Sexual Orientation Discrimination in Employment: Legislation and Issues in the 103d Congress

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SUMMARY

The proposed Employment Non-Discrimination Act of 1994, which would prohibit discrimination in public and private employment on the basis of sexual orientation, was introduced in the Senate and House on June 23, 1994. Religious organizations, religious schools, the armed services, and firms with fewer than 15 employees would be exempt from coverage. Preferential treatment or quotas on the basis of sexual orientation would be specifically prohibited. Controversy exists over the extent of sexual orientation discrimination in employment, whether remedial legislation is called for, and the constitutional, moral, social, and medical issues surrounding homosexuality.

BACKGROUND

A bill to prohibit discrimination on the basis of sexual orientation at the Federal level was first introduced by Representative Bella Abzug, with four original co-sponsors, in the 94th Congress in 1975. That bill, H.R. 166, would have amended the Civil Rights Act of 1964 and the Fair Housing Act of 1968 to prohibit discrimination on the basis of "affectional or sexual preference" in the areas of employment, housing, public accommodations and facilities, public education, and federally assisted programs. Similar bills have been introduced in the House in each succeeding Congress, and in the Senate beginning with S. 1432 in the 99th Congress in 1985. (Bills to prohibit discrimination on the basis of sexual orientation in employment only were introduced in the Senate in the 96th through 98th Congresses.) Except for hearings held in 1980 and 1982, the bills have not seen action in any Congress.

The current Congress, however, marks a departure from this historical pattern. Although the traditional bill covering employment, housing, and other forms of discrimination was introduced in the House early in the first session of the 103d Congress (H.R. 423/Towns), it was not introduced in the Senate. Instead, congressional supporters of gay rights legislation, in concert with the coalition of civil rights groups that backs such legislation in Congress, decided to drop the more broadly based approach introduced in earlier Congresses in favor of the recently introduced legislation that would affect only the area of employment.
THE EMPLOYMENT NON-DISCRIMINATION ACT OF 1994

In the House, H.R. 4636 was introduced by Representative Gerry Studds with 108 co-sponsors and was referred to the Committee on Education and Labor. In the Senate, S. 2238 was introduced by Senator Edward Kennedy with 29 co-sponsors and was referred to the Committee on Labor and Human Resources. Hearings on the bills are expected to be held, first in the Senate and then in the House. Identical except for the "Findings and Purposes" section included in the Senate version, the bills contain the same provisions.

The proposed act would require that both public and private employers, "in connection with employment or employment opportunities, shall not—(1) subject an individual to different standards or treatment on the basis of sexual orientation; (2) discriminate against an individual based on the sexual orientation of persons with whom such individual is believed to associate or to have associated; or (3) otherwise discriminate against an individual on the basis of sexual orientation." The term "employment or employment opportunities" is defined in the bills to include job application procedures, hiring, advancement, discharge, compensation, job training, or any other term, condition, or privilege of employment. Employment agencies, joint labor-management committees, Senate and House employers, and congressional agencies would also be covered. As is the case with the Civil Rights Act of 1964, employers with less than 15 employees and labor unions with less than 15 members would be excluded from coverage. The act would take effect 60 days after its enactment, and it would not apply to conduct that occurred before the effective date.

The act would not apply to the U.S. Armed Forces, nor to religious organizations. The religious exemption would include colleges, schools, or universities that are run by religious organizations or that promote a particular religion. A religious organization's for-profit activities that are subject to taxation, however, would be covered. The bills as introduced specifically prohibit employment quotas and preferential treatment based on sexual orientation. Also prohibited is the use of statistical evidence to support a finding of discrimination on the basis of sexual orientation, as can be done in cases involving race or sex, as well as the use of numerical ratios, targets, or other affirmative action quotas as remedies for alleged discrimination on the basis of sexual orientation. The act would specifically not require the provision of employee benefits to an unmarried domestic partner. Finally, the act would not affect marriage, adoption, or child custody laws, all of which are determined by the individual States.

The proposed act's enforcement powers are patterned after those of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e et seq.). The act would be enforced by the Equal Employment Opportunities Commission (EEOC), which would be authorized to issue implementing regulations. In enforcing equal employment opportunity in the private sector under Title VII, the EEOC is mandated to receive complaints of discrimination and to issue charges of patterns or practices of discrimination without receipt of a complaint. It investigates complaints and, if it finds reason to believe that a charge is true,
seeks to eliminate such discrimination through conciliation. If conciliation fails, the EEOC may file a civil action in a Federal district court. The EEOC is required to follow the same enforcement procedures in resolving complaints against State and local governments, except that the Justice Department must institute any court actions against such respondents. With respect to Federal employment, the EEOC is mandated to review appeals from department or agency decisions on complaints of discrimination. In the case of the U.S. Congress, enforcement of the act for Senate employees would be based upon the provisions of Title III of the Civil Rights Act of 1991 (P.L. 102-166, 2 U.S.C. 1201 et seq.) and for House employees upon Section 117 of the same law (2 U.S.C. 601).

The bills define sexual orientation to mean "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations." If enacted, the act would therefore apply to heterosexuals as well as homosexuals and bisexuals. Men and women who are of heterosexual orientation, for example, but who are perceived on the basis of appearance or behavior to fit a homosexual stereotype, would be protected from job discrimination based on such false perceptions. Heterosexuals would also be protected from discrimination by homosexual or bisexual employers.

As a practical matter, however, the proposed act's principal impact and major controversy arise from its extension of civil rights protections in employment to homosexuals and bisexuals. The pro-con discussion that follows, therefore, focuses on these groups and ignores the act's application to heterosexuals. (For purposes of brevity, the term homosexual is used below to refer to both homosexuals and bisexuals of either sex.)

ARGUMENTS FOR AND AGAINST S. 2238/H.R. 4636

(1) Constitutional Arguments

Opponents of civil rights protections on the basis of sexual orientation argue that the proposed bills violate the "establishment of religion" and "free exercise of religion" clauses of the First Amendment. According to this view, for the government to forbid those whose religion teaches that homosexuality is wrong from discriminating against homosexuals on the basis of that belief would constitute an infringement of their free exercise of religion and would violate the separation of church and state. Opponents also cite the 1986 Supreme Court decision in Bowers v. Hardwick (106 S.Ct. 2841), which upheld the Georgia sodomy statute, as evidence that homosexual acts, and therefore homosexuals, are not protected as such by the Constitution. They reason that many States outlaw homosexual acts through democratically enacted statutes, and that those who practice this illegal activity should not receive civil rights protection as a class specifically differentiated by that practice.

Proponents of the legislation argue that discrimination against homosexuals constitutes a violation of basic rights that are guaranteed to all under the Constitution. They base this reasoning on the due process clauses of the Fifth
and Fourteenth Amendments, the equal protection clause of the Fourteenth Amendment, and the implied right to privacy found in the Fourth and Fifth Amendments. Due process rights, for example, are said to be violated by the dismissal of a public school teacher on the grounds of homosexuality. It has also been argued that discrimination against homosexuals by governmental entities violates the First Amendment's separation of church and state insofar as Biblical injunctions are responsible for shaping the belief that homosexual behavior is immoral. In any case, proponents point out, religious organizations are excluded from coverage by the recently introduced bills.

(2) The Nature of Protected Classes

Opponents of the proposed legislation argue that homosexuals as a class are not deserving of civil rights protection because, unlike the other classes that are already protected by civil rights legislation, the characteristic by which homosexuals are identified is volitional, not innate. Membership in sex, racial, and ethnic classes is a matter of birth, not choice. Homosexuality, however, is said by opponents to be a matter of choice — an immoral choice that should not be protected by law. Homosexuals, in this view, are not comparable to the other protected classes. Instead, they are persons who choose to engage in deviant behavior that is unacceptable to society and is by its very nature beyond the scope of civil rights legislation.

Proponents argue that one's sexual orientation is not in fact a matter of choice any more than one's sex or race. Homosexuals are comparable to other protected classes such as women and ethnic and racial minorities insofar as the characteristic that sets them apart is not chosen but is innate. Therefore, they say, discrimination on the basis of sexual orientation is just as wrong as discrimination on the basis of sex, race or nationality. It is also possible, some proponents continue, that sexual orientation is sometimes a matter of choice. Some lesbian activists, for example, have stated that they have chosen their sexual orientation on moral grounds. In their view, then, their sexual orientation is akin to religion, which also may be viewed as a matter of moral choice that is already protected by civil rights laws.

(3) The Extent of Anti-Homosexual Discrimination

Opponents of extending civil rights protection to homosexuals sometimes argue that the legislation is unnecessary because employment discrimination against homosexuals is not widespread. It would be difficult, they say, to make a case that homosexuals as a class are broadly discriminated against in employment. Homosexuals, by their own admission, are present in every profession. They already enjoy widespread tolerance, especially if they are discreet and do not openly display their sexual orientation. The real objective of homosexual rights activists, according to their opponents, is not access to jobs but the acceptance of homosexuality as a morally legitimate and socially accepted lifestyle under color of Federal law.
On the contrary, argue proponents of the proposed legislation, homosexuals in the United States constitute a historically persecuted group. Disclosure of one's homosexuality or even the suspicion of homosexuality has frequently resulted in the loss of employment. Actual cases in numerous occupations and jurisdictions can be cited to support the argument that discrimination against homosexuals is widespread and materially injurious. Proponents also argue that passage of the legislation would not condone homosexuality any more than the inclusion of religion in civil rights legislation indicates support for a particular religion or for religion in general. The legislation, in other words, in no way attempts to condemn or change privately held beliefs concerning the immorality of homosexual behavior.

(4) Employment Issues

Opponents of civil rights protections for homosexuals argue that sexual orientation must continue to be considered an employment-qualifying factor, especially in certain occupations. Of particular concern are teachers, pastors, camp counselors, and social workers who deal with children. To permit homosexuals to occupy these nurturing and role-model positions could be expected to influence children toward homosexuality.

Opponents of the proposed legislation also express the concern that it will eventually lead to affirmative-action employment quotas for homosexuals. Although the proposed bills as introduced specifically forbid the use of statistical data to determine that discrimination exists and forbid the use of numerical quotas in remedying past discrimination, they argue that any gay rights laws would be merely a steppingstone to a quota system in every occupation, as a remedy for perceived past discrimination against homosexuals.

Proponents argue that skills and job performance, not sexual orientation, should determine whether employees are hired, promoted, or fired. Improper behavior or poor performance on the job by homosexuals should be handled in the same way as for heterosexuals. Homosexuals, they say, do not seek special legal protection, such as employment quotas. Rather, they seek equal treatment in the workplace, without regard to sexual orientation.

Proponents also argue that there is no evidence that homosexuals in role-model positions influence children toward homosexuality. They maintain that in the eight States and approximately 130 local jurisdictions that already protect homosexuals from employment discrimination, no such problems have arisen.

(5) Effects Upon Society

Opponents argue that making discrimination on the basis of sexual orientation illegal would place homosexuality on a par with heterosexuality, thereby undermining heterosexuality, which is one of the most important cohesive forces in our society. Homosexuality would become more widespread, and society's procreative powers would be diminished. Extending civil rights protections to homosexuals would therefore damage society as a whole, and
constitute a direct assault upon the family, and open the way to protection of a wide range of sexual practices now condemned. Nothing less than the nature of society as we know it, some argue, is at stake.

Proponents argue that discrimination against homosexuals is harmful because it deprives society of the energies and talents that homosexuals must expend in hiding their sexual orientation. If civil rights protections were granted to homosexuals, these diverted energies and talents could be redirected into productive activities. The general welfare is diminished when any group is denied full participation in the economic and social life of the Nation. This is no less true for homosexuals than for women, blacks, and other groups already protected by civil rights laws. Passage of the proposed legislation would benefit not just homosexuals but the society as a whole.

(6) Public Health Issues

Opponents of civil rights protections for homosexuals argue that such laws would increase the exposure of the general public to AIDS, a deadly viral disease that has had a major impact on the homosexual community in the United States. The public, in this view, has a right to a workplace and marketplace in which the risk of exposure to the AIDS virus is held to a minimum. The danger of exposure to other infectious diseases such as hepatitis has also been mentioned as a reason for opposing gay rights legislation.

Proponents of the legislation argue that AIDS and other infectious diseases are not homosexual diseases but are human diseases that can affect anyone. Furthermore, there is no danger of contracting AIDS through casual contact such as occurs in the workplace and in the marketplace. The Americans with Disabilities Act (P.L. 101-336; 42 U.S.C. 12101 et seq.) already protects persons with HIV infection and AIDS from discrimination in employment, housing, public accommodations, and other areas of life. Most medical experts agree that no public health danger would arise from extending similar protections to all homosexuals. In any case, it is argued, the discrimination that can result from the AIDS epidemic makes the proposed legislation more necessary than ever.