



July 9, 2013

The Honorable Tom Harkin  
Chairman, Senate Committee on Health, Education, Labor and Pensions  
428 Senate Dirksen Office Building  
Washington, D.C. 20510

The Honorable Lamar Alexander  
Ranking Member, Senate Committee on Health, Education, Labor and Pensions  
428 Senate Dirksen Office Building  
Washington, D.C. 20510

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**Re: ACLU Urges “YES” Vote on the Employment Non-Discrimination Act (ENDA), S. 815**

Dear Chairman Harkin and Ranking Member Alexander:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to urge you and all of the members of the Senate Committee on Health, Education, Labor and Pensions to vote YES on the Employment Non-Discrimination Act (S. 815) during the Committee’s markup of the legislation on July 10, and to oppose any amendments that may be offered that would undermine this legislation’s core goal – protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from workplace discrimination. ENDA would prohibit employment discrimination based on sexual orientation and gender identity in most American workplaces. This critical and long-overdue legislation will allow American workers, who stand side-by-side in the workplace and contribute with equal measure in their jobs, to also stand on the same equal footing under the law.

Congress needs to act to ensure that LGBT individuals have the same workplace protections that apply based on race, color, religion, sex, national origin, age, and disability. The reality remains that it is legal to fire or refuse to hire someone based on his or her sexual orientation in 29 states. Those who are transgender can be fired or denied employment solely based on their gender identity in 33 states. Such numbers demonstrate the need for the federal government to expand employment non-discrimination protections to LGBT workers.

This view is shared by the overwhelming majority of the American public, including majorities of self-identified Democrats, Republicans, and independents. A 2011 poll found that 73 percent of likely voters support protecting LGBT people from discrimination in employment.<sup>1</sup> In addition, many large and small businesses – including many federal contractors – have already taken these steps on their own, and report that they have very few or no costs and actually reap longer-term benefits to their bottom lines (e.g. recruiting the best and brightest, minimizing turnover costs, increasing productivity, appeal to new markets, etc.). Nearly 90 percent of Fortune 500 companies have implemented non-discrimination policies including sexual orientation and more than 57 percent have policies that include gender identity.

While such numbers are encouraging, there are obvious gaps in the patchwork of state civil rights laws which leave many LGBT people vulnerable to employment discrimination based simply on who they are or whom they love. The ACLU report, *Working in the Shadows: Ending Employment Discrimination for LGBT Americans*,<sup>2</sup> documented the stories of workers from across the country who have experienced workplace discrimination based on sexual orientation and gender identity. The following individuals were among those courageous enough to come forward and share their stories.

- Single mother **Jacinda Meyer** worked as a licensed insurance agent in Southern California. During her first nine months on the job, the company gave her positive feedback about her performance and a raise. But soon after her boss learned that she was a lesbian, she was fired. She later applied for a job with a “sister company” and after several interviews and personality and placement testing, they made her a verbal offer. The next day, she received a call rescinding the offer.
- Before transitioning from male to female, **Diane Schroer** was a decorated U.S. Army Special Forces officer who completed 450 parachute jumps into some of the world’s most dangerous places during her 25 years of service. She was handpicked to head up a classified national security operation and briefed Vice President Cheney. After retiring from the military, she wanted to capitalize on her experience fighting terrorism and applied for a federal job to be a senior terrorism research analyst. She received an offer after the interview and accepted the position. Prior to starting work, Schroer invited her new boss to lunch to explain that she was transgender and would like to begin the job as a woman. The next day, the director called Schroer and rescinded the offer because she wasn’t a “good fit.”<sup>3</sup>

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1 Greenberg Quinlan Rosner Research (released June 2011).

2 American Civil Liberties Union, Deborah Vagins, *Working in the Shadows: Ending Employment Discrimination for LGBT Americans*, (September 2007), available at [http://www.aclu.org/files/pdfs/lgbt/enda\\_20070917.pdf](http://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf).

3 In April 2009, as a result of litigation brought by the ACLU, a federal court awarded Schroer maximum damages of \$491,190 for back pay, other financial losses and emotional pain and suffering after finding the library illegally discriminated against her *because of her sex*. While Schroer succeeded in her challenge using prohibitions on sex discrimination, her case does not negate the need for a federal law making clear that workplace discrimination against individuals based on sexual orientation or gender identity is illegal.

- **Thomas Bryant** worked for a temporary staffing agency in Indiana where he was viewed as a good employee and was responsible for training 50 new workers. Bryant, who was honest about the fact that he was gay when asked, had a co-worker who repeatedly made comments about “fags” in front of him. After complaints to his supervisor were ignored, Bryant complained to human resources. After a meeting with HR and the other employee, Bryant thought the problem was resolved. The next day, Bryant was fired.
- **Brooke Waits** worked as an inventory control manager for a cell phone vendor in Texas. One day, her manager opened her cell phone and saw a picture of Waits and her partner sharing a New Year’s Eve kiss. The next day she was fired.

Though the ACLU remains firmly committed to ENDA’s passage, we have concerns about the legislation’s current, sweeping religious exemption. The current exemption, unprecedented in federal laws prohibiting employment discrimination, could provide religiously affiliated organizations – far beyond houses of worship – with a blank check to engage in employment discrimination against LGBT people. Under Title VII, which protects against employment discrimination on the basis of race, sex, religion, and national origin, houses of worship and religiously affiliated organizations are granted an exemption from the prohibition on discrimination on the basis of religion, allowing them to prefer members of their own faith in hiring. This exemption’s purpose is to permit a religious organization to require those who carry out its work to share its faith (and applies even when an employee’s work is not religious).<sup>4</sup> But, it is not a blank check for these organizations to discriminate for any reason. It does not, for example, permit discrimination on the basis of race or sex.<sup>5</sup> In 1964 and 1972, there were attempts to create a blanket exemption from Title VII’s protections for religious organizations and both times, the exemption provided to these institutions was limited to hiring preferences based on religion.

Section 6 of S. 815 would depart from Title VII’s limited exemption that permits religiously affiliated organizations only to prefer members of their own faith in hiring, and would allow these organizations to discriminate on the basis of sexual orientation and gender identity under ENDA – for *any* reason. It essentially says that LGBT discrimination is different – more legitimate – than discrimination against individuals based on their race or sex.

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4 This does not affect how churches select their ministers. As the Supreme Court recently held, churches may assert a “ministerial exception” in response to employment discrimination claims brought by their ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). The constitutionally mandated “ministerial exception” “ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church’s alone.” *Id.* at 709 (internal quotation marks and citation omitted).

5 When religious organizations have argued, for example, that Title VII’s exemption should allow them to pay women less because of religious teachings about the appropriate roles of men and women, courts have not allowed Title VII’s religious exemption to authorize otherwise impermissible sex discrimination. *E.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-67 (9th Cir. 1986).

Religious liberty guarantees us the freedom to hold any belief we choose and the right to act on our religious beliefs, unless those actions harm others or result in discrimination. We believe that the existing Title VII exemption for example, which allows religious organizations to restrict their hiring based on religion, but not to engage in race, sex, or national origin discrimination offers sufficient protection to religious organizations. There is no reason to adopt an exemption that would dilute ENDA's protections and treat LGBT discrimination differently.

In 2013 in the United States, it is fundamentally unacceptable that there are individuals who, when they go to work, are forced to deny their families and loved ones and hide who they are for fear of losing their livelihood. It makes absolutely no sense to add otherwise talented, dedicated workers to the unemployment rolls simply because they have the "wrong" sexual orientation or gender identity. When it passes ENDA, Congress will help ensure that everyone can enter and succeed in the workplace without regard to sexual orientation or gender identity.

We urge all members of the Committee to vote YES on S. 815, the Employment Non-Discrimination Act (ENDA), and to oppose any amendments that undermine or weaken this legislation's core goal. If you have questions, please contact Ian Thompson at (202) 715-0837 or [ithompson@dcaclu.org](mailto:ithompson@dcaclu.org).

Sincerely,



Laura W. Murphy  
Director, Washington Legislative Office



Ian S. Thompson  
Legislative Representative

cc: Members of the Senate Committee on Health, Education, Labor and Pensions