQ community (e.g. transgender and transsexual persons) after protections for the "less controversial" sectors of the community (e.g. gays, lesbians and bisexuals) have been achieved. After H.R. 2015 was amended to remove protections for transgender and transsexual individuals, over 300 GLBTQ groups wrote a letter to House Speaker Nancy Pelosi (D-CA) stating that they "opposed legislation that leaves part of our community without protections" (Murray, 2007).

Representative Barney Frank (D-MA), the co-author and sponsor of both House Resolutions 2015 and 3685, stated that he believes that "if you can pass a bill that improves things for a large number of people, then [you should] take it. The notion that you don't protect most people if you don't protect them all – that's never worked. Historically speaking, civil rights protections tend to expand very slowly and group by group" (Murray, 2007). Arguments for and against the piecemeal approach to passing ENDA legislation are discussed further below.

#### ONE COMMUNITY UNITED

The issue of including transgender/transsexual anti-discrimination protections has divided the GLBTQ community on ENDA, between the group that seems to believe if you can't have the "perfect," you should still try for the "good," versus the group that believes the GLBTQ community should stand or fall in attempting to attain protections for everyone without excluding anyone. One such group, the Equality Federation, falls into the latter category along with over 300 other national and local GLBTQ organizations, stating that it "remains steadfast in its opposition to [the incomprehensive ENDA bill] – not because of what it purports to do, but because of what it fails to do. This bill does not ban discrimination based on gender identity – despite the fact that trans-

gender people experience phenomenally high unemployment rates and are the members of our community most in need of employment protections” and therefore, “Equality Federation will not settle for less than an ENDA that protects all members of our LGBT community” (Equality Federation, 2007).

#### **STRENGTH IN NUMBERS AND LOOPHOLES**

While there are two main camps, those in support of any legislated anti-discrimination protections for GLBTQ workers, and those opposed to anything short of comprehensive, legislated anti-discrimination protections for GLBTQ workers, within the latter camp there is still another group that not only seeks the “strength in numbers” that would accompany the passage of comprehensive ENDA legislation, but also sees anything short thereof as full of loopholes that could potentially leave GLBTQ workers no better off than they are now. Lambda Legal, the nation’s oldest and largest legal organization working for the rights of GLBTQ persons, is one such group.

Recently, Lambda Legal published their analysis of the incomprehensive version of ENDA, H.R. 3685. Lambda Legal’s assessment of H.R. 3685 went so far as to call the version of ENDA “riddled with loopholes in addition to failing altogether to protect transgender people against discrimination” (Lambda Legal, 2007). The organization went on to say the bill would prevent an employee from being “fired for being lesbian, gay or bisexual, but. . . [allow them] to be fired if [their] boss thinks [they] fit the stereotype of [a gay, lesbian or bisexual]” because gender identity protections would not only protect transgender and transsexual workers, but gays, lesbians and bisexuals who did not conform to their “employer’s idea of how a man or woman should look and act” (Lambda Legal, 2007). The organization also stated in their assessment that they “fear that defense counsel will argue, and some courts may rule, that a lesbian, gay or bisexual plaintiff was ‘really’ being discriminated against based on gender non-conformity and that the plaintiff is trying to bootstrap protection under a sexual orientation discrimination theory in line with *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)” (Lambda Legal, 2007).

Whether Lambda Legal’s analysis is correct and courts, employers or other groups would act as they say they fear, without a law on the books to act on, the fear that once an ENDA law is passed that it will be abused, is moot.

## **THE RIGHT**

#### **RELIGIOUS GROUPS AS TARGETS**

Many conservative and/or religious groups have voiced their opposition to ENDA legislation because of their concern about the impact the legislation might have for churches, religious organizations, religious business owners and other groups. People and groups on the ideological “right” have stated their fear that churches and religious groups might have to hire a GLBTQ person in direct violation of their moral and

religious oppositions to homosexual behavior. One such group, Concerned Women for America (CWFA), stated such a concern that “businesses owned by devout Christians, Jews and Muslims would be forced to adopt a view of human sexuality at odds with that taught by their faiths” (CWFA, 2002). However, this view is incorrect for at least two reasons.

First, federal ENDA legislation (as well as state, if the state legislation is modeled after the federal) as proposed exempts religious corporations, schools, associations or societies. If an entity is exempt under either Section 702(a) or 703(e)(2) of Title VII’s religious exemptions, it will be exempt under ENDA. For example, a business owned by the LDS Church such as Deseret Industries, a school owned by the LDS Church such as Brigham Young University, or a school operated by the Catholic Church such as Judge Memorial High School would all be exempt from ENDA compliance and not be required to treat a gay job applicant, whose lifestyle choices conflict with the Church’s teachings, the same as a heterosexual job applicant. Further, other businesses that are not owned by a religious entity but are owned by individual members of a faith do not have to give preference to GLBTQ employees, just treat them equally or the same as everyone else in regard to hiring, firing, retention, tenure and promotion employment decisions.

Secondly, small businesses and their owners are also exempt from compliance with ENDA. As proposed, federal ENDA legislation (and again, state legislation if modeled after the federal) would exempt businesses from compliance when they have fewer than 15 employees; as does Title VII and numerous other articles of federal employment non-discrimination legislation. Small business owners, who stand to incur the greatest impact in terms of numbers in employment, could not be sued or sanctioned for non-compliance with ENDA’s mandates. Only larger businesses that already have to comply with other federal anti-discrimination mandates would have to comply.

While the argument could be made that religious business owners with 16 or more employees that are opposed to hiring a GLBTQ applicant should not have to hire such an applicant in opposition to their religious beliefs, the interests of equal treatment in employment and its resultant benefits outweigh these concerns; as will be elaborated on later in this piece.

Therefore, religious corporations, schools, associations, societies and business owners do not need to fear having to make employment decisions “at odds with that taught by their faiths” (CWFA, 2002) by hiring an employee that is a member of the GLBTQ community because such entities are protected under religious and business size exemptions. Just as these religious entities are exempted from compliance with other federal anti-discrimination legislation such as Title VII of the Civil Rights Act, those Churches and other already-exempted entities will retain their same rights under ENDA’s exemptions. This means that just as the Catholic or LDS Churches do not have to promote a female member of the



clergy against their teachings, they will not have to condone the actions of, hire, promote or otherwise give preference in employment to any members of the GLBTQ community in opposition to the teachings and beliefs of their faiths.

#### LEGISLATING PRIVATE, MORAL BEHAVIORS

Many conservative and/or religious groups have voiced their opposition to ENDA legislation because it is many such groups' belief that "immoral" behavior or the "immoral" actions of individuals (e.g. homosexuals) should not be legally-protected by ENDA legislation or any similar laws. However, these concerns are invalid for at least two reasons.

First, the U.S. Supreme Court has already held that the government cannot regulate beliefs, only actions. In *Reynolds v. U.S.*, 98 U.S. 145 (1878) and *Sherbert v. Verner*, 374 U.S. 398 (1963) that the Free Exercise Clause of the First Amendment "prohibits any invasions [on the free exercise of religion] by a [governmental] authority" and "bars governmental regulation of beliefs," only permitting regulation of actions. That means that the government is not supposed to legislatively mandate compliance with any religion's beliefs or morals, Christian or otherwise. To clarify this distinction, a state or the federal government can outlaw the act of sodomy committed by heterosexuals and homosexuals, but cannot outlaw homosexuality because the lifestyle is deemed immoral by Christian and other religions. Secondly, morality is all relative, depending on which religion you believe or disbelieve in.

The Family Action Organization, a conservative Christian think tank in Washington, D.C., argues that finding people are born gay "would advance the idea that sexual orientation is an innate characteristic, like race – that homosexuals, like African-Americans, should be legally protected against 'discrimination' and that disapproval of homosexuality should be as socially stigmatized as racism" (Family Action Organization, 2008). As previously explained, all proven, innate characteristics and statuses as well as some temporary conditions are legally protected from employment discrimination – except for sexual orientation or gender identity, if those statuses are innate. If sexual orientation and gender identity are innate characteristics, the Family Research Council may be right. Such a finding probably would result in the protection of GLBQ individuals in those groups because discriminating against an individual for one innate characteristic (e.g. sexuality) but not another (e.g. race) would be hypocritical, if nothing else.

One might wonder why such a finding (i.e. that sexual orientation and gender identity are innate characteristics) would be a bad thing. Well, according to the Concerned Women for America, "[s]exual behavior is fraught with moral consequences" (CWFA, 2007) and therefore should not be legally protected. But what the Concerned Women for America and other similar groups fail to realize is that whether homosexuality is an innate characteristic or a choice, it involves acts and therefore, their beliefs as to the morality of homosexuality are irrelevant. According to *Reynolds*,

*Sherbert*, and *Lawrence v. Texas*, 539 U.S. 558 (2003), if the government wants to outlaw typically homosexual acts of sodomy, it has to outlaw the acts for the heterosexuals and homosexuals alike that commit those acts. As Justice O'Connor wrote in *Lawrence*, "the State cannot single out one identifiable class of citizens for punishment [or regulation] that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law" (*Lawrence v. Texas*, 2003).

According to the American Psychological Association (APA), "human beings can not choose to be either gay or straight. Sexual orientation emerges for most people in early adolescence without any prior sexual experience. Although we can choose whether to act on our feelings, psychologists do not consider sexual orientation to be a conscious choice that can be voluntarily changed" (APA, 2008). Whether religious or non-religious heterosexuals believe homosexuality is immoral, that is irrelevant as it is a *belief* and for every heterosexual that believes such, there is likely a homosexual that believes the exact opposite. The U.S. Supreme Court has ruled that beliefs cannot be regulated one way or another. Only actions can be.

#### PROTECTING CHILDREN FROM HARMFUL SEXUAL CONDUCT

Yet another reason that conservative groups on the ideological right have opposed ENDA legislation or any legislation that would afford equal treatment to the GLBTQ community is their fear that "[b]ecause ENDA is so sweeping, employers could not take into account any sexual conduct, even that which might severely impact children" (CWFA, 2007). However, this misguided fear is unfounded for at least two reasons. First, as most child molesters are heterosexual men, if there is any group whose employment will potentially sexually harm or otherwise negatively impact children, it is that one and not the GLBTQ community. Secondly, as stated previously, ENDA legislation does not require employers or businesses to give preferential treatment to GLBTQ applicants, only to treat them the same as all other applicants.

These two arguments run in the same vein. First, according to the U.S. Department of Justice's (DOJ) Bureau of Justice Statistics, 95 percent of all children that are sexually assaulted or molested by age 18 are female and in 96 percent of those cases, the offenders are male (DOJ, 2000). Further, the rates of heterosexual males victimizing female children are over 10 times greater than the male rates in similar age groups (DOJ, 2000). This means that the group mostly likely to sexually assault or otherwise harm a child is heterosexual males, not homosexuals or GLBTQ persons.

Further, as ENDA legislation does not require employers or businesses to give preferential treatment to GLBTQ applicants, only to treat them the same as all other applicants, a business could deny employment to a convicted child molester or other criminal that had or might potentially harm a child, whether they are homosexual or heterosexual. If anything, ENDA legislation ensures that a business would not

have to preferentially consider hiring a suspected or actual homosexual child molester over a heterosexual child molester even though it is more likely that the heterosexual had in the past, or would in the future, molest a child. The right's arguments against ENDA passage for its potentially negative effects on children fails to hold water in light of these facts and the Act's proposed language.

## THE ARGUMENTS

Commentary and rhetoric now examined, this analysis shall turn to the arguments for and against passage of employment non-discrimination legislation on the basis of sexual orientation and gender identity.

### "SPECIAL RIGHTS" FOR QUEERS

According to Joe Solomonese, the President of the Human Rights Campaign, a gay rights organization, "some of ENDA's opponents would like to misrepresent it as inconsistent with religious liberties" and as though it would "sacrifice the rights of conservative Christians in favor of *special* rights for homosexuals" (Murray, 2007). In fact, Concerned Women for America has stated that they oppose passage of ENDA protections for GLBTQ persons for the very reason that they believe the legislation would "[a]fford special protections" to the GLBTQ community (CWFA, 2007). However, this is patently false if special is defined as it is commonly understood in these contexts, as being in some way superior to the norm in a category or situation (Merriam-Webster, 2008).

ENDA legislation, as proposed (and as states would likely adopt it) creates no "special" rights. Rather, the legislation provides GLBTQ workers with the *same* employment protection enjoyed by all other American workers. As clarified and stated earlier herein, ENDA does not require employers to provide extraordinary rights or benefits to GLBTQ employees or their partners. The same groups – religious groups and small businesses – that are exempt from compliance with even the requirement to treat all employees equally in their employment practices, are still exempt under ENDA. ENDA only mandates equal treatment for GLBTQ workers, not special, above-equal preference or treatment.

### A "FLOOD" OF LAWSUITS

Groups such as the Concerned Women for America and other similar groups have cited their belief that the passage of ENDA legislation would result in religious groups and organizations becoming the "targets" of lawsuits and "inspire 'a flood of' lawsuits by homosexual activists, who will cry 'homophobia' when an employer cleaves to policies that favor marriage, family and traditional sexual morality" (CWFA, 2007). However, as with other fears the ideological right has, these fears are unfounded and unlikely to become the reality as organizations such as the Log Cabin Republicans are quick to point out.

Many states have already passed employment non-discrimination or ENDA-type legislation. Some states have even passed broader legislation that protects GLBTQ workers from not only public, but also private, employment discrimination. Still other states have gone so far as to prohibit discrimination against GLBTQ individuals in housing and other areas. Research from the EEOC and a report from Congress' General Accounting Office (GAO) have both found that the passage of ENDA-type laws and even laws that afford queers protections beyond the workplace have "not led to a flurry of lawsuits" (GAO, 2000). According to yet another study published in 2001 by the Williams Institute at the UCLA School of Law, reports of discrimination based on sexual orientation are roughly equal to those on race or gender, not in great excess thereof (Rubenstein, 2002).

To further support the unfounded nature of the "flood of lawsuits" claim, cost estimates from a 2002 Congressional Budget Office (CBO) report on the estimated impacts and costs of passing federal ENDA legislation state that the EEOC estimates that their complaint caseload "would rise by only 5 to 7 percent annually" (CBO, 2002).

On the state level, Utah law does not require employment authorities to track incidences of discrimination based on sexual orientation or gender identity, just as discrimination claims based on race, religion or other protected classes are. Without concrete data or evidence of discrimination on these bases over time, some claim there is no need to pass legislation (e.g. H.B. 89) designed to fix the discrimination problem. Hopefully, the interim study on H.B. 89 will collect the evidence necessary for Utah legislators to recognize this discrimination that is happening in Utah.

Despite this, recently Utah's Antidiscrimination and Labor Division and Labor Commission released statistics that illustrate that while there is a need for state-level ENDA protections for the GLBTQ community working in Utah, that the number of complaints filed for sexual orientation or gender identity-based employment discrimination is far from indicative of a current or potential "flood" of lawsuits, were the legislation to pass. As stated, while the Division and the Commission are not legislatively required to record such complaints, the agencies were asked by Equality Utah, a state-level gay rights organization, to track the number of complaints received due to sexual orientation- or gender identity-based employment discrimination.

The result of the data collection efforts by the Utah Labor Commission was 14 complaints of discrimination against GLBTQ people on the basis of their sexual orientation or gender identity from June through December 2007 (Vergakis, 2008). That's an average of just over two per month – hardly a "flood" by any definition. Even if Utah passed state-level ENDA legislation, if the number of state-level complaints were comparable to the estimated number of federal complaints, 5 to 7 percent is still anything but a "flood."

**THE SLIPPERY SLOPE**

Opponents of ENDA legislation claim that legislating employment non-discrimination protections for members of the queer community will lead to a harmful “slippery slope” in at least two ways: to the possible recognition of same-sex marriage and the possible protection of other “special interests” – sexuality-related or not – potentially including groups from polygamists to the tattooed. But these claims are as untrue as they are unlikely.

First, to examine the argument about the passage of ENDA legislation leading to the recognition of gay marriage. As federal-level ENDA legislation has never been fully passed, it is impossible to fully know what effect such passage will have in the movement for federal recognition of equal marriage rights for GLBTQ partners. However, in analyzing states that have either ENDA-type or gay marriage/civil union laws, the lack of a causal link from ENDA passage to marriage recognition becomes evident.

Of the states with state-level, ENDA-type laws, 5 states and Washington, D.C. either have no laws prohibiting or allowing same-sex marriages or civil unions or they passed ENDA legislation at the same time or after their marriage or civil union legislation: California, New Mexico, New York, Iowa and Wisconsin. Another 6 states passed all-inclusive, state-level ENDA legislation after passing laws allowing same-sex marriages or civil unions: Connecticut, Vermont, Massachusetts, New Hampshire, New Jersey and Washington. And still 9 more states have ENDA laws that protect GLBTQ persons from employment discrimination but also have laws banning same-sex marriage and/or civil unions outright or that do not allow for the state recognition of such unions: Colorado, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, Oregon and Rhode Island.

This information means out of the states and Washington, D.C. that have both some type of ENDA legislation and laws on same-sex marriage, only 6 of them fall into the “possible causal link” category that the ideological right claims exists between ENDA and same-sex marriage laws. Further, as the federal Defense of Marriage Act (DOMA), which states that “[n]o state need recognize a marriage between persons of the same sex, even if the marriage was concluded or recognized in another state,” and that the “Federal Government may not recognize same-sex or polygamous marriages for any purpose, even if concluded or recognized by one of the states” (The Marriage Law Project, 2005) was passed before many ENDA laws were passed at the state level and federal ENDA legislation makes clear that any federal ENDA law would not alter DOMA in any way, these fears seem more groundless than ever.

Therefore, ENDA legislation, at least on the state level, does not seem to cause or lead states or the federal government toward the recognition of same-sex marriages or unions. Quite to the contrary, it appears that after a state passes ENDA-type legislation, it is more likely than not that the state will choose not to recognize such unions.

Secondly, to examine the argument that passing ENDA legislation may lead to a slippery slope where states’ or the federal government would afford employment protections to other minority groups such as the tattooed. Insofar as the passage of federal anti-discrimination legislation such as the Civil Rights Act of 1964 was enacted before the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, if one were to say that any anti-discrimination act that is passed before another similar act causes the latter act’s passage and that this can be called a slippery slope, this claim is true. However, along these lines, if that claim were true, it would be just as plausible and arguable that one of the aforementioned acts caused the slippery slope, of which ENDA legislation would be a part, and not that ENDA legislation caused an initial slippery slope leading to other anti-discrimination laws. The key difference between groups like polygamists or the tattooed is that ENDA legislation seeks to protect GLBTQ people, a group that is suffering from employment discrimination in the status quo, and that is in all likelihood a group that is being discriminated against based on innate characteristics, occurring at birth. Religious choices to become a polygamist or the choice to alter one’s body by obtaining a tattoo are not innate as sexuality likely is.

Thus, while slippery slope arguments could be made, accusing ENDA legislation of causing or contributing to the passage of other similar legislation, there are better rationales for passing ENDA than other legislation that might come after it and a greater likelihood that ENDA is part of a causal chain or “slippery slope” caused by a predecessor piece of legislation such as the Civil Rights Act of 1964, than ENDA causing such a chain itself.

**ECONOMICS AND FISCAL IMPACTS**

Some opponents of ENDA legislation cite possible negative and fiscal impacts for government and business as a reason that they are against such protections. However, the potential for economic and fiscal benefits arising out of ENDA passage are far greater than the potential losses for the same.

According to Equality Forum, a Philadelphia-based GLBTQ rights organization, more than 94% (470) of the 2007 Fortune 500 companies include sexual orientation in their employment nondiscrimination policies (Lazin, 2007). To put things in perspective, about half of the remaining 30 Fortune 500 companies that do not have anti-discrimination policies are headquartered in Texas. Regarding these companies’ lack of non-discrimination policies, Lazin stated “[w]hen it comes to equality, Texas is a lone and tarnished star” (Lazin, 2007).

Through the passage of such policies, many major American companies – including General Mills, Microsoft, Citibank, and Morgan Stanley – have through their actions expressed their strong support for legislation that outlaws discrimination on the basis of sexual orientation or gender identity (Speaker Nancy Pelosi, 2007). These companies, among

the 500 largest American corporations as measured by revenue, whose interests are unarguably primarily financial, obviously see the economic benefit in advancing equality in the workplace and protections from discrimination for everyone.

“Corporate America is ahead of government in providing equal treatment for GLBT people because it knows that fairness is good for business,” declares Joe Solmonese, President of Human Rights Campaign (Gunther, 2006). According to *Fortune* magazine, one reason more companies, both large and small, are embracing workplace equality and rights for GLBTQ employees is that “they want to attract gay consumers” (CNN.Money.com, 2007). Surveys by the U.S. Census Bureau, among other organizations, show that the GLBTQ community has a collective \$514 billion annual expendable income (Yazigi, 1995). On this note, Malcom Lazin, the Executive Director for Equality Forum, states “[c]orporations and shareholders benefit from a workplace where merit, not intolerance, prevails” (Lazin, 2007). As Fortune 500 companies like Wal-Mart and IBM have realized, it pays off monetarily to pay attention to queers (Wilke, 2004).

#### FEDERAL VERSUS STATE- AND LOCAL-LEVEL ACTION

Some of both ENDA opponents and proponents alike oppose the passage of ENDA legislation on the state level prior to or in place of its passage on the federal level. Still others would prefer passage of ENDA legislation on a municipal or local level instead of or before passage at the state or federal level.

First, groups and individuals in the former group, including Gayle Ruzicka of the Utah Eagle Forum, insist that if change is to take place, it should come from the top-down, not the bottom-up. In a panel debate at the University of Utah in November 2007, Mrs. Ruzicka argued that attempts to pass ENDA legislation at the state level are a waste of state legislators’ and other officials’ time and resources. Mrs. Ruzicka went on to advocate that Utah not expend any such resources that could be spent on other, “more pressing” issues, and leave any changes to employment non-discrimination laws or anything else that in her opinion could be legislated by Congress rather than Utah, up to Congress (Norlen, 2007).

Congress could and *almost* did pass federal ENDA legislation this year, with “almost” being the operative word in the phrase. While proposed ENDA legislation came closer to full passage this year than any year before, and that is a notable achievement, *almost* doesn’t quite count in regard to legislation. ENDA has been proposed and almost passed nearly every year since its initial proposal in 1974. With the uncertainty of Congressional, federal-level lawmaking, a law’s near-passage one year could precede its defeat the next year. This uncertainty is just one more reason that federal ENDA legislation alone cannot and will not suffice.

Further, as with U.S. Supreme Court decisions, Congressionally-made laws can be changed or even over-

turned within exceptionally short periods of time – even just one session or year. Having state-level or municipal-level ENDA laws on the books in addition to a federal ENDA law provides one more level of protection to secure the equal treatment of the minority, in this case GLBTQ persons, against the majority. As Dr. Martin Luther King Jr. once said, “injustice anywhere is a threat to justice everywhere.” Along those lines, if the federal ENDA law is passed, that will be wonderful news for members of the GLBQ community, but if the federal ENDA law is passed and states choose not to pass ENDA laws because of the federal law’s likely or actual passage, and then the federal law is subsequently repealed without the presence of those additional state- or municipal-level protections in its place, that lack thereof would unfortunately threaten justice everywhere.

Secondly, in this same vein, it would be insufficient to pass municipal-level ENDA protections without the eventual passage at the state or federal levels. The more ENDA-type ordinances and laws at different levels the GLBTQ community has, the better protected they will be. As illustrated by Salt Lake City and its less-than-one-month-old ENDA-type ordinance a few years ago, even the seemingly sure protections given can be ripped away almost immediately thereafter, once given. Moreover, the bodies that pass and enact laws are not the only ones that can make such changes. Courts, too, can nullify acts of Congress, state legislatures and other law-making bodies.

With just one act of a Court, years and years of “truth,” accepted and held until then can be undone; as was the case with the U.S. Supreme Court’s decisions in *Bowers v. Hardwick* and *Lawrence v. Texas*. In just a relatively short, 17-year span from 1986 to 2003, the Supreme Court went from ruling the criminalization of homosexual sodomy (but not heterosexual sodomy) constitutional in *Bowers* to striking down the same in *Lawrence*. Single Court opinions in these cases changed the “truth” and the laws on sodomy as they were known at the time with just the flick of the Court’s pen. With so many such ways to retract, alter or otherwise nullify a law and so small a number of ways to pass it, the importance of layered laws and protections cannot be undervalued.

#### MORALS

One of the chief reasons that groups and individuals on the ideological right cite for their opposition to ENDA legislation is their belief that governmental employment protections for members of the queer community in essence condone or sanction what they deem to be “immoral” behavior. Matt Barber, a leader of the Concerned Women for America has staid to this effect “ENDA would. . .force business owners to abandon their faith at the workplace door and adopt a view of sexual morality which runs directly counter to central tenets of every major world religion and thousands of years of history” (CWFA, 2007). Having already addressed the arguments on the morality of GLBTQ lifestyles and the irrelevance of



morality to the ENDA debate, analogies to other moral situations and cited examples of popular opinions on morality shall now be given.

Whether sexual orientation and gender identity are immutable and innate characteristics an individual possesses from the time of their birth or choices made with knowledge and consent to the repercussions and consequences thereof is irrelevant. Analogies can be made in both situations that make any religious or other moral oppositions to ENDA completely irrelevant.

To offer two comparisons that are analogous to the nature and nurture sides of the debate, if an individual's sexuality or gender identity is immutable and innate, instilled in them by "nature" from the time of their birth, it would be analogous to a person's race; which is another immutable and innate characteristic and an unchangeable trait. If the "nature" theory of sexuality is true and if the CWFA and other conservative groups on the ideological right do not oppose legal protections for individuals of minority racial groups, it would be hypocritical of them to oppose such protections for queers that possess a similar, unchangeable characteristic. Alternatively, if an individual's sexuality or gender identity is instead "nurtured" and chosen at some point in life, as is an individual's religious affiliation, it is hypocritical to oppose legal protections for religious persons, who choose their religion as GLBTQ persons theoretically "choose" their sexual preferences. Whether the CWFA, the government or other groups believe sexual orientation and gender identity are the result of "nature" or "nurture," if said groups support current Civil Rights Act protections based on characteristics such as race or religion, those entities should support ENDA protections for the queer community. They can't have it both ways.

Organizations such as the Concerned Women for America claim that passing ENDA legislation will "declare traditional morality regarding sexuality as a form of 'discrimination'" (CWFA, 2008). If "traditional morality regarding sexuality" is to treat others differently and inferiorly because they engage in different sex practices than you do, CWFA is right. However, if "traditional morality regarding sexuality" can be measured in terms of responses to a poll of the American people about their values, CWFA is wrong.

According to a nationwide Gallup Values and Beliefs Poll conducted from May 10-13, 2007, 89% of U.S. citizens believe that gays and lesbians should have workplace discrimination protection (Lazin, 2007). Insofar as the majority of Americans, at least in the Gallup poll, and the in the majority of large corporations nationally (94 percent of Fortune 500 companies as cited previously herein) support equal workplace protections for all employees – straight and queer alike – it would seem the new "traditional morality regarding sexuality" is to support equality for all people regardless of their sexuality.

## CONCLUSION

In the State of Utah and 32 other states, it is legal to discriminate against and even fire an employee for no other reason than their perceived or actual sexual orientation. In the State of Utah and in 36 other states, it is legal to discriminate against and fire an employee for no reason other than their perceived or actual gender identity. In all 50 states, however, it is illegal to discriminate against or fire an employee on the basis of numerous other mutable and immutable, temporary and permanent characteristics, including: race, sex, religion, ethnicity, pregnancy status, disability status and age.

Although employment non-discrimination (ENDA) legislation has been proposed in Congress almost yearly since 1974, it has yet to gain complete passage into law. Some states have passed ENDA legislation that protects individuals based on either or both their sexual orientation and gender identity, but for the reasons explicated herein, legislation at any one level (i.e. state rather than federal or vice versa), as stated herein, will not suffice.

While arguments have been and can be made by individuals and entities both for and against passage of ENDA legislation at any level, under scrutiny, almost all of the main arguments cited by those in opposition to passage of ENDA fail to hold water. Utah should pass ENDA legislation to protect and treat equally all of its workers, straight and queer alike. As shown, passing these protections will likely lead to numerous benefits that far exceed the few potential detriments.

If Utah believes as President William Clinton did that "[i]ndividuals should not be denied a job on the basis of something that has no relationship to their ability to perform their work" (Executive Order 13087, 1998), such as their sexual orientation or gender identity, Utah should pass state-level ENDA-type employment non-discrimination protections for the benefit of all Utahns, straight and queer alike. As detailed herein, Utah lacks a good reason not to.

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