

Sexual Orientation and Gender Identity Discrimination in the American Workplace: Legal and Ethical Considerations

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Abstract

This article examines the legal, ethical, practical ramifications of discrimination in the workplace based on sexual orientation and gender identity. The authors discuss discrimination in the workplace covering 1) federal law, arising from statutes, executive orders, and case law, as well as proposed federal statutory law, 2) state law, and 3) local government law. The article also examines certain contractually based company policies covering discrimination against sexual orientation and gender identity. Questions of morality and ethics are never far removed from debates about expanding the rights of gay, lesbian, bisexual, sexually transitioning, and transgender people. Accordingly, this article provides an ethical analysis of expanding employment protections based on sexual orientation and gender identity. The authors will discuss the practical implications for employers based on the current state of sexual orientation discrimination law; and finally, based on the legal and ethical analysis furnished herein, the authors will make appropriate recommendations to employers. Amending Title VII of the Civil Rights Act to encompass protection against discrimination against gay, lesbian, bisexual, sexually transitioning, and transgender individuals will ensure that all people have equal access to the same employment opportunities, benefits, and protections, as well as fair and unbiased treatment in the employment environment. In order to achieve the goals of fair and equal treatment, as well as to promote diversity, inclusion, and mutual understanding and respect, all employees must have the full protection of civil rights law.

Key Words: *Sexual orientation, sexual preference, gay, lesbian, bisexual, transgender, sexually transitioning, gender identity, sexual identity, gender expression, sexual stereotyping, discrimination, harassment, employment, civil rights, Civil Rights Act, Employment Non-Discrimination Act, Equal Employment Opportunity Commission, EEOC, diversity, ethics, morality.*

INTRODUCTION

This article deals with discrimination based on sexual orientation and gender identity. Accordingly, it is important to provide definitions of these key terms. State civil rights statutes that encompass protections based on sexual orientation and gender identity are a suitable place to look for definitions of these key terms.

Edelman (2011, note 34) relates that pursuant to the Washington state statute “sexual orientation” is defined as meaning “heterosexuality, homosexuality, bisexuality, and gender expression or identity”; pursuant to the Maine statute “sexual orientation” encompasses “a person’s actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression”; pursuant to the Minnesota statute “sexual orientation” is defined as “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness”; and pursuant to the Oregon statute “sexual orientation” is defined as “an individual’s actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s sex at birth.” Edelman (2011, p. 744) notes that in the proposed Missouri Non-Discrimination Act “sexual orientation” is defined as “male or female heterosexuality, homosexuality, or bisexuality” and also as “having a self-image or identity not traditionally associated with one’s gender.”

Clancy (2011) explains that “‘sexual orientation’ reflects an individual’s personal desires or sexual interests, denoting whether a person is attracted to a member of the same sex, different sex, or both sexes” (p. 121). Decker and Reeves (2011, pp. 74-75) define “gender identity” as a person’s psychological identification as male or female. This identification, however, may or may not correspond to the person’s body or to the person’s official designated sex at birth. “Transgenderism,” Reeve and Decker (2011, pp. 74-75) explain, which is also referred to as “transsexuality” is different from homosexuality, which is defined as a sexual attraction to members of one’s own biological sex; and further differentiated from “transvestitism,” also known as “cross-dressing,” which refers to a person dressing in clothes usually worn by people of the opposite biological sex. Relating transgender people to employment, Reeves and Decker (2011) further explain:

Transgender individuals identify emotionally and psychologically with the opposite biological sex and usually live in the gender role opposite the one they were biologically born into or assigned. Transgender individuals do not always use surgery or medication to alter their bodies, but many do seek surgical alteration of their anatomy to conform to their desired biological sex. Before undergoing gender reassignment surgery, transgender individuals are required to undergo a period of counseling and cross-gendered living - a *period that, often by necessity, includes employment*(pp. 74- 75, emphasis added).

The 2010 Census was the first Census to report the number of same-sex-couple households by whether the couples reported themselves as living together as spouses or unmarried partners. According to the 2010 Census, the total number of same-sex-couple households was 901,997, and this number represented a 52% increase in the number of same-sex-couple households since the 2000 Census (O’Connell and Feliz, 2011). Furthermore, a study of 602 same-sex couples in 2010 revealed that 16% of couples who were in a civil union or registered domestic partnership indicated that they selected the “husband/wife” relationship option when completing the Census (O’Connell and Feliz, 2011). The Census data also indicated that the states with the highest average percentages of same-sex-couple households were located in the east and west coasts of the United States (O’Connell and Feliz, 2011). To further illustrate, the *Bergen Record* (Lipman and Sheingold, 2011) reported using 2010 Census data that the number of households in northern New Jersey headed by same-sex partners grew by 30% in the past decade; and furthermore a substantial number of these couples are raising children.

Specifically concerning the employment of lesbian, gay, bisexual, and transgender (LGBT) people, Sung (2011) reported on a 2009 Williams Institute of the UCLA School of Law study which estimated that:

There are over 8.157 million LGBT Americans in the workforce, over 6.948 million of whom work in the private sector while over 1.208 million work for local, state, and federal governments. Over 3.313 million LGBT workers in the private sector and over 520,000 LGBT local, state, and federal government employees work in states that do not protect them against sexual orientation or gender identity discrimination. Moreover, an estimated 4.486 million LGBT workers in the private sector and over 748,000 LGBT local, state, and federal government employees work in states that do not protect them against gender identity discrimination. Overall, an estimated 47 percent of LGBT workers across the nation are not protected from sexual orientation and gender identity discrimination and about 64 percent of LGBT workers across the nation are not protected against gender identity discrimination (p. 491, citations omitted).

Edelman (2011) reports on a national study that found that gay and lesbian couple families are significantly more likely to be poor than are heterosexual married couple families; and consequently Edelman (2011) declares that “the last thing a same-sex family trying to make ends meet needs is for one partner to be fired for her sexual orientation” (p. 755). Specifically regarding transgender people, the National Gay and Lesbian Task Force reported in 2009 the findings of a survey, the National Transgender Discrimination Survey, based on interviews with 6,450 transgender people. The survey indicated that at the time 13% of the respondents were unemployed, 26% lost their jobs due to their gender identity or gender expression, and that 97% of the respondents had experienced mistreatment, harassment, or discrimination on the job (National Gay and Lesbian Taskforce, National Transgender Discrimination Survey, 2011) Accordingly, the important issue emerges as to whether such discrimination or harassment is legally actionable.

FEDERAL LAW

In this legal section, the authors examine federal law rooted in executive orders and, to a much greater extent, federal statutes, case law, and proposed federal statutory law dealing with sexual orientation discrimination. The authors also examine selected state and local government law. The authors, finally, examine contractually-based company policies prohibiting discrimination based on sexual orientation and gender identity. In this federal law section of the article, the authors discuss VII of the Civil Rights Act and the general rule of law governing the area of sexual orientation discrimination in employment. The authors will examine the protections afforded to federal workers under Presidential Executive Orders and the limitations of these orders. The analytical focus will scrutinize federal court decisions which have carved out three exceptions, though limited ones, to the general rule. Next, the authors will examine a proposed federal statute supplying employment protections based on sexual orientation and gender identity; and finally the authors discuss proposals to amend Title VII of the Civil Rights.

1. The Civil Rights Act and the General Rule

Presently, federal civil rights law generally does not prohibit discrimination at the workplace based on sexual orientation, sexual preference, or gender identity. Neither sexual orientation, nor sexual preference, nor gender identity is currently covered by federal anti-discrimination law (Reeves and Decker, 2011). Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers on the basis of race, color, religion, sex, or national origin (Title VII of the Civil Rights Act of 1964). However, Title VII's prohibition against discrimination based on "sex" does not include discrimination based on sexual orientation or preference (Sung, 2011; Reeves and Decker, 2011). Consequently, it is said that “Courts in early Title VII sexual discrimination cases adopted a plain meaning interpretation of ‘sex,’ limiting the term to its strict, biological definition. The plain meaning interpretation of sex was applied to deny Title VII protection to homosexuals, bisexuals, transsexuals, and effeminate men alike” (Sung, 2011, p. 514).

To illustrate, in *DeSantis v. Pacific Telephone & Telegraph Co.* (1979), the United States Court of Appeals for the Ninth Circuit ruled that Title VII applies only to discrimination on the basis of gender, and consequently Title VII should not be extended by the courts to encompass sexual preference, such as homosexuality. The court also pointed out that the employer had discriminated against all homosexual employees, both male and female, and, accordingly, there had been no discrimination based on “sex” pursuant to Title VII (*DeSantis v. Pacific Telephone & Telegraph Co.*, 1979). Furthermore, the Equal Employment Opportunity Commission (EEOC) has determined that Title VII's protections do not extend to discrimination based on sexual orientation or preference (EEOC Decision, 1975, as cited in Reeves and Decker, 2011, note 6).

Furthermore, the federal courts have consistently ruled that transgender individuals are not afforded protection under Title VII of the Civil Rights Act, which does not protect transgender employees when the discrimination is based on the transsexuality of the employee (*Sommers v. Budget Marketing, Inc.*, 1982; *Ulane v. E. Airlines*, 1984). To illustrate, the Seventh Circuit of Appeals has stated that the “prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born” (*Ulane v. E. Airlines*, 1984, p. 1085). The courts, therefore, have taken the plain and traditional meaning of “sex” to deny relief under Title VII to transgender plaintiff employees (*Holloway v. Arthur Andersen & Co.*, 1977). Reeves and Decker (2011) explain that “generally, the physical state of the transgender individual at the time of the alleged discrimination has little influence on a court's decision to deny Title VII discrimination claims. Courts have refused to allow Title VII actions when the transgender individual has yet to undergo sex-reassignment surgery and also after the transgender individual has undergone such surgery” (p. 75).

It is worth noting that certain federal, state and local governments may condition the award of governmental contracts on the basis that the bidder or provider agrees to not discriminate based on the sexual orientation or preference as to its workforce and sub-contractors. This particular issue, which has a profound impact on the private sector, is beyond the scope of this article. These particular mandates, either through legislative or executive enactments, are upheld or declared illegal depending on the nature of the act and the basis of the legal challenges to them (Miller, 2011).

2. Executive Orders and Federal Employment

On May 28, 1998, President Clinton, ushered in federal protection of civil federal employees from workplace discrimination based on their sexual orientation or preference with the issuance of Executive Order 13087. This Executive Order amended the prior Executive Order 11478 which had banned employment discrimination based upon the traditional protected classes of individuals. However, Executive Order 13087's milestone achievement and reach was blunted, thereafter, by President Clinton's issuance of Executive Order 13152. This follow-up Executive Order prevented private standing, and consequently the ability to sue the federal government, by any aggrieved party alleging a violation of Executive Order 13087. One federal postal worker quickly learned that his private action, founded upon Executive Order 13087, against the United States Postal Service, was dispatched by summary judgment in the case of *Centola v. Potter* (2002), recognizing that no private cause of action existed under the forgoing Executive Orders.

The court's rationale rested on the fact that Congress must enable such laws and thereby vest such "standing" to sue in federal workers, while also pointing out that the very language of Executive Order 13152 explicitly prevented such lawsuits. To further undercut the effectiveness of Executive Order 13087, the EEOC has taken the position that it has no authority to investigate federal employees' complaints of workplace discrimination if the complaint is based on this Executive Order 13087 (EEOC Man. Dir. 110 2003). This circumstance leaves federal employees only one avenue of redress, to wit: using their specific agency's internal complaint procedure to resolve allegations of sexual orientation discrimination, which will be investigated by the Office of Special Counsel in accordance with Title 5 of the United States Code, Section 1214 (*Morin v. Kathleen Sebelius*, 2010).

3. The Same-Sex Sexual Harassment Exception

In 1997, in an important civil rights decision, the Eleventh Circuit Court of Appeals, in a case of first impression, *Fredette v. BVP Management Associates* (1997), in a contorted opinion, rationalized that Title VII of the Civil Rights Act did not provide protection to prevent discrimination against homosexual employees, but nonetheless ruled that the sexual harassment of a male employee by a homosexual male supervisor was actionable under Title VII of the Civil Rights Act. Then in 1998, in a seminal civil rights decision, the Supreme Court ruled in *Oncale v. Sundowner Offshore Services, Inc.* (1998) that same-sex sexual harassment is a form of sexual discrimination and thus is a violation of Title VII of the Civil Rights Act. In supporting the rationale of applying Title VII to protect against same-sex sexual harassment, the Court explicitly observed that:

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminate(ion)...because of... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements (*Oncale*, 1998, pp.79-80).

Clancy (2011) emphasizes that the *Oncale* decision "expressly acknowledged that Title VII's discriminatory protections advance beyond Congress' original scope, expanding employee protections as our understanding of discrimination likewise evolves" (p. 124). However, Reeves and Decker (2011) relate:

Since *Oncale*, plaintiffs' claims of same-sex sexual harassment have had mixed success. While several courts have recognized claims for same-sex sexual harassment under Title VII, many courts have dismissed such claims based on a lack of sufficient evidence that the alleged harassment was based on sex, rather than on sexual orientation. These courts have invoked the Supreme Court's analysis in *Oncale* that same-sex sexual harassment can be inferred only where there is evidence of sexual desire, general hostility toward one sex, or noncompliance with gender stereotypes. Plaintiffs have been required to provide evidence that fits squarely into one of those specific situations in order to have a viable claim (p. 67).

For example, in *Spearman v. Ford Motor Company*(2000), an employee sued his employer alleging Title VII sexual harassment violations claims for retaliating against him for filing complaints of sexual harassment; and discriminating against him because of his sex by failing to investigate his sexual harassment complaints as promptly as similar complaints from female employees. The court eviscerated the employee's harassment claim by stating: "In other words, Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation....Therefore, harassment based solely upon a person's sexual preference or orientation (and not one's sex) is not an unlawful employment practice under Title II" (*Spearman*, 2000, p. 1084). This rationale was also embraced by the Tenth Circuit Court of Appeals in the case of *Medina v. Income Support Division, State of New Mexico*(2005), in an apparent "reverse sexual preference discrimination" scenario allegation by a heterosexual female worker. In *Medina*, the worker alleged that she was being harassed by lesbian co-workers, but her claim also failed as it was based upon alleged hostile work environment based upon her sexual orientation, rather than sex (*Medina*, 2005).

Nonetheless, there have been some successful sexual orientation same-sex sexual harassment claims. For example, in *Rene v. MGM Grand Hotel, Inc.*, (2002), the Ninth Circuit Court of Appeals held in a case brought by an openly gay man employee that sexual orientation harassment that relates to sex contravenes Title VII of the Civil Rights Act. The harassment allegations were particularly pervasive in nature in *Rene* as the homosexual male employee alleged that he was repeatedly inappropriately grabbed and poked by male supervisors and co-workers, and that he was purposefully singled out from his other male co-workers for such offensive touching. The Ninth Circuit reasserted this principle by reversing a lower court's summary judgment ruling in *Dawson v. Entek International*(2011), and accordingly finding that a factual issue existed that could support the employee's sexual orientation hostile work environment claim. One court has even gone further and created an apparent legal presumption of sorts; that is, when a gay or lesbian supervisor treats a same-sex subordinate in a way that is sexually charged, the court rules that under these conditions it is reasonable to infer that the harasser acts because of the other's sex for purposes of establishing a claim under Title VII (*Bibby v. Phila Coca Cola Bottling Co.*, 2001).

4. The Gender Stereotyping Sexual Orientation Exception

In the seminal civil rights decision of *Price Waterhouse v. Hopkins* (1989), the Supreme Court ruled that Title VII prohibits discrimination based on gender stereotyping. Then in 2001, in an important civil rights decision stemming from *Price Waterhouse* (1989), the Ninth Circuit Court of Appeals in *Nichols v. Azteca Rest. Enterprises* (2001) ruled that the prohibition in Title VII against gender stereotyping protects effeminate employees because such discrimination "was closely linked to gender" (p. 874). In *Nichols*, the employee was perceived as effeminate; yet Edelman (2011) points out that "it is unclear from the facts whether (the employee) was gay or just perceived as gay by his co-workers. But the case offers at least a slight potential for federal remedy in some circumstances" (p. 747). Next, in 2009, the Third Circuit Court of Appeals in *Prowel v. Wise Business Forums, Inc.* (2009) held that even though an employee was gay, nevertheless the employee was not precluded from bringing a gender stereotyping civil rights lawsuit pursuant to Title VII. Clancy (2011), commenting on *Prowel*, explains: "An employer cannot then discriminate against an employee for behavior it perceives inappropriate for the employee's sex. Therefore, even if an employer believes (correctly or not) that an employee is homosexual, he cannot discriminate against that employee because he believes an individual should engage in sexual activity only with members of the opposite sex" (p. 127).

Recently, in 2010, the Eighth Circuit Court of Appeals, in *Lewis v. Heartland Inns. of America* (2010), also upheld a claim for gender stereotyping. Reeves and Decker (2011, p. 71), however, emphasize that "recognizing that a gender-stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII,' circuit courts have struggled to distinguish between discrimination based on sexual orientation and discrimination based on gender stereotyping." Similarly, Clancy (2011, p. 129) warns that "...courts are suspicious of plaintiffs attempting to camouflage a sexual orientation claim as a gender or race discrimination claim, since members of Congress insist Title VII's protections do not cover sexual orientation discrimination." Nonetheless, Clancy (2011, p. 129) asserts that "discrimination based on sexual orientation is intrinsically intertwined with gender and sex, and separating the topics is impossible."

5. The Gender Stereotyping Transgender and Sexually Transitioning Exception

The gender stereotyping case law also has been used by the courts to extend civil rights protections under Title VII to transgender employees. For example, in *Smith v. City of Salem, Ohio* (2004), the Sixth Circuit Court of Appeals ruled that an employer contravenes Title VII when it discriminates against an employee who is a transgender person because that employee does not fit stereotypical notions of masculinity or femininity associated with biological sexes. In doing so, the *Smith* court explained:

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity (*Smith*, 2004, p. 575).

The Sixth Circuit Court of Appeals reinforced this principle a year later in *Barnes v. City of Cincinnati* (2005), when it affirmed the trial court's holding that a pre-operative male-to-female transsexual law enforcement officer was discriminated against on the basis of sex in violation of Title VII, based on the officer's allegations of adverse treatment for his failure to conform to sex stereotypes relative to how a man should look and behave on the police force.

Similarly, in *Etsitty v. Utah Transit Authority* (2007), the Tenth Circuit Court of Appeals recognized that Title VII protected transgender persons who are discriminated against because they do not conform to gender stereotypes regardless of the employee's status as a transgender person. However, the former employee's claim failed in *Etsitty*, as the court explained that Title VII does not protect "transgender" status alone in interpreting Title VII's language; and also there was insufficient evidence to prove discrimination based upon gender stereotypes. In doing so, the *Etsitty* court explained the current interpretation of Title VII, as applied to transgender individuals, as well as its possible future evolution, by stating:

Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female... Scientific research may someday cause a shift in the plain meaning of the term "sex" so that it extends beyond the two starkly defined categories of male and female (*Etsitty*, 2007, p. 1222).

Also, in the case of *Schroer v. Billington* (2008), the federal district court recognized a gender stereotyping claim for a sexual transitioning employee pursuant to Title VII. The plaintiff employee in *Schroer* applied for a position at the Library of Congress as a specialist in terrorism; she initially presented as male; however, after receiving the offer, she informed her superiors that she planned to transition and present as a female at her new job; and then after which the job offer was withdrawn. The federal district court found that the library had engaged in impermissible sex stereotyping, despite previous cases holding that sexually transitioning or "transsexuality" status not to be protected by Title VII. Accordingly, there is one federal district court that explicitly has used the sex-stereotyping rationale of *Price Waterhouse* to protect employees from discrimination based on gender identity. Edelman (2011) concurs, stating that "thus at least one federal district court has used the sex-stereotyping rationale of *Price Waterhouse* to protect employees from discrimination based on gender identity" (p. 747).

6. Employment Non-Discrimination Act of 2009 – Proposed Federal Law

There currently is in Congress proposed federal legislation that would significantly expand the protections of civil rights laws in the United States. The proposed law is called the Employment Non-Discrimination Act (ENDA). The ENDA closely follows Title VII and would prohibit discrimination nationwide in employment based on sexual orientation, preference, or gender identity (ENDA, 2009). The proposed law was first introduced in the U.S. House of Representatives in 2009 by Representative Barney Frank (Democrat from Massachusetts) with 137 co-sponsors; and the bill was subsequently referred to the Committees on Education and Labor, House Administration, Oversight and Government Reform, and the Judiciary (Reeves and Decker, 2011). Sung (2011, pp. 499-500) relates that "current legislative efforts to ban employment discrimination on the basis of sexual orientation and gender identity enjoy 202 cosponsors in the House, 45 cosponsors in the Senate and President Obama's pledged support."

Hearings have been held and testimony had been taken by the House Committee on Education and Labor as well as the Senate Health, Education, Labor, and Pensions Committee. However, the National Gay and Lesbian Task Force (National Gay and Lesbian Taskforce, The Issues, Employment Non-Discrimination Act, 2011) reported that in December of 2010 work on the ENDA bill was postponed in the House Committee on Education and Labor, which prompted an assertion of “outrage” by the Task Force for the “apparent stall.” As of the writing of this article, Representative Barney Frank (D. Massachusetts) again has reintroduced and furthered the ENDA bill with 148 co-sponsors; and a similar bill with 39 co-sponsors was also introduced in the U.S. Senate in 2011 (Hunt, 2011). However, due to the conservative make-up of the House of Representatives, it is not expected to continue forward to a vote, and consequently it is unlikely that there will be legislative action on the ENDA proposal in the current legislative session (Hunt, 2011). Specifically, the ENDA would make it illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual ... because of such individual's actual or perceived sexual orientation or gender identity” (ENDA, Section 4(a)(1)). Passage of the ENDA, therefore, would be one way to offer nationwide clarity desperately needed by multi-state employers in light of the patchwork of different, and at times conflicting, state and local laws attempting to eliminate workplace discrimination based on sexual orientation.

However, the ENDA has been criticized on several grounds. Certain commentators condemn the proposed law as being “transexclusive,” that is, excluding transgender employees from the protections of the proposed law (Sung, 2011, pp. 505-06). Others criticize the ENDA for prohibiting disparate impact claims; whereas Title VII allows claims instituted pursuant to the disparate impact doctrine (Sung, 2011).

In other words, a claim under ENDA cannot be ‘based on statistical disparities between the number of gay people in a particular workplace and the number of gay people generally.’ ... (T)his concession was written into ENDA for no better reason than to ‘make the bill more palatable to its opponents.’ Moreover, ... the inability of LGBT litigants to bring disparate impact claims under ENDA reinforces the idea that discrimination on the basis of gender identity or sexual orientation is somehow different - and less objectionable - than other forms of discrimination (Sung, 2011, p. 510, citations omitted).

A very interesting and highly contentious issue regarding the ENDA is whether *voluntary* affirmative action programs would be permissible under ENDA. Section 4(g) of ENDA 2009 expressly forbids quotas and preferential treatment for gay, lesbian, and bisexual employees. The concern expressed by certain commentators is that this provision might preclude employers from adopting *voluntary* affirmative action programs. Furthermore, if an employer's voluntary affirmative action program that benefits gays, lesbians, and bisexuals is challenged in court, there is a possibility that it may be struck down as invalid based on the language of the ENDA (Sung, 2011, pp. 511-512). Such a legal “holding would result in a divergence between ENDA and Title VII jurisprudence and further perpetuate the idea that gender identity or sexual orientation discrimination should be treated differently from other forms of discrimination” (Sung, 2011, p. 512). The validity of affirmative action programs, even those granting preferences to women and minority employees, has been upheld by the courts under certain conditions (Cavico and Mujtaba, 2008).

7. Proposals to Amend Title VII of the Civil Rights Act

Certain commentators have proposed amending Title VII's prohibition on sex discrimination to include discrimination based on sexual orientation, sexual preference, and gender identity (Clancy, 2011; Sung, 2011). That is, instead of enacting the ENDA, the United States Congress should amend Title VII's prohibition on discrimination “because of sex” to cover gay, lesbian, bisexual, transgender, and sexually transitioning people (Sung, 2011, pp. 493-94). Clancy (2011) adds that the proposed solution in revising Title VII is “strikingly simple”; that is, simply to amend Title VII to prohibit discrimination on the additional grounds of sexual orientation (p. 134). Clancy (2011) underscores that the “the result would reinforce the existing protections on gender and remove the confusion regarding sexual orientation. No longer will courts be forced to artificially sever a ‘legitimate’ gender-based claim from an ‘illegitimate’ sexual orientation claim” (p. 134). Clancy (2011) also asserts that the proposed ENDA is an “inadequate remedy for Title VII's ills” (p. 135). Clancy (2011) explains that by introducing the ENDA as a separate piece of legislation, “Congress is itself engaging in a symbolic contradiction: Title VII was originally enacted to protect against discrimination against especially vulnerable groups of people and to promote equality in the workplace. Not including ... sexual orientation discrimination in Title VII suggests that while employees should benefit from a discriminatory-free workplace, ... sexual orientation discrimination is distinct from other protected characteristics” (pp. 135-36).

Clancy (2011) furthermore emphasizes that “amending Title VII does not reflect an endorsement of homosexuality, but instead a prohibition against discrimination” (p. 136). Sung (2011) also explains some of the reasons for preferring the Title VII amendment approach to the stand-alone ENDA proposed law:

While the stand-alone approach was probably a more practical solution at the time, an examination of the legislative history of ENDA and the progress LGBT plaintiffs made litigating under Title VII since the 1990s has revealed that this approach is no longer the better solution. Fifteen years' worth of compromises and concessions have weakened the efficacy of ENDA to a point at which it would no longer provide comparable legal protections as an amended Title VII. Enacting such a watered-down bill would only perpetuate the idea that discrimination against LGBT individuals is somehow different from - and less pernicious than - discrimination against people of color or women. Moreover, in the last two decades the LGBT community as a whole has made progress, although in varying degrees and consistency, litigating Title VII sex discrimination claims under the gender-stereotyping theory. Amending Title VII will complement and confirm their progress while enacting a freestanding bill may only go as far as undermining the progress made by transgender people (p. 493, citations omitted).

It is also important to point out that the Civil Rights Act in Title VII does have an exemption for religious employment. In “Application to Religious Employment,” the statute says that the Act does “not apply to religious corporations, associations, educational institutions or societies” with respect to employment of individuals of a particular religion to perform work connected with the carrying out by such corporations, associations, educational institutions, and societies of its activities” (Title VII of the Civil Rights Act of 1964, Section 2000e-1(a)). Mawdsley(2011) points out that in addition to the aforementioned exemption, two other exemptions to Title VII are available to religious institutions and organizations regarding employment determinations: 1) when religion is a *bona fide* occupational qualification for a particular organization; and 2) when the curriculum of a religious institution is directed toward the propagation of a particular religion (Mawdsley, 2011). Consequently, religious organizations could discriminate based on sexual orientation, as they now can on the other protected categories, but only within the confines of the aforementioned exemptions to the Civil Rights Act (Mawdsley, 2011). Mawdsley (2011) also notes that these exemptions which apply to religious institutions “would, presumably, also protect those institutions if Title VII were amended to include sexual orientation” (p. 282). Furthermore, Sung (2011) points out that the religious exemption in the ENDA is broader than the one in Title VII of the Civil Rights Act.

In summary of the federal laws, it should be noted that the Civil Rights Act in Title VII does not offer protection to employees based on their sexual orientation or gender identity. Presidential Executive Order 13087 on its face was a “leap forward” in protecting federal employees from this type of workplace discrimination; however, as noted, it remains mainly ineffective without some private civil remedy to enforce its mandate. Moreover, the general rule of law as developed by the courts does not provide protection from discrimination based on sexual orientation. However, there is an inchoate corpus of federal case law, deemed “exceptions” to the general rule of no liability, which does provide some, though limited, protection in employment for gay, lesbian, bisexual, sexually transitioning, and transgender employees. Commenting on the seminal and “exceptional” Supreme Court decisions in *Price Waterhouse* and *Oncale*, Sung (2011) posits:

Although neither case involved homosexual, bisexual, or transgender plaintiffs, nor can they be said to have held that Title VII covers individuals discriminated against on the basis of their sexual orientations or gender identities, the Court laid down the doctrinal foundation for later courts and plaintiffs to drive Title VII's jurisprudence from a narrow prohibition of discrimination based on one's biological sex toward a broader prohibition on discrimination based on gender nonconformity. And because...effeminate men and masculine women, gay men and lesbian women, and transgender individuals are by definition gender nonconformists, discrimination against or harassment of them because they defy conventional gender expectations is discrimination on the basis of sex (p. 518).

However, Edelman (2011), in examining federal case law, opines that “the legal climate places LGBT victims of discrimination in a precarious position. The line of cases only protects them from employment discrimination, if at all, to the extent they can demonstrate the discrimination did not result from their employer's animus toward their sexual orientation or gender identity” (p. 747). Plainly, in its present formulation, federal statutory and case law fail to fully and adequately protect people based on their sexual orientation or gender identity. Therefore, in order to achieve equal protection and fair treatment, employees must in many cases have to resort to state or local civil rights law.

STATE LAW

In this subsection of the legal section of the article, the authors examine selected state statutory civil rights laws that include protections in employment based on a person's sexual orientation or gender identity. It is beyond the scope of this article, however, to cover in detail the many states that now have included sexual orientation and gender identity as protected characteristics under their state civil rights laws. There has been a progressive increase in the number of state and municipal enactments and executive orders expressly forbidding sexual orientation discrimination (Miller, 2000). Due to the lack of a federal standard prohibiting this type of workplace discrimination, the state and local governments have been tasked with addressing this issue within their own separate jurisdictional boundaries. This situation has resulted in a patchwork of state and municipal laws that practically results in multi-state companies facing conflicting regulations governing their workforces. Reeves and Decker (2011, p. 64) point out that twenty-one states and the District of Columbia prohibit sexual orientation and sexual preference discrimination by statute. As presented in Table 1, states with sexual orientation or sexual preference anti-discrimination statutes include District of Columbia and Hawaii.

Reeves and Decker (2011, pp. 64, 74) also relate that twelve states also prohibit gender identity discrimination in the workplace. Similarly, Sung (2011) points out that "nearly half of the states provide some form of protection for LGBT workers" (p. 499). Edelman (2011) reports that twelve states have non-discrimination statutes that protect people on the basis of both sexual orientation and gender identity; and nine more states provide protection for sexual orientation, but not gender identity (p.750). The National Gay and Lesbian Task Force in the organization's State Nondiscrimination Laws in the U.S. Map (National Gay and Lesbian Task Force, Nondiscrimination Laws Map, 2011), which was last updated in June of 2011, reports that 15 states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity or gender expression. These states are: Minnesota, Rhode Island, New Mexico, California, Illinois, Maine, Hawaii, New Jersey, Washington, Iowa, Oregon, Vermont, Colorado, Connecticut, and Nevada. Six states also ban discrimination based on sexual orientation, to wit: Wisconsin, Massachusetts, New Hampshire, Maryland, New York, and Delaware. However, according to the Gay & Lesbian Alliance Against Defamation (GLADD, 2011), despite the existence of a material corpus of state anti-discrimination law, employees can still be discharged for being gay or lesbian in 29 states, and for being transgender in 35 states.

Table 1 – States that Prohibit Discrimination based on Sexual Orientation

- | | |
|-----|-----------------------|
| 1. | California, |
| 2. | Colorado, |
| 3. | Connecticut, |
| 4. | Delaware, |
| 5. | District of Columbia, |
| 6. | Hawaii, |
| 7. | Illinois, |
| 8. | Iowa, |
| 9. | Maine, |
| 10. | Maryland, |
| 11. | Massachusetts, |
| 12. | Minnesota, |
| 13. | Nevada, |
| 14. | New Hampshire, |
| 15. | New Jersey, |
| 16. | New Mexico, |
| 17. | New York, |
| 18. | Oregon, |
| 19. | Rhode Island, |
| 20. | Vermont, |
| 21. | Washington, and |
| 22. | Wisconsin |

Source: Reeves and Decker (2011, p. 64)

Edelman (2011) reports on a proposed Missouri law, the Missouri Non-Discrimination Act, which expands the coverage of that state's civil rights laws to encompass sexual orientation and gender identity, including protecting people who are perceived to be members of the expanded protected class and are discriminated against because of that perception. This article, as noted, however, cannot elaborate in detail every particular state law, whether actual or proposed; but rather brings to the reader's attention a few specific state law examples. Of course, it would be prudent for all employers to contact local legal representation when hiring employees or agents locally as well as outside their jurisdiction.

One of the earliest forms of protections offered to workers to prevent employment discrimination based on sexual preference or orientation on a state level came from California's judicial branch. The Californian courts spearheaded the development of protections against this type of workplace discrimination long before other states codified anti-discrimination workplace laws. The California Supreme Court articulated the state's public policy to protect those "who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations" (*Gay Law Students Assoc. v. Pacific Tel. & Tel. Co.*, 1979). Eventually the *Gay Law Students Association* court decision was codified into California statutes (*Delaney v. Superior Fast Freight*, 1993), which then evolved into the more advanced protections articulated in the California's Fair Employment and Housing Act (FEHA), which took effect on January 1, 2000. These new amendments to the FEHA significantly expanded the statute's scope by adding sexual orientation to the categories of discrimination prohibited in the workplace.

The FEHA recites the strong public purpose in preventing discrimination based on sexual orientation or preference by pronouncing that such action was necessary for the protection of the Californian's welfare, health and peace "and to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination on account of...sexual orientation" (FEHA Sec. 12920). Further, the FEHA declares that "the opportunity to seek, obtain and hold employment without discrimination because of...sexual orientation is hereby recognized as a civil right" (FEHA, Section 12921(a)). This civil right can be enforced by criminal sanctions by way of the California Department of Justice. This state law enforcement agency has stated on its web page that "The Civil Rights Section works aggressively to protect Californians from discrimination on the basis of ...sexual orientation" (California Civil Rights, 2011). If a worker feels that he or she has been discriminated against under the FEHA, the employee may file a private lawsuit or file a complaint with the Attorney General's Civil Rights Enforcement Section or with the California Department of Fair Employment and Housing (but no later than one year from the date of the violation) (California Civil Rights, 2011).

The state of Connecticut anti-discrimination statute bans not only workplace discrimination based on sexual orientation, but also prohibits discrimination based on the worker's civil union status; and furthermore was recently expanded in October of 2011 to protect "gender identity or expression" (Conn. General Statutes, Section 46a-81c, 2011). This new protected class is defined as:

(21) 'Gender identity or expression' means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose (Conn. General Statutes, Section 46a-81c, 2011).

The Connecticut's Commission on Human Rights and Opportunities is the administrative agency that investigates alleged employment discrimination based on sexual preference; and a complaint must be filed within 180 days of the alleged act discrimination; and the aggrieved employee can also file a civil action, but that filing must occur within two years of the date of the alleged incident (Conn. General Statutes, Section. 46a-102, 2011).

New York has a very expansive state law that bans this type of workplace discrimination. The state statute makes it unlawful for any employer, licensing agency, employment agency, or labor organization to discriminate based on the worker's or the applicant's sexual preference (N.Y. Exec. Law, Article 15, Section 296). The New York Division of Human Rights investigates allegations of employment discrimination but complaints must be filed within one year of the alleged occurrence (New York DHR Website).

Civil actions are an additional avenue for aggrieved workers to seek traditional compensatory damages as well as additional special damages, such as mental suffering and anguish. For example, in the case of *County of Onondaga v. Mayock* (2010), the court awarded \$25,000.00 mental anguish damages, over and above the compensatory damages, to a probation officer on the basis of sexual orientation discrimination by his employer. The scope of aforementioned New York anti-discrimination laws has been expanded to out-of-state residents who are physically employed within the borders of the state of New York as well as expanded to cases of perceived "sexual preferences" (*RohnPadmore, Inc. v. LC Play Inc.* (2010)). In the *RohnPadmore* case, the worker was an employee of a New York clothing manufacturer, but who resided in California and worked primarily from his home in Los Angeles. The court ruled that since he returned to the company's New York offices three times, the jurisdictional limitations of the New York State Human Rights and the New York City Human Rights laws were satisfied. In the *RohnPadmore* case, the allegedly discriminatory decision to terminate the employee on the basis of a perceived "sexual preference" was actionable based on, in part, a desire not to have the company associated with homosexuals. Additionally, one New York court ruled that an employer unlawfully discriminated against an employee under New York state law for refusing to recognize the employee's valid Canadian same-sex marriage (*Martinez v. County of Monroe* (2008)).

As a summary, it can be said that while there are many states that do protect against discrimination based on sexual orientation and/or gender identity, obviously not all states do; and those states that have such protection are not uniform as to who is protected. As such, there are tremendous variations of administrative complaint and pre-suit procedures to follow, which vary from state to state. Further, the applicable Statutes of Limitations for both civil and administrative actions are different from state to state. Finally, the employer's liability may include various civil sanctions that can result in different degrees of fines, penalties, adverse license actions, and monetary damages that range from compensatory to mental anguish awards. Such a wide spectrum of state protections, procedures, and remedies seems to be increasingly expanding, and thus further dividing up, jurisdictions with every yearly legal "twist of the Kaleidoscope." However, if there are no state protections, victims of employment discrimination based on their sexual orientation or gender identity may have to resort to local law in the form of county or municipal ordinances.

LOCAL LAW

This subsection of the legal analysis examines legal protections in employment afforded to people based on their sexual orientation or gender identity that have been promulgated by local government, that is, counties and municipalities. Of course, the authors again are selective as to the local government entities examined, as a "micro" analysis detailing every variation and nuance of these local ordinances would daze even the most ardent legal analyst. Attempting to even provide a basic map of these ordinances, moreover, would result in a twisted, incomplete, and ever-changing network of "roadways" and "off-ramps" leaving the reader wandering, as well as wondering, where to even stop to ask for directions; so a general overview of this area of law with some pertinent illustrations is the best route to take for this type of article. Reeves and Decker (2011, pp. 64, 74) point out that at least 181 cities and counties, as well as the District of Columbia, prohibit sexual orientation or sexual preference discrimination by statute, code, or ordinance. Business managers should be cautioned that just because a state, like Florida, does not have a state law preventing workplace discrimination based on sexual orientation or preference, there still may very well be county and municipal protections afforded to employees within certain jurisdictional boundaries within that state. For example, in Florida, there are multiple county and city ordinances scattered throughout the state. As explained by a Florida legal practitioner, a survey of Florida's legal "local" ordinance "landscape" reveals:

Alachua, Broward, Hillsboro, Leon, Miami Dade, Monroe, Orange, Palm Beach, and Volusia Counties all outlaw sexual orientation discrimination among all municipalities and at private employers within their jurisdictions. Broward, Leon, and Monroe Counties also have ordinances forbidding local governments and private employers from engaging in gender identity discrimination. The cities of Dunedin, Gainesville, Gulfport, Key West, Lake Worth, Miami Beach, Oakland Park, Tampa, West Palm Beach, and Wilton Manors each have ordinances prohibiting gender identity discrimination and sexual orientation bias. Of the ordinances, some regulate only those workplaces having more than a certain minimum number of employees. Not all of these jurisdictions permit workers to file private lawsuits against employers committing the types of discrimination outlawed within these cities and counties. In those locales where individuals can file lawsuits, only the local governments can initiate legal proceedings against employers alleged to have violated antidiscrimination ordinances (Sploter Law, 2011).

Thus, cities within counties may overlap in their coverage of protection, or a city may afford protection to workers, when none exist inside a county. This scenario makes it especially challenging for an employer to try to understand the status of this area of employment law in the State of Florida and other similarly situated states. States that prevent this type of employment discrimination also harbor municipalities within their borders that may “clone” such protections or further them, as is the case in New York City. The technical interplay between the state of New York’s Human Rights Law (NYSHRL) protections and the city of New York’s Human Rights Law (NYCHRL) protections can result in different legal evaluations, as explained in *RohnPadmore*, when the court stated that “*NYCHRL is to be more liberally construed than the NYSHRL.*” Moreover, Title 8 of the New York City Human Rights Law ordinance provides specific details regarding unlawful discrimination practices (see Table 2).

An employer’s conforming to the New York State’s provision’s regarding preventing workplace discrimination based on sexual preference does not necessarily preclude a finding of liability pursuant to the City of New York’s municipal code provision, which is more liberally interpreted to protect against this type of employment discrimination! These state and local ordinances can even create overlapping administrative agencies and investigative bodies that parallel each other in powers and responsibilities, as is the case of the State of New York’s Division of Human Rights and New York City’s Commission on Human Rights. Some local city ordinances, in addition, attempt to reach beyond the scope of their own borders, in a “noble effort” to eliminate this particular type of employment discrimination elsewhere. For example, the city of San Francisco extended the reach of its “sexual preference” employment protections by amending its anti-discrimination code provision in 1997 to read:

No contracting agency of the City, or any department thereof, acting for or on behalf of the City and County, shall execute or amend any contract or property contract with any contractor that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits as well as any [other] benefits ... between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration (City of San Francisco Municipal Code, 1997).

Table 2 - Unlawful Discriminatory Practices from New York City

8-107 Unlawful discriminatory practices.

1. Employment. It shall be an unlawful discriminatory practice:

- (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.
- (b) For an employment agency or an employee or agent thereof to discriminate against any person because of such person’s actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants for its services to an employer or employers.
- (c) For a labor organization or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to exclude or to expel from its membership such person or to discriminate in any way against any of its members or against any employer or any person employed by an employer.
- (d) For any employer, labor organization or employment agency or an employee or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status, or any intent to make any such limitation, specification or discrimination.

Source: New York City Human Rights Law, Title 8, Section 107.

However, such a progressive “leap forward” in furthering the public purpose of ending employment discrimination based on sexual orientation was partially rebuked by the federal court in a case pitting the airline travel/trade industry against the municipality, based on the allegation that this code provision violated the Commerce Clause of the U.S. Constitution (*Air Transport Ass’n of America v. City and County of San Francisco*, 2001). This case produced a ruling that certain provisions of the local ordinance violated the Commerce Clause since this Constitutional provision, as interpreted by the Supreme Court, forbids a state or local government from imposing any undue burden on the free flow interstate commerce (Cavico and Mujtaba, 2008), though other provisions and applications of the municipal code were not struck down and were left operable by the court.

It is evident that this virtual maze of county and municipal code provisions is a response to the lack of effective protections against this type of workplace discrimination on a federal and state level. The fact that multiple states have enacted protective employment regulations, together with the presence of a hodgepodge of confusing federal case precedents, topped-off with a neutered federal executive order, quickly forces one to the realization that the legal system is caught in a wake of progressive social changes and public opinion promoting equality in employment practices to protect gay, lesbian, and transgendered workers. The unintended consequences of, and the confusion resulting from, the differing federal, state, and municipal laws relative to workplace protections against “sexual preference” discrimination are obvious. Reflecting upon the foregoing situation, the only legally sound advice would be for a company to adopt an absolute, uniform, consistent code of conduct for all its employees to prevent discrimination and harassment of workers based on sexual preference, sexual orientation, or gender identity.

Company Policies and Codes of Conduct

Today, many private employers have adopted policies prohibiting discrimination in the workplace based on sexual orientation. Reeves and Decker (2011, p. 64) note that “these protections have expanded rapidly in the past decade. These policies typically are contractually based and form part of the employee’s contract with his or her employer. In 2000, fifty-one percent of the Fortune 500 companies had such policies, and by 2008 that number had jumped to eighty-five percent, including ninety-seven percent of the “Fortune 100.” Reeves and Decker (2011, p. 74) also report that 176 of the Fortune 500 businesses have gender-identity protections, including 61 of the Fortune 100. Sung (2011) points out that “over three hundred top American corporations, collectively employing over nine million full-time employees, have aided the struggle for job equality for LGBT workers by providing comprehensive employment protections for LGBT employees” (p. 499). The Gay & Lesbian Alliance Against Defamation (GLADD, 2011) similarly reports that when the Human Rights Campaign’s Corporate Equality Index was commenced in 2002, merely 13 companies in the U.S. received the top rating of 100%; whereas in 2011, 337 companies, employing more than 8.3 million employees, received the highest grade. Clancy (2011) thus concludes that “even major companies are recognizing the need to stem sexual orientation discrimination, enacting anti-discrimination policies that cover sexual orientation” (p. 139). Clancy (2011) deems this private sector effort to be a worthwhile, commendable, “bottom-up approach,” but also one that “should send a signal to Congress that expanding Title VII to protect sexual orientation is not only beneficial at the local level, but not as controversial as it may appear on its face” (p. 139).

To illustrate the aforementioned “bottom-up approach,” the Gay & Lesbian Alliance Against Defamation (GLADD, 2011) highlights two “forward-looking” companies regarding gay, lesbian, bisexual, sexually transitioning, and transgender employees. At Hilton Worldwide, the company mandates a non-discriminatory policy based on sexual orientation and gender identity and also offers domestic partner benefits. Moreover, in 2011, Hilton commenced a LGBT Team Member Resource Group in order to complement its current diversity and inclusion policies and training; and the company recruited at the 2011 Reaching Out MBA LGBT Conference in Dallas, Texas in order to build a network of contacts for future employment with the company. Furthermore, Hilton is partnering with the gay, lesbian, bisexual, sexually transitioning, and transgender community to identify investors for franchise opportunities (GLADD, 2011). The Gay & Lesbian Alliance Against Defamation (GLADD, 2011) also underscores that Allstate received a “perfect score” on the Human Rights Campaign’s Corporate Equality Index the last four years, and that the company was also the recipient in 2011 of GLADD’s Corporate Responsibility Award, which honor is awarded to a company for its “sustained and creative corporate commitment to the LGBT community” (GLADD, 2011, p. S3). To illustrate, in 2011, Allstate updated its Family Medical and Leave Act policy to encompass domestic partners and civil unions.

The company already had promulgated a non-discrimination policy that included not only sexual orientation and gender identity but also “gender expression language.” The company’s yearly inclusive diversity survey now includes lesbian, gay, bisexual, and transgender demographic questions; and Allstate’s diversity training, required of all employees, includes a sexual orientation and gender identity component (GLADD, 2011, p. S3).

International and Comparative Law

Yecies (2011, pp. 790-91) indicates that in the United Nations there is a debate about whether Article 2 of the Universal Declaration of Human Rights, which provides protection against discrimination on the basis of race, color, sex, national origin, or "other status" protects against discrimination on the basis of sexual orientation. The Universal Declaration of Human Rights (UDHR) encourages all United Nations member states to protect certain rights, in particular, rights that human beings naturally possess and that are fundamental to living a dignified human life. Yecies (2011) reports that recent international developments raise the question of whether protection against discrimination based on sexual orientation is included in the Universal Declaration; and, in particular, whether Article 2 protects against discrimination on the basis of sexual orientation. Yecies (2011) notes that in December of 2008 a representative of Argentina, on behalf of a number of other countries, presented a Declaration on Sexual Orientation and Gender Identity to the United Nations.

The Declaration stated that, consistent with Article 29 of the Universal Declaration, rights must be applied equally to all human beings, regardless of their sexual orientation or gender identity. However, Yecies (2011) points out that Article 2 must be read in the context of Article 29, which states: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society” (p. 793). As such, Yecies (2011, pp. 793-94) explains: “The most popular argument for including sexual orientation under Article 2 is that sexual orientation is a protected ‘other status.’ This is a broad reading of Article 2, however, and Article 29 explains that the UDHR is not unboundedly protective. In particular, rights and freedoms may be restricted for the purpose of securing the rights of others, or for ensuring morality, public order, and general welfare.” Yet, as of the writing of this article there has been no action by the United Nations to extend the protections of the Universal Declaration to people based on their sexual orientation.

Because of the problems in bringing a sexual orientation or preference lawsuit pursuant to federal law, Reeves and Decker (2011, p. 64) advise that “employee advocates who are considering GLBT-related claims that may be subject to such state, local, or company-provided protections should seriously consider whether to bring a federal claim of sexual harassment or gender stereotyping.” Yet without uniform and specific federal statutory law, gay, lesbian, bisexual, sexually transitioning, and transgender people will continue to be vulnerable to discrimination and unfair treatment in the employment arena. Similarly, Sung (2011) criticizes what he deems to be a “patchwork” of laws: “The existing patchwork of local and private protections, however, is far from adequate. A statute that covers employment discrimination on a federal level is necessary to regulate the two largest groups of employers in the nation: small businesses and state governments” (p. 499). Yet sexual orientation and sexual preference are also morally “charged” issues, which brings the topic of the morality of discrimination based on sexual orientation and preference into the realm of ethics.

ETHICAL ANALYSIS

Ethics is the branch of philosophy that is used to make moral conclusions as to “good” or “bad,” “right or wrong,” and “moral or immoral.” It is important to underscore that there is a difference between morality and ethics, to wit: Morality is the conclusion as to what is right or wrong; whereas ethics is the thought-system, consisting of ethical theories and principles, which one uses to make moral determinations. The problem in ethics is that there is more than one ethical theory, there are conflicting ethical theories, and there is no Supreme Court of Ethics, to inform one which ethical theory or which moral conclusion is the “right” one. As emphasized by Ball (2011, p. 93), “there is no consistent or objective way to establish which moral positions are ‘correct’ and which are not.” Nonetheless, the authors in this section of the article will apply three major ethical theories – Ethical Egoism, Utilitarianism, and Kantian Ethics – to determine the moral parameters of expanding civil rights protections to encompass sexual orientation and gender identity.

Ethical Egoism

The ethical theory of Ethical Egoism also harkens back to ancient Greece and the Sophists and their teachings of relativism and promotion of self-interest. This ethical theory maintains that a person ought to promote his or her self-interest and the greatest balance of good for himself or herself. Since this theory is an ethical theory, one has a moral obligation to promote one's self-interest; and so "selfishly" acting is also morally acting; and concomitantly an action against one's self-interest is an immoral action; and an action that advances one's self-interest is a moral action. An ethically egoistic person, therefore, will shrewdly discern the "pros" and "cons" of an action, and then perform the action that performs the most personal good, which also is the moral course of action. However, the Ethical Egoists counsel, one should be an "enlightened" ethical egoist; that is, one should think of what will inure to one's benefit in the long-run, and accordingly be ready to sacrifice some short-term pain or expense to attain a greater long-term good – for oneself, of course.

Also, the prudent ethical egoist would say that as a general rule it is better, even if one has a lot of power as well as a big ego, to treat people well, to make them part of "your team," and to "co-op" them. Why should one treat people well? Certainly not because one is beneficent, but rather because one is "selfish." That is, one is treating people well because typically it will advance one's own self-interest in the long-term to do so (Cavico and Mujtaba, 2009). Accordingly, for the ethical egoistic employer, establishing a work environment at the company or organization where all people can work without fear of discrimination based on their sexual orientation and other characteristics will lead to a more content, motivated, energized, and thus productive workforce. Enhancing the business "bottom-line" is thus a very good, prudent, and ethically egoistic reason for the employer to ensure that gay, lesbian, bisexual, sexually transitioning, and transgender employees are treated in a non-discriminatory, equal, and fair manner.

Utilitarianism

Utilitarianism is a major ethical theory in Western civilization; it was created principally by the English philosophers and social reformers Jeremy Bentham and John Stewart Mill. Their goal was to develop an ethical theory that not only was "scientific" but also would maximize human happiness and pleasure (in the sense of satisfaction). Utilitarianism is regarded as a consequentialist ethical theory; that is, one determines morality by examining the consequences of an action; the form of the action is irrelevant; rather, the consequences produced by the action are paramount in determining its morality. If an action produces more good than bad consequences, it is a moral action; and if an action produces more bad than good consequences it is an immoral action. Of course, ethical egoism is also a consequentialist ethical theory. The critical difference is that the Utilitarians demand that one consider the consequences of an action not just on oneself, but also on other people and groups who are affected directly and indirectly by the action. The scope of analysis, plainly, is much broader, and less "selfish," pursuant to a Utilitarian ethical analysis. In business ethics texts and classes, the term "stakeholders" is frequently used to indicate the various groups that would be affected by a business decision. Furthermore, the Utilitarians specifically and explicitly stated that society as a whole must be considered in this evaluation of the good and/or bad consequences produced by an action. The idea is to get away from a "me, me, me" mind-set and consider other people and groups affected by an action. Utilitarianism is a very egalitarian ethical theory since everyone's pleasure and/or pain gets registered and counted in this "scientific" effort to determine morality.

Yet, there are several problems with the doctrine. First, one has to try to predict the consequences of putting an action into effect, which can be very difficult if one is looking for longer-term effects. However, the Utilitarians would say to use one's "common storehouse of knowledge," one's intelligence, and "let history be your guide" in making these predictions. Do not guess or speculate, but go with the probable or reasonably foreseeable consequences of an action. Also, if one is affected by an action, one naturally gets counted too, but if that same one person is doing the Utilitarian analysis, there is always the all-too-human tendency to "cook the books" to benefit oneself. The Utilitarians would say that one should try to be impartial and objective in any analysis. Next, one now has to measure and weigh the good versus the bad consequences to ascertain what prevails and thus what the ultimate moral conclusion will be. The Utilitarians have said that not only was this ethical theory "scientific," but it was also mathematical ("good old-fashioned English bookkeeping," they called it). But how does one do the math? How does one measure and weigh the good and the bad consequences? And for that matter how does one measure different types of goods? The Utilitarians, alas, provided very little guidance.

Nonetheless, regardless of such ethical “challenges” if a determination is made that the good consequences outweigh the bad, then the action is moral; and if the bad outweighs the good, the action is immoral. Such is the nature of Utilitarianism (Cavico and Mujtaba, 2009). Pursuant to the Utilitarian ethical theory, one must look at the stakeholders affected by an action. In this case, one must ascertain, measure, and weigh the consequences of extending employment protections to the gay, lesbian, bisexual, sexually transitioning, and transgender employees. The employees, of course, benefit by the enhanced employment opportunities as well as continuing employment in an environment free from discrimination and harassment based on their sexual orientation and gender identity. The benefits come in the form of money, status, prestige, fulfillment, and job security. The spouses, partners, and families of the employees benefit indirectly too. Employers also benefit by creating and maintaining an environment at the workplace that respects diversity, is inclusive, and is free from discrimination and harassment. Such a beneficial work environment surely will help the employer attract excellent employees, keep them, motivate them, and inspire their loyalty.

Conversely, not only the employer but also society is harmed since discriminatory barriers to employment means the loss to the employer of such employees but also the loss to society of knowledgeable and skilled people producing goods and providing services and enhancing the economy and improving society. Society is also harmed since the preclusion of job opportunities due to discrimination as well as the loss of employment due to discrimination engenders economic insecurity and even severe economic devastation, thereby creating economic burdens for other people in society to shoulder. Plainly, the gay, lesbian, bisexual, sexually transitioning, and transgender employees are harmed, as well as their spouses, partners, and families, when employment opportunities are foreclosed or terminated due to sexual orientation and gender identity discrimination or harassment. There is, however, some concern on the part of employers and the legal community that including sexual orientation as a protected category would open up the “floodgates of litigation”; but Clancy (2011) replies that such a fear is “manifestly without merit,” based on the history of Title VII sex discrimination law, as well as the courts’ capabilities of determining and permitting only meritorious complaints of discrimination (pp. 138-39). Clancy (2011) also points out that “currently over twenty states already prohibit discrimination based on sexual orientation. None of these states have transformed the workplace into a hypersensitive, overregulated forum nor opened the floodgates to litigation” (p. 139).

Nevertheless, plainly, there is one segment in society that might vociferously object to expanding the civil rights of members of the “gay community” – certain religious people, groups, and institutions, such as Fundamentalist Christians. They may feel that expanding civil rights based on sexual orientation and gender identity infringes on their religious freedom. However, Clancy (2011) points out that “amending Title VII is not analogous to gay marriage or other positive rights, because the proposed amendment is primarily a negative right; it restricts discrimination. Amending Title VII does not reflect an endorsement of homosexuality, but instead a prohibition against discrimination” (p. 136). It also must be emphasized that in the Civil Rights Act, as noted herein, there is an exemption for religious institutions. As such, no church or religious educational institution under an amended and expanded Civil Rights Act would be compelled to hire an employee connected with the religious activities and mission of that religious organization who is gay or lesbian.

In examining the state statutes that furnish protection based on sexual orientation and/or gender identity, Edelman (2011), commenting on Missouri’s proposed Non-Discrimination Act, emphasizes that “the prediction the religious liberties that Americans have enjoyed for centuries will somehow be jeopardized has not been borne out in other jurisdictions that have passed similar laws” (p. 752). Social conservatives also may object to expanded legal protections based on the grounds of their perceived immorality. Yet, the religious and social conservative objections to expanded civil rights protection for the “gay community” seems to be directed more at the very controversial Gay Marriage laws and legal proposals as opposed to providing protections against discrimination in employment. Moreover, other conservatives may applaud any expansion of rights, freedom, and liberty. Overall, therefore, there appears to be more “good” achieved than “bad” by expanding civil rights protections in employment to gay, lesbian, bisexual, sexually transitioning, and transgender employees; and thus to do so would be a moral action pursuant to the Utilitarian ethical theory.

Kantian Ethics

The German professor and philosopher Immanuel Kant condemned Utilitarianism as an immoral ethical theory. How is it logically possible, said Kant, to have an ethical theory that can morally legitimize pain, suffering, exploitation, and injustice?

Disregard consequences, declared Kant, and instead focus on the form of an action in determining its morality. Now, of course, since Kantian ethics is also one of the major ethical theories in Western civilization, a huge problem arises since these two major ethical theories are diametrically opposed. Is one a Kantian or is one a Utilitarian? Or is it all relative as the Sophists and Machiavelli stated? For Kant, the key to morality is applying a formal test to the action itself. This formal test he called the Categorical Imperative. "Categorical" meaning that this ethical principle is the supreme and absolute and true test to morality; and "imperative" meaning that at times one must command oneself to be moral and do the right thing, even and especially when one's self-interest may be contravened by acting "rightly." The Categorical Imperative has several ways to determine morality. One principal is called the Kingdom of Ends test. Pursuant to this Kantian precept, if an action, even if it produces a greater good, such as an exploitive but profitable overseas "sweatshop," is nonetheless disrespectful and demeaning and treats people as mere means, things, or as instruments, then the action is not moral.

The goal, said Kant, is for everyone to live in this "Kingdom of the Ends" where everyone is treated as a worthwhile human being with dignity and respect. Related to the Kingdom of Ends precept and also part of the Categorical Imperative is the Agent-Receiver test, which asks a person to consider the rightfulness of an action by considering whether the action would be acceptable to the person if he or she did not know whether the person would be the agent, that is, the giver, of the action, or the receiver. If one did not know one's role, and one would not be willing to have the action done to him or her, then the action is immoral. Finally, another formulation of the Categorical Imperative is called the Universal Law precept. Kant is not talking about legal law here, but rather asks if an action, such as bribery or discrimination, would be efficacious if everyone did it. If not, and if the action becomes meaningless if everyone did it, such as where everyone bribed or everyone discriminated against everyone else, then the action self-destructs. It is thus immoral. Do your duty, said Kant, and obey the moral "law," based on his Categorical Imperative (Cavico and Mujtaba, 2009).

In the work environment, treating a person with dignity and respect entails judging people based on their knowledge, ability, and job performance, and not by their sexual orientation or gender identity. Accordingly, for people to remain unemployed or to be discharged because of their sexual orientation or gender identity is demeaning and disrespectful, and consequently immoral pursuant to Kantian ethics. Assuring that all people are treated in a fair and impartial manner, as well as expanding their rights, freedom, and liberty, means treating people with dignity and respect, as well as treating them in a manner that any rational person would want to be treated; accordingly, expanding legal protections in employment to encompass sexual orientation would be moral pursuant to Kantian ethics. Ethical analysis indicates that providing employment protections against discrimination and harassment for gay, lesbian, bisexual, sexually transitioning, and transgender employees is a critical component to a dignified, economically secure, and productive life, and therefore is the right, moral, and smart thing to do – for the "gay community," for employers, and for society as a whole.

IMPLICATIONS FOR MANAGEMENT

Based on the preceding legal and ethical analysis, the authors strongly urge employers to follow a broad policy of diversity, inclusion, and non-discrimination. Although sexual orientation and gender identity are not protected presently by Title VII of the Civil Rights Act there is the proposed ENDA statute as well as proposals to amend the Civil Rights Act. Moreover, although there is a general rule of no liability for sexual orientation discrimination as interpreted by the courts, there are the "exceptions" discussed by the authors herein which, though narrow and limited, do provide some basis for an expanded judicial interpretation of civil rights laws to protect people in employment based on their sexual orientation and gender identity. There is also, as noted, a large body of state and local civil rights laws that protect gay, lesbian, bisexual, sexually transitioning, and transgender people regarding their employment. The ethical analysis herein supports the proposition that civil rights law should encompass protections based on sexual orientation, sexual preference, and gender identity.

As such, the authors strongly recommend that employers should interview, select, hire, train, and promote employees solely on the basis of their knowledge, skills, abilities, and experience. Concomitantly, employees must be rewarded only for their work-related performance; and disciplined solely for their work-related conduct. It is essential for the employer to have in its Code of Conduct or Code of Ethics a clear, firm, strong, and broad policy against discrimination and harassment. The policy must state that every employee is entitled to, and thus must have, a work environment that is free from discrimination, hostility, or harassment of any kind.

Furthermore, the policy must state that all employment decisions, such as interviewing, selecting, hiring, promoting, training, rewarding, disciplining, or sanctioning, will be made exclusively on the basis of the employee's knowledge, skills, abilities, experience, performance, or conduct. The policy must state that discrimination and harassment of any kind, including based on sexual orientation or gender identity or gender expression, is explicitly forbidden and also that such discrimination or harassment will be subject to appropriate disciplinary action. Specifically, the anti-discrimination policy should state that sexual orientation discrimination or harassment is misconduct directed at persons who are gay, lesbian, bisexual, sexually transitioning, or transgender, who are perceived as such, or persons who associate with persons who are gay, lesbian, bisexual, sexually transitioning, or transgender. The policy also should state that a hostile work environment can be created by ridicule, abuse, insults, or derogatory comments that are directly or indirectly related to a person's sexual orientation, sexual preference, gender identity, or gender expression. The policy, moreover, must state that employees have a duty to come forward and to report to management any conduct that they view as discrimination, harassment, or tending to create a hostile, abusive, or offensive work environment.

The employer, of course, must provide channels for such reporting, maintain confidentiality, and investigate all reports in a prompt, fair, and impartial manner. The employer also must clearly and strongly state that any attempts at reprisals for employees reporting alleged misconduct will not be tolerated and will be severely punished. Employment non-discrimination policies, therefore, should cover both sexual orientation and gender identity; and such policies of course must cover more than application and discharge, but also should protect employees regarding promotions and transfers, as well as all the terms and conditions of employment. Furthermore, including gay, lesbian, bisexual, sexually transitioning, and transgender employees in a company's or organization's overall diversity policy, program, and strategy makes very good sense – legally, morally, and practically. The goal, therefore, should be for a company or organization to make equality of treatment, dignity and respect, inclusive diversity, toleration and mutual understanding core values of the organization.

CONCLUSION

Gay, lesbian, bisexual, transgender, and sexually transitioning employees cannot proceed under federal civil rights law directly, yet may be able to succeed legally on claims related to sexual orientation or gender identity either by utilizing their state or local laws, if applicable, or by positioning their claims to comply with the discrete requirements of judicially cognizable same-sex sexual harassment or gender stereotyping lawsuits under federal law. Furthermore, these employees may be able to pursue relief based on their companies' and organizations' codes of conduct and codes of ethics, assuming these protections are deemed to be contractually based. There is also the possibility, though remote, of the ENDA being enacted or Title VII being amended. However, due to the uncertainty and ambiguity created by all of these factors, as well as the difficulty for gay, lesbian, bisexual, transgender, and sexually transitioning employees to navigate the confusing patchwork of federal, state, local, and private protections, a simple and straightforward, as well as moral and ethical, federal solution is necessary. Dignity and equality of treatment for all people must be attained. Accordingly, the authors of this article recommend that the U.S. Congress should enact legislation to amend Title VII of the Civil Rights Act in order to encompass the protection of employees based on their sexual orientation, sexual preference, or gender identity. Amending the Civil Rights Act to encompass such protections underscores the very tradition of the equal protection under the law and equality of opportunity that are fundamental to the legal, political, and ethical history of the United States as well as modern business practice. The proposed legislation, therefore, should be passed, and business should enthusiastically support its passage. Such a resolution is the "smart thing to do" as well as the "right thing to do"!

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