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Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act

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I. INTRODUCTION

On February 22, 2009, Sean Penn won the Academy Award for Best Actor for his portrayal of gay activist and politician Harvey Milk in the movie *Milk*.[1] Milk was the first openly gay man elected to public office

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1. *See* Tyche Hendricks, *Joy in the Castro as Penn Wins Oscar for 'Milk,'* S.F. CHRON., Feb. 22, 2009, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/23/

in the United States.[2] A large part of the film focused on Milk's political battle against Proposition 6, a proposed law that would mandate the firing of all homosexual or bisexual public school employees.[3] Similar legislation had passed in other cities and states, encouraged and spearheaded by singer and conservative political activist Anita Bryant.[4] After a long, hard-fought battle, filled with death threats, violence, protests, slurs, and intimidation, the proposition was defeated in California.[5] Sadly, on November 10, 1978, just weeks after the proposition was defeated, Harvey Milk was assassinated.[6] The fight for gay rights in employment would be met with similar intense opposition for decades to come.[7]

Beginning in the 1950s and 1960s, the push for civil rights and protections of minorities emerged at the forefront of American culture and politics. With the passage of the Civil Rights Act in 1964, the Voting Rights Act of 1965, the *Brown v. Board of Education of Topeka*[8] decision in 1954, and the Equal Pay Act of 1963, among others, the American courts and legislative bodies were moving swiftly and progressively to protect racial, ethnic, religious, and gender minorities. However, one minority classification was either omitted or forgotten: sexual orientation.[9]

Employment discrimination based on sexual orientation has been a preeminent problem in the workplace for years.[10] To date, an overwhelming majority of states do not offer any legal protection or remedy to homosexual or bisexual employees. Currently, twenty states and the District of Columbia have laws that prohibit sexual orientation

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MNFU162QFP.DTL; *See* Mary Milliken, *Sean Penn Wins Best Oscar for "Milk,"* REUTERS, Feb. 23, 2009, http://reuters.com/article/idUSTRE51M1P920090223.

2. *See* Matthew S. Bajko, *Milk Foundation Plans SF Events*, BAY AREA REP., Feb. 11, 2010, http://www.ebar.com/news/article.php?sec=news&article=4538.

3. MILK (Focus Features 2009).

4. Harvey Milk, Anita Bryant, and Religion, http://www.boston.com/news/local/articles_of_faith/2008/*11*/Harvey_milk_ani.html (Nov. 25, 2008, 10:57 EST).

5. Milk, Harvey (1930-1978), Encyclopedia of Gay, Lesbian, Bisexual, Transgender & Queer Culture, http://glbtq.com/social-sciences/milk_h.html (last visited Mar. 1, 2010).

6. *See id.*

7. *Id.*

8. 347 U.S. 483 (1954).

9. *See* DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331-32 (9th Cir. 1979) (holding that Title VII of the 1964 Civil Rights Act does not apply to sexual orientation discrimination).

10. *See* Gay Leaders in Virginia Reflect on McDonnell's Removal of Sexual Orientation Protection, www.metroweekly.com/news/?ak=4933 (last visited Mar. 1, 2010); *see also* Senate Committee Hears Bill on Sexual Orientation Discrimination, www.columbiamissourian.com/stories/2010/02/04/senate-committee-heard-bill-sexual-orientation-discrimination; Workplace Discrimination: Policies, Laws and Legislation, Human Rights Campaign, www.hrc.org/issues/workplace/equal_opportunity.asp (last visited Mar. 1, 2010).

discrimination in private employment.[11] Additionally, some states prohibit sexual orientation discrimination in public workplaces.[12] However, the remaining states have no employment discrimination protection for homosexual or bisexual individuals, and employers can legally fire, or refuse to hire, homosexual or bisexual individuals.

The federal government has not been completely silent, however, in protecting sexual orientation discrimination in employment.[13] In 1998 President William Jefferson Clinton signed Executive Order 13087, which prohibited discrimination based on sexual orientation within the federal government.[14] The Order prohibits "discrimination in employment because of race, color, religion, sex, national origin, handicap, age, or sexual orientation."[15] However, it does not offer comprehensive protection to all homosexual and bisexual individuals in the workplace because it does not apply to private organizations or businesses.[16] A more comprehensive law is necessary.

The Employment Non-Discrimination Act (ENDA) is a proposed piece of legislation that would, for the first time, grant federal employment discrimination protection to homosexual and bisexual Americans in the private sector.[17] ENDA, in different forms, has been before the House of Representatives several times, and the most recent version to be voted on was passed by the House of Representatives during the fall of 2007, with a vote of 235-184.[18]

Since 1974 House Democrats have pursued legislation outlawing employment discrimination based on sexual orientation, spearheaded most recently by Representative Barney Frank (D-MA).[19] A cloud of controversy hung over ENDA while it was pending in the House.[20] President George W. Bush made it clear that he would veto ENDA if passed by the Senate, citing excessive lawsuits and his commitment to

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11. Preventing Sexual Orientation Discrimination in the Workplace, http://www.nolo.com/legal-encyclopedia/article-30213.html (last visited Feb. 23, 2010).

12. *Id.*

13. *See infra* notes 14-15 and accompanying text.

14. U.S. Equal Employment Opportunity Comm'n, Facts About Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, http://www.eeoc.gov/facts/fs-orientation_parent_marital_political.html (last visited Jan. 26, 2010).

15. Exec. Order No. B, 087 3, C.F.R. 191 (1993).

16. *See id.*

17. David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A-1, *available at* http://www.nytimes.com/2007/11/08/washington/08employ.html?_r=1.

18. *Id.*

19. *Id.*

20. *See infra* notes 21-24 and accompanying text.

the Religious Right.[21] Additionally, many politicians and political action groups objected to ENDA's failure to include employment protection for transgender individuals, leaving many Lesbian, Gay, Bisexual, and Transgender (LGBT) supporters and lobby groups disgruntled.[22] One of a few openly gay members of Congress, Representative Tammy Baldwin (D-WI), refused to put her name on the version of ENDA that did not offer protection to transgendered people.[23] Protection for transgendered people was initially included in the version of ENDA introduced in the 110th Congress, but this clause was removed in the very late stages of debate due to fear that including it would block the bill from passing the House.[24]

In 2008, ENDA was introduced to the Senate by the late Senator Edward M. Kennedy (D-MA) and Senator Susan Collins (R-ME).[25] ENDA was placed on the Senate calendar for 2008, but a vote was never taken, and thus the bill died in its tracks.[26] Because supporters of ENDA did not have the sixty-senator majority necessary to block a filibuster, the opponents of ENDA, mostly Republicans, were able to block a vote on the bill.[27] In August 2009, ENDA was introduced to the Senate yet again, sponsored by Kennedy, Collins, Senator Jeff Merkley (D-OR), and Senator Olympia Snowe (R-ME).[28] The current version includes protection for sexual orientation and gender identity discrimination.[29] This revision was also introduced to the House on June 24, 2009, but neither chamber has voted on it yet.[30]

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21. Natalie Bell, *CWA Thanks President Bush for ENDA Veto Pledge*, CHRISTIAN NEWSWIRE, Oct. 23, 2007, http://christiannewswire.com/news/925294574.html.

22. Most notably, the Human Rights Campaign voiced support for ENDA but faced a tremendous amount of public criticism. *See* Cynthia Laird, *Tense Meeting with HRC Over ENDA*, BAY AREA REP., Jan. 10, 2008, http://www.ebar.com/news/article.php?sec=news&article=2589; Andy Humm & Paul Schindler, *Pelosi/HRC ENDA 'Bargain'—The Inside Story*, GAY CITY NEWS, Oct. 12, 2007, http://www.gaycitynews.com/articles/2007/10/12/gay_city_news_archives/top%20news%20stories/18913390.txt.

23. Paul Schindler, *Tammy Baldwin Withholds Name From ENDA Stripped of Trans Protections*, GAY CITY NEWS, Sept. 28, 2007, http://www.gaycitynews.com/articles/2007/09/28/gay_city_news_archives/top%20news%20stories/18866338.txt.

24. Many in Bay Area Call Anti-Bias Measure an Act of Betrayal, www.sfgate.com/cgi-bin/article.cgi?file=chronicle/archive/2007/11/08/MNFST800.DTL&type=politics (last visited Mar. 1, 2010).

25. Editorial, *Acivil Rights*, WASH. POST, www.washingtonpost.com/wp-dyn/content/article/2007/11/09/AR2007110902177.html (last visited Mar. 1, 2010).

26. Steve Weinstein, *On 1st Day Obama Puts Gay Rights Front & Center*, EDGEBOSTON, Jan. 21, 2009, www.edgeboston.com/index/php?ch=news&sc=&sc2=news&SC3=&id=86089.

27. *Id.*

28. Human Rights Campaign, Inclusive Employment Non-Discrimination Act Introduced for the First Time in US Senate, www.hrc.org/news/1327.htm (last visited Mar. 1, 2010).

29. *Id.*

30. *Id.*

This Article explores whether ENDA should include a bona fide occupational qualification (BFOQ) defense for employers and the consequences of its inclusion and exclusion. This Article additionally explores the defenses allowed under ENDA and provides an analysis of the appropriateness of including a BFOQ defense.

Part II begins by introducing Title VII of the Civil Rights Act (Title VII) and the BFOQ defense. Part III addresses the need for ENDA and ENDA's most recent construction and included defenses and exemptions. Part IV examines if a BFOQ will be read into ENDA, even without the explicit inclusion of the defense, as ENDA is meant to mirror Title VII.

Part V examines the gap between the religious exemption and BFOQ for traditionally religious businesses and explains that the lack of a BFOQ in ENDA may result in businesses qualifying for a BFOQ based on religion under Title VII being liable under ENDA. Part V also discusses how nonreligious employers may also be affected by a lack of a BFOQ defense.

Part VI closely examines how a BFOQ defense could aid gay-oriented businesses if accused of reverse discrimination. Subparts A and B detail the arguments that gay bars, nightclubs, community centers, youth centers, and counseling services could make in asserting a BFOQ defense. Subpart C addresses the repercussions of the possible success of these arguments.

Lastly, Part VII concludes with a discussion of the direction of the Obama Administration and its legislative agenda, as well as the consequences of Congress's failure to debate or address even the possibility of a BFOQ defense in ENDA.

II. INTRODUCTION OF TITLE VII AND BFOQ DEFENSE

Prior to any analysis, it is important to understand the context under which ENDA was proposed and written. ENDA borrows much of the language of Title VII and explicitly references it several times. Therefore, in order to examine ENDA's defenses, one must first look at the defenses under Title VII.

Title VII forbids employment discrimination based on race, color, religion, sex, or national origin.[31] There are very few exceptions to this law, and this Article focuses on two defenses in particular: (1) the religious exemptions found in §§ 702(a) and 703(e)(2), which is discussed in detail in Part III and Part V; and (2) the BFOQ, found in

31. Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-1(a), 2000e-1(e) (2006).

Title VII § 703(e).[32] In defining BFOQ, Title VII provides, in pertinent part:

> [I]t shall not be an unlawful employment practice . . . to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .[33]

This exemption is generally read very narrowly and does not include race or color.[34]

In a Title VII suit, once the plaintiff establishes a prima facie case for discrimination, the defendant must then rebut the presumption of discrimination in order to avoid summary judgment.[35] One way to meet this burden is by asserting the BFOQ defense.[36] If defendants can show the existence of a BFOQ they are, in essence, arguing that discrimination never actually occurred.[37]

One seminal case that addressed the BFOQ defense is *International Union v. Johnson Controls, Inc.*, considered by the United States Supreme Court in 1991.[38] The defendant corporation excluded pregnant women entirely from battery manufacturing jobs and mandated that "[i]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure."[39] The policy defined "'women . . . capable of bearing children' as '[a]ll women except those whose inability to bear children is medically documented.'"[40] After this policy was adopted, a class action suit was filed against the corporation alleging sex discrimination under Title VII.[41]

After ruling that the policy was facially discriminatory, the Court examined whether or not a BFOQ existed.[42] The Court stated that the BFOQ exception should be read very narrowly, relying on case law and the specific language of the statute.[43] The Court discussed *Dothard v. Rawlinson*, in which it held that sex discrimination would be allowed in

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32. *Id.*
33. *Id.* § 2000e-1(e).
34. *Id.*
35. McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973).
36. Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-1(e).
37. Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1349 (D. Del. 1978), *aff'd without opinion*, 591 F.2d 1334 (3d Cir. 1979).
38. 499 U.S. 187 (1991).
39. *Id.* at 192 (internal quotations omitted).
40. *Id.*
41. *Id.*
42. *Id.* at 201.
43. *Id.*

maximum-security male penitentiaries, "only because more was at stake than the individual woman's decision to weigh and accept the risks of employment."[44] The Court in *Dothard* held that gender was a BFOQ because employing female guards could create higher risks of safety to others and that more violence could break out if the guard were female.[45] The Court in *Dothard* required, for future cases, "a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one."[46]

Relying on *Dothard*, the Court stated that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job."[47] The standard employed by the Court was that in order to qualify for a BFOQ, a discriminatory job qualification must "affect an employee's ability to do the job"[48] and "must relate to the 'essence' . . . or to the 'central mission of the employer's business.'"[49]

The Court ultimately concluded that Johnson Controls could not establish a valid BFOQ defense.[50] The Court held that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else."[51] The Court found that possible danger to the women's unborn children, and the likelihood that fertile women will actually become pregnant, could not satisfy the high burden required by the BFOQ defense.[52]

BFOQ defenses have only been granted in limited cases. Courts generally consider the primary purpose of the defendant's business, safety to third parties, privacy concerns, and the intent and objectives of Title VII.[53] Defendants face a high burden when asserting a BFOQ defense, and expansion of the defense is rare, as allowing for a BFOQ, in essence, allows for discrimination to occur.

ENDA, as it was last introduced and passed, did not contain a BFOQ defense. ENDA mirrored Title VII in several ways, but failed to include, or even prompt debate about, the insertion of a BFOQ defense.

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44. *Id.* at 202 (quoting Dothard v. Rawlinson, 433 U.S. 321, 335 (1977)).
45. *Dothard*, 433 U.S. at 335.
46. *Johnson Controls*, 499 U.S. at 202.
47. *Id.* at 204.
48. *Id.* at 201.
49. *Id.* at 203 (quoting Dothard, W. Airlines, Inc. v. Criswell, 499 U.S. 187 (1991)).
50. *Id.* at 206.
51. *Id.*
52. *See id.*
53. *See id.* at 200.

This absence creates several potential problems, primarily for owners of religious businesses or institutions and owners of gay-oriented businesses. Without a BFOQ, ENDA will never allow or entertain that someone's sexual orientation may be a job requirement or necessity.

III. ENDA CONGRESSIONAL HISTORY, RELIGIOUS EXEMPTION, AND OTHER DEFENSES

While Title VII provides a broad ban on race, gender, religious, and ethnic discrimination, it has never been interpreted to prevent sexual orientation discrimination. Courts have consistently held that sexual orientation discrimination does not fall under Title VII and is not actionable under federal law.[54] Thus, federal protection to prevent discrimination based on sexual orientation is necessary in order to prevent the oppression of homosexual and bisexual individuals. A strong push for passing such legislation emerged in the mid-1990s, led by Representative Gerry Studds (D-MA), but did not pass the House until November 2007.[55]

Before the House of Representatives passed ENDA in November 2007, four versions of the bill had been introduced to the 110th Congress.[56] None of the versions contained a BFOQ defense, but every version contained an exemption for the armed services[57] and some form of a religious exemption.[58] The first version introduced in 2007 had a very detailed religious exemption contained in Section 6.[59] It was introduced to the House on April 24, 2007, and was not the version that eventually passed.[60] It exempted "any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the

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54. Williamson v. A.G. Edwards and Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).

55. Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (Sponsor Rep. Gerry Studds); Joel Wendland, *A New Beginning: Congress Debates Civil Rights Bill*, POL. AFF. MAG., May 24, 2007, http://www.politicalaffairs.net/article/articleview5325/; H.R. 4636: Non-Discrimination Act of 1994, http://www.govtrack.us/congress/bill.xpd?bill=h103-4636 (last visited Jan. 26, 2010).

56. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007) (version 1); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (includes versions introduced in House, reported in House, and engrossed as agreed to or passed by House).

57. Every version contained an exemption for the armed services because of the federal policy of "don't ask, don't tell."

58. H.R. 2015.

59. *Id.*

60. *Id.*

teaching or spreading of religious doctrine or belief."[61] It also contained an exception for positions in religious groups whose primary duties were religious in nature but did not meet the aforementioned exemption.[62] Most interestingly, the religious exemption in the April 2007 version of ENDA also included the following language: "Under this Act, a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenets that such corporation, association, institution, or society declares significant."[63] This language signaled a broad exemption to many religious entities: entities could mandate that their employees subscribe to and uphold certain religious beliefs and practices, including the practice of heterosexuality.

The next two versions submitted to the House, introduced on September 27 and October 22 of 2007, both had very brief but broad religious exemptions, reading only, "[t]his Act shall not apply to a religious organization."[64] The term "religious organization" was defined in the statute in § 3(a)(8) as follows:

> [A] religious corporation, association, or society; or a school, college, university, or other educational institution or institution of learning, if—the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society; or the curriculum of the institution is directed toward the propagation of a particular religion.[65]

The aforementioned language and exemption generated much discussion in committee meetings, floor speeches, and floor debates.[66] Immediately prior to the passing vote on November 7, 2007, the House commenced floor debates on ENDA, predominantly discussing defenses and exemptions contained in the law.[67]

During the final floor debate before the passing vote, Representative George Miller (D-CA) and Representative Bart Stupak (D-MI) proposed a change.[68] The proposal included changing the religious exemption to mirror very closely the exemption contained in Title VII and would read: "This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the

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61. *Id.* § 6(a).
62. *Id.* § 6(b).
63. *Id.* § 6(c).
64. Employment Non-discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).
65. *Id.* § 3(a)(8).
66. *See infra* notes 67-82 and accompanying text.
67. 153 CONG. REC. 13228, 13243 (2007) (statement of Rep. George Miller (D-CA)).
68. *Id.*

religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2)).”[69] The sections referring to Title VII read, respectively:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities,[70]

And further:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[71]

In arguing the necessity of the change, Miller stated that mirroring the language in Title VII would “ensure that the many decades of case law on title VII’s religious exemption is imported to ENDA.”[72] Miller also argued that replacing the previous language with the proposed change would assuage concerns that religious schools or other religious organizations will be forced to hire homosexuals.[73]

There was significant opposition to this change, however.[74] Representative Buck McKeon (R-CA) spoke in opposition to ENDA as a whole, but in support of the amendment.[75] He expressed concerns over the exemption and the Act generally, arguing that Miller and Stupak’s proposed change still would not fully protect faith-based institutions.[76] Additionally, Representative Paul Broun (R-GA) argued that the religious exemption, as previously stated or amended, was not sufficient to immunize religious organizations.[77] Specifically, Broun expressed

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69. *Id.*
70. Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-1(a), 2000e-1(e) (2006).
71. *Id.* § 2000-1(e).
72. 153 CONG. REC. 13,228, 13,243 (2007) (statement of George Miller, (D-CA)).
73. *Id.*
74. *See infra* notes 75-79 and accompanying text.
75. 153 CONG. REC. at 13,244.
76. *Id.*
77. *Id.*

concern over whether religious schools, day care providers, or bookstores would fall under any of the presented exemptions.[78] Ultimately, his proposed change to the religious exemption passed the House with a vote of 402 in favor, 25 against, and 10 not voting.[79]

The intent of this amendment was to mirror Title VII's religious exemption.[80] Additionally, the proposal read, for example, "if a school is exempt from Title VII's religious discrimination prohibitions, it will also be exempt from ENDA."[81] It follows, that any entity that does not fall under Title VII's religious exemption would also not fall under ENDA's religious exemption and could not discriminate based on sexual orientation.

Following the floor debate, the House passed ENDA with the amended religious exemption, 235 in favor, 184 against, and 14 not voting.[82] As passed, the 2007 version of ENDA did not have a bona fide occupational qualification (BFOQ) defense.[83]

IV. COULD A BFOQ DEFENSE BE READ INTO ENDA?

If ENDA is enacted without an explicit BFOQ defense, as it was passed in the House in 2007, some defendants may argue that courts should read a BFOQ into it because the language of ENDA so closely mirrors Title VII and the statute references Title VII multiple times. Some scholars argue that a BFOQ likely will be read into ENDA.[84] But congressional intent is unclear. The insertion of a BFOQ defense was not found in the floor debates and was only tangentially mentioned in committee hearings.[85] Furthermore, no debate occurred as to whether to include a BFOQ defense.

Congress's intent to mirror ENDA after Title VII is clear. More specifically, the most recent version of ENDA passed by the House mentions Title VII seven times in multiple sections, including the religious exemption, enforcement, powers of the Equal Employment Opportunity Commission (EEOC), powers of the Librarian of Congress,

78. *Id.* at 13,245.
79. *Id.* at 13,246.
80. H.R. REP. No. 110-422, at 3 (2007).
81. *Id.*
82. 153 CONG. REC. 13228, 13252 (2007).
83. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (placed on calendar in Senate).
84. J. Banning Jasiunas, *Is ENDA the Answer? Can a "Separate But Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination*, 61 OHIO ST. L.J. 1529, 1546 (2000).
85. 153 CONG. REC. 13228, 13243; the Employment Non-Discrimination Act of 2007: *Hearing on H.R. 2015 Before the H. Comm. on Education and Labor*, 110th Cong. (2007).

powers of the Attorney General, jurisdiction of federal courts, the procedures and remedies, and state and federal immunity.[86] In fact, the 2007 version of ENDA provides that ENDA has the identical state and federal immunity, religious exemption, federal jurisdiction, procedures, and remedies as Title VII.[87] Additionally, the EEOC, Attorney General, and Librarian of Congress have the same powers under ENDA as they possess under Title VII.[88]

With respect to similar language, ENDA defines the terms "employee," "employer," "employment agency," "person," "labor organization," and "state" the same as Title VII does, and it specifically refers to the Civil Rights Act of 1964 in all of the definitions.[89] ENDA employs the use of the EEOC, which was created under Title VII.[90] Also, while not referring specifically to Title VII, section 4(a-d) of the 2007 version of ENDA, which defines unlawful employment practices, contains identical wording to section 703(a-d) of Title VII.[91]

It is curious that ENDA's objective is not just to add sexual orientation to the list of protected classes in Title VII. ENDA, as last introduced, was a free-standing law and not an amendment to Title VII. This lends itself to the argument that ENDA, and any law prohibiting sexual orientation discrimination, was meant to stand on its own, and Congress only meant to impute the parts of Title VII that were specifically mentioned in the text of ENDA.

Despite the similarities and absent clear intent, courts have refused to extend the BFOQ defense to other laws, including the Americans with Disabilities Act (ADA).[92] In *Bates v. UPS*, the United States Court of Appeals for the Ninth Circuit, en banc, refused to apply a BFOQ defense in ADA cases.[93] The plaintiff sued UPS for excluding hearing impaired individuals from driving vehicles weighing 10,000 pounds or less.[94] Previously, the Ninth Circuit used Title VII BFOQ analysis to determine if the ADA's business necessity defense applied.[95] In evaluating whether

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86. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*; Civil rights Act of 1964, 42 U.S.C. §§ 2000c-1(a), 2000e-1(e) (2006).
91. *See supra* notes 31, 83 and accompanying text.
92. *See infra* notes 93-96 and accompanying text.
93. 511 F.3d 974 (9th Cir. 2007).
94. *Id.* at 981.
95. *See* Morton v. UPS, 272 F.3d 1249 (9th Cir. 2001). The business necessity defense under the ADA provides a defense if the test or requirement "has been shown to be job-related and consistent with business necessity." Americans with Disabilities Act of 1990, as amended by Civil Rights Act of 1991, 42 U.S.C. § 12101 (2000).

the BFOQ standard should apply to ADA analysis, the Ninth Circuit found that the ADA's text and congressional intent did not allow for BFOQ standards to be applied.[96] Additionally, the court stated, "[T]here is no [BFOQ] defense as such in the ADA," and the BFOQ standard should not be read into the ADA business necessity defense.[97]

Without clear intent from Congress, it is very unlikely that courts will insert a BFOQ defense in ENDA. Even Title VII exempts race and color from the BFOQ defense, so it is likely Congress also meant to exempt sexual orientation from a BFOQ defense. If Congress intended for ENDA to mirror Title VII exactly, it likely would have simply amended Title VII.

V. THE GAP LEFT FOR RELIGIOUS ORGANIZATIONS WITHOUT A BFOQ

Throughout the history of Title VII jurisprudence, the religious exemption found in sections 702(a) and 703(e)(2) has been read to exclude some commonly considered faith-based organizations, such as religious bookstores, charities, or day camps.[98] Without a BFOQ defense or a broad religious exemption, some faith-based groups, businesses, or schools may find themselves subject to ENDA and forced to hire homosexuals, while their religious tenets oppose it.

The circuits are split as to how to read Title VII's religious exemption, which is found verbatim in the most recent version of ENDA.[99] The Ninth Circuit reads the religious exemption narrowly, stating, "Congress's conception of the scope of [the religious exemption] was not a broad one."[100] Further, the court stated that "[a]ll assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches" were the types of organizations Congress intended to exempt.[101] In *EEOC v. Townley Engineering & Manufacturing Corp.*, the Ninth Circuit ultimately held that a mining business with a covenant that stated their business would be a "Christian, faith-operated business" did not fall under the religious exemption of Title VII.[102]

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96. *Bates*, 511 F.3d at 995.

97. *Id.* at 996 (internal quotations omitted).

98. JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION 210-11 (6th ed. 2007).

99. *Id.* at 44, 53-58.

100. EEOC v. Townley Eng'g & Mfg. Corp., 859 F.2d 610, 618 (9th Cir. 1988) (alteration in original).

101. *Id.*

102. *See id.* at 612, 618 (internal citations omitted).

Alternatively, the United States Court of Appeals for the Third Circuit has a broader reading of Title VII's religious exemption and interprets it to cover "beyond formal houses of worship."[103] In *Leboon v. Lancaster Jewish Community Center*, the court ultimately held that because a Jewish community center's primary purpose was religious, it therefore fell under the religious exemption.[104]

In other instances, courts have held that a Protestant boarding school,[105] a Methodist orphan home,[106] and Jesuit colleges[107] do not fall under the religious exemption of Title VII. In one instance, the United States Court of Appeals for the Seventh Circuit found that the traditionally Jesuit Loyola University of Chicago did not fall under the religious exemption because what it did was not "all, total, and entirely" managed, owned, or supported by a religion.[108] In *Pime v. Loyola University of Chicago*, a Jewish individual applied for a tenure-track position as a professor of philosophy.[109] Loyola argued that it fell under the religious exemption for educational institutions found in Title VII in section 703(e)(2), which exempted schools that were "whole or in substantial part, owned, supported, controlled, or managed by a particular religion," and had therefore not violated Title VII in refusing to hire a Jewish professor.[110] The court found that, in fact, Loyola did not fall under this exemption because the University could not prove that a "considerable amount of its support, control, or management [came] from or is in the hands of the religious society."[111]

Loyola then argued that being Jesuit was a BFOQ for the position of professor of philosophy because Loyola held itself out as a Jesuit university, and, therefore, it is reasonably necessary to the normal course of business that members of the philosophy department be Jesuit.[112] In holding that this was a BFOQ, the court stated that a BFOQ defense for religion was different and distinct from the blanket religious exemption

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103. Leboon v. Lancaster Jewish Cmty. Ctr. Assoc., 503 F.3d 217, 230-31 (3d Cir. 2007).

104. *Id.* at 231. The defendant ran summer camps, published a Jewish newspaper, ran a preschool, held events for various Jewish holidays, and was funded in significant part by a Jewish federation. Membership, however, was open to all religious persuasions. *Id.* at 221.

105. EEOC v. Kamehameha Schools/Bishop Estate, 990 F.2d 458, 466 (9th Cir. 1992).

106. Fike v. United Methodist Children's Home of Va., Inc., 547 F. Supp. 286, 290-91 (E.D. Va. 1982).

107. Pime v. Loyola Univ. of Chi., 585 F. Supp. 435, 440 (N.D. Ill. 1984), *aff'd on other ground*, 803 F.2d 351 (7th Cir. 1986).

108. *Id.* at 440.

109. *Id.* at 435.

110. *Id.* at 440 (internal quotations omitted).

111. *Id.*

112. *Id.* at 441.

found in section 702(a) of Title VII, under which an employer who seeks its protection must be "a religious corporation, association, educational institution, or society,"[113] and that the BFOQ defense is not limited to positions that promote religion or perform religious functions.[114] Ultimately, the court found that it was necessary for the university to maintain "a Jesuit presence," and therefore certain areas of teaching (including philosophy) had to be done by Jesuit-trained professors.[115]

This case highlights how schools like Loyola, or similar Jesuit institutions like Boston College or Georgetown University, and religious elementary and high schools will likely find themselves not covered by the religious exemption in ENDA as it passed the House in 2007, if Congressmen Miller is correct and Title VII jurisprudence also applies to ENDA.[116] Additionally, religious schools without a direct tie to a specific religion or church, such as Wheaton College[117] in Illinois, will have a more difficult time than Jesuit schools qualifying for the religious exemption under ENDA and will find themselves without a BFOQ alternative. The *Pime* decision held that there are occupations that will not fall under the religious exemption but will qualify as a BFOQ.[118] This indicates that there will be employers and positions not covered by ENDA that have historically taken advantage of the BFOQ defense to maintain their religious autonomy.

ENDA's lack of a BFOQ will also impact nonreligious employers. In *Kern v. Dynalectron Corp.*, the District Court for the Northern District of Texas found that being Moslem was a BFOQ for the position of helicopter pilot.[119] The position in question required the pilot to fly over Mecca, the holy land for Moslem people.[120] Under Saudi Arabian law, based on Islamic tenets, non-Moslems are prohibited from entering Mecca, and violation is punishable by death.[121] The court ultimately held that being Moslem was a BFOQ because "the essence of Dynalectron's business would be undermined by the beheading of all of the non-Moslem pilots."[122] The court did note that this decision was not based on

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113. *Id.* at 442.
114. *Id.*
115. *Id.* at 443 (internal quotations omitted).
116. *See supra* note 72 and accompanying text.
117. 153 CONG. REC. 13228, 13243 (2007).
118. *Id.*; *see also* Wheaton College, Mission, http://www.wheaton.edu/welcome/aboutus_mission.html (last visited Jan. 25, 2010).
119. Kern v. Dynalectron Corp. 577 F. Supp. 1196, 1230 (N.D. Tex. 1983).
120. *Id.* at 1197.
121. *Id.* at 1198.
122. *Id.* at 1200.

customer preference, but rather being Moslem was an "absolute prerequisite" to flying helicopters into Mecca and not being killed.[123]

While this is a very narrow decision due to unusual circumstances, this case will have some serious consequences for employers like Dynalectron that cannot rely on a BFOQ defense to justify sexual orientation discrimination. Sodomy and other homosexual sex acts are punishable by death in countries including, but not limited to, Mauritania, Nigeria, Somalia, Sudan, United Arab Emirates, Yemen, and Iran.[124] For example, in Iran, male homosexual sex acts are punishable by death, and lesbian sex is punishable by 100 lashes, and after the fourth offense, death.[125] Additionally, many other countries have criminalized homosexual sex acts, including Ethiopia, Morocco, Saudi Arabia, Jamaica, Afghanistan, and Sri Lanka.[126] Even in the United States, sodomy was illegal in many states until 2003, when the United States Supreme Court struck down a Texas antisodomy law.[127]

The *Kern* decision may seem to have unique and narrow facts that allowed for religion to be a BFOQ. In the event that a United States employer does business with any nation that criminalizes homosexuality, whether punishable by a fine, jail, or death, that employer will not be able to rely on a BFOQ defense when refusing to hire a homosexual individual for certain positions. The arrest or murder of a homosexual employee, similar to the situation that the court analyzed in *Kern*, would severely frustrate the essence of the employer's business, and, therefore, heterosexuality should be considered a BFOQ. However, without a BFOQ defense in ENDA, employers will not have its shield and will be left to choose between civil liability under ENDA, and the potential death or imprisonment of employees.

While inserting a BFOQ defense into ENDA will broaden employers' ability to discriminate against homosexual and bisexual

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123. *Id.* at 1202.

124. Top 10 Countries Where Gay Sex Is Punishable By Death, http://socialist.freebase.com/top/10/Countries%20where%20gay%20sex%20is%20punishable%20by%20death (last visited Jan. 26, 2010); Allegra Stratton, *Gay Iraqi Could Face Death Penalty If Deportation Goes Ahead*, GUARDIAN.CO.UK, Feb. 3, 2009, http://www.guardian.co.uk/uk/2009/feb/03/gay-iraqi-asylum-seeker; Nadya Labi, *The Kingdom in the Closet*, ATLANTIC, May 2007, http://www.theatlantic.com/doc/200705/gay-saudi-arabia.

125. Anne Penketh, *Brutal Land Where Homosexuality Is Punishable by Death*, INDEPENDENT, Mar. 6, 2008, at 2, *available at* http://www.independent.co.uk/news/world/middle-east/brutal-land-where-homosexuality-is-punishable-by-death-792057.html.

126. *See* Int'l Lesbian, Gay, Bisexual, Trans & Intersex Ass'n, http://ilga.org/ilga/en/index.html (select "Male to Male Relationship Punishments" from menu) (last visited Jan. 21, 2010).

127. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

individuals, it may be necessary in order to mirror effectively Title VII's protections for employers. In order to respect First Amendment protection of religious institutions and groups and the general necessity of some businesses, inserting a BFOQ defense into ENDA may be essential. Additionally, asserting the BFOQ defense is not limited to majority-on-minority discrimination, but can be used for reverse discrimination as well.

Congress, however, may have intended to omit completely a BFOQ defense in order to best effectuate the prevention of sexual orientation discrimination. BFOQ defenses allow for intentional discrimination based on immutable characteristics, and any accepted BFOQ defense allows for the perpetuation of discrimination in certain positions of employment. Because religious groups have been at the forefront of opposing the gay rights movement,[128] perhaps it is best to omit the BFOQ defense from ENDA in order to make liable under the Act the egregious actions of the most common offenders. But, without documented congressional intent, the motivation is unclear, and the complete omission of a BFOQ defense is left open for debate.

VI. USING BFOQ TO DEFEND REVERSE DISCRIMINATION

As religious groups may want to take advantage of a BFOQ defense under ENDA, circumstances may exist when employers desiring to hire only homosexual or bisexual employees may want to do the same. While most courts have held that customer preference cannot be the basis for a BFOQ, courts do consider if there are instances in which being a member of a protected class may be necessary for the operation or success of the business, privacy concerns, and the primary purpose of the business.[129] Subpart A examines the applicability of a BFOQ defense to gay bars, nightclubs, youth-centers, and counseling groups. It also discusses the dangers of asserting this defense and the potential repercussions of successful BFOQ claims.

A. Gay Bars and Nightclubs

Gay bars and nightclubs are not only scenes for drinking and socializing, but also cornerstones of social change in the gay rights movement. Most notably, the Stonewall Inn in New York City's West

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128. *See, e.g.*, Mormons for Proposition 8 Donors, http://mormonsfor8.com (last visited Jan. 26, 2010); Lisa Leff, *Calif. Win Emboldens Coalition of Religious Groups*, FOX NEWS, Nov. 7, 2008, http://www.foxnews.com/printer_friendly_wires/2008Nov7/0,4675,GayMarriage,00.html.

129. *See infra* Parts VI.A-B.

Village was the birthplace of the Stonewall Riots, which are considered the beginning of the gay liberation movement in the United States.[130] On June 27, 1969, the New York City police raided the popular bar—such raids occurred regularly at the time.[131] That night, patrons at the bar decided to fight back, and violent protests erupted in the streets and continued for several nights.[132] Today, many gay pride events occur in June to commemorate this event.[133] Gay bars continue to be involved in the gay social movement, holding fundraisers for gay rights,[134] sponsoring events at gay pride festivals,[135] and acting as safe havens for homosexual and bisexual individuals.[136]

In the event that gay bar owners desire to hire only homosexual individuals, they will very likely be liable for reverse discrimination under ENDA. In the event that a BFOQ defense is included in the law, gay bar owners may be able to defend such a claim and argue that sexual orientation is a BFOQ for a particular position in their business. BFOQs have been very narrowly construed by courts, so any expansion of the definition of what falls under a BFOQ is rare and unlikely.

However, if a gay bar or nightclub chooses to assert a BFOQ defense, there is some case law that could be very useful.[137] In one case, the defense argued that a BFOQ existed for sex appeal reasons, and some language in the opinion (even though the court found for the plaintiff-employee) could be helpful if gay bar owners tried to assert a BFOQ

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130. *See* Stonewall and Beyond: Lesbian and Gay Culture, http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25 (last visited Jan. 26, 2010).

131. *Id.*

132. *Id.*

133. *See* Brad Wong, *Gay Pride Is Brought To You By . . .*, SEATTLE POST-INTELLIGENCER, June 25, 2005, at A1, *available at* http://www.seattlepi.com/business/230034_gaypridebusiness25.html.

134. The Human Rights Campaign, a gay political action group, holds a large number of its fundraisers at gay bars. *See* Attend an Event: *Noah's Arc Jumping the Broom*, http://www.hrc.org/your_community/12614.htm (last visited Jan. 10, 2010); HRC's Post Office Party—October, http://www.hrc.org/your_community/12356.htm (last visited Jan. 20, 2010); Human Rights Campaign, L Word Finale Parties, http://www.hrc.org/11632.htm (last visited Jan. 10, 2010).

135. Gay pride is a festival celebrated in most major American cities, and it includes marches, parades, concerts, political fundraising and soliciting, and political rallies, among several other events. *See* NYC Pride, http://www.nycpride.org/ (last visited Jan. 10, 2010); June Pride Month, http://www.chicagopridecalendar.org/ (last visited Jan. 26, 2010); LA Pride, http://www.lapride.org/ (last visited Jan. 26, 2010).

136. Armando Alvarado, *Hitch Hiker in Hades*, DAILY NEXUS, Sept. 20, 2001, http://www.dailynexus.com/article.php?a=1287; Raheem F. Hosseini, *Straight Faces*, NEWS REV., Apr. 5, 2001, http://www.newsreview.com/sacramento/content?oid=5266; Motoko Rich, *TURF; Edged Out by the Stroller Set*, N.Y. TIMES, May 27, 2004, at F1, *available at* http://www.nytimes.com/2004/05/27/garden/turf-edged-out-by-the-stroller-set.html.

137. *See, e.g.*, *infra* notes 138-176 and accompanying text.

defense.[138] In *Wilson v. Southwest Airlines*, the Northern District of Texas held that sex appeal and femininity did not amount to a BFOQ for flight attendants.[139] The all-male plaintiffs argued that Southwest's "open refusal" to hire males as flight attendants and ticket agents was a violation of Title VII.[140] Southwest argued that its policy met the BFOQ standard because of the airline's "sexy image" and its promise to fly passengers "with love."[141] Southwest also argued that the hiring policy was essential to its financial success and survival.[142]

Meeting the BFOQ standard of "reasonably necessary to the normal operation of its particular business" largely depends on the outcome of analyzing the defendant's particular business.[143] Southwest argued that its business image was meant to appeal to young businessmen by emphasizing "feminine youth and vitality."[144] Southwest's ads featured "young," "vital," and "friendly" women, and promised "tender loving care" in the sky to its predominantly male customers.[145] Southwest argued that hiring young females was important and crucial to its image; however, survey evidence indicated that customers did not choose Southwest primarily based on the age, gender, or appearance of its staff.[146]

After considering the rulings by other circuits, the court used the commonly adopted two-part BFOQ test: "(1) does the particular *job* under consideration require that the worker be of one sex only; and if so, (2) is that requirement reasonably necessary to the 'essence' of the employer's business."[147] The first part of the test is meant to determine if an individual's gender is so essential to job performance that someone of the opposite gender could not do the same work.[148] The second requirement is aimed at assuring that the job qualification in question is "so important to the operation of the business that the business would be undermined if employees of the 'wrong' sex were hired."[149]

While Southwest conceded that males were fully capable of performing the duties of flight attendant and ticket agent, it also argued

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138. Wilson v. S.W. Airlines, 517 F. Supp. 292, 293-96 (N.D. Tex. 1981).
139. *Id.* at 296.
140. *Id.* at 293.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 294.
145. *Id.*
146. *Id.* at 296.
147. *Id.* at 299.
148. *Id.*
149. *Id.*

that only females can do nonmechanical aspects of the job, including attracting male customers and preserving Southwest's image.[150] The court ultimately held that the "love" and femininity are "the *manner* of job performance, not the job performed," indicating that the crux of the analysis depends on the mechanical aspects of the job, not the tangential aspects of the job.[151] Additionally, the court noted that the essential element of Southwest's business is transporting passengers, stating: "Southwest is not a business where vicarious sex entertainment is the primary service provided. . . . [T]he ability of the airline to perform its primary business function . . . would not be jeopardized by hiring males."[152] The court also noted that "sex does not become a BFOQ merely because an employer chooses to exploit . . . sexuality as a marketing tool, or to better insure profitability."[153]

This language is important in potential analysis of a sexual orientation BFOQ. By replacing the words "male" and "female" with "heterosexual" and "homosexual," respectively, there may be instances in which a BFOQ could and would apply to sexual orientation discrimination. The opinion in *Wilson* indicates that there could be an instance where a defendant's business has a primary purpose related to sex and sex entertainment, and that "business would be undermined if employees of the opposite sex [or sexual orientation] were hired."[154] If a BFOQ is included in ENDA, this reasoning could be used to argue that gay bars and nightclubs should be allowed to hire only gay employees. Gay bar owners could make a much stronger case than Southwest in arguing that a primary service of their business is "sex entertainment," as opposed to transporting passengers. It is quite likely that nightclubs or bars are more closely tied to "sex entertainment" than any airline company and could qualify for a BFOQ defense. Opponents could argue that the mechanical aspects of jobs at gay bars are to serve drinks and check identification. However, homosexuals and bisexuals go to gay-oriented bars and nightclubs, not because they make better drinks or offer better security, but rather for the atmosphere, clientele, and themes of the establishments.

Another line of helpful cases is a series of reverse gender discrimination cases filed against Hooters.[155] Hooters is a national chain

150. *Id.* at 300.
151. *Id.* at 302 (emphasis added).
152. *Id.*
153. *Id.* at 303.
154. *Id.* (original altered).
155. *See infra* notes 156-164 and accompanying text.

of restaurants that is famous for chicken wings and attractive female waitresses in skimpy clothing.[156] On several occasions males have filed suit against Hooters for failure to hire male waitstaff.[157] In particular, in 1991 the EEOC charged that Hooters' refusal to hire male waiters was illegal employment discrimination.[158] Hooters, in response, argued that female waitresses were the "essence of [its company's] concept" and food service was secondary to its main business, the "sexiness of the Hooters' Girls."[159] Eventually, the EEOC dropped its investigation, and Hooters settled the lawsuit.[160]

Subsequently, Hooters settled a class action suit in 1997 and another lawsuit earlier in 2009 in Texas, with each plaintiff alleging reverse gender discrimination.[161] Every time a suit is filed, Hooters' spokespeople, attorneys, and advertisers publicly assert that Hooters' core concept relies on "well-endowed waitresses to 'titillate and entice,'" and hiring only women is a BFOQ.[162] While this argument has not been litigated, the EEOC's reluctance to proceed with an investigation, the public's general acceptance, and comments from professionals[163] indicate that if ever litigated, Hooters likely would be able to make a very strong argument that sex is a BFOQ for the position of waitress.[164] It is very likely that people go to Hooters to see the female waitresses, not for the food. And, hiring male waitstaff would destroy the image of the restaurant and could completely alter and destroy the nature of the clientele.

Gay bar and nightclub owners, like Hooters, could argue that drinking and socializing are secondary to their bar's main objectives of acting as safe havens for homosexuals or providing a social network

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156. Hooters Girl Image, http://www.hooters.com/hootersgirl/Home/default.aspx (last visited Jan. 26, 2010).

157. FRIEDMAN, *supra* note 98, at 172.

158. *Id.*

159. *Id.* (internal quotations omitted).

160. *Id.* at 173.

161. *Texas Man Settles Discrimination Lawsuit Against Hooters for Not Hiring Male Waiters*, FOX NEWS, Apr. 21, 2009, http://www.foxnews.com/story/0,2933,517334,00.html; Dan Kelley, *Hooters Settles Employment Suit*, CALLER-TIMES (Corpus Christi, Tex.), Apr. 21, 2009, http://www.caller.com/news/2009/apr/21/hooters-settles-employment-suit/.

162. Matthew Heller, *Would-Be Hooters Guy Settles Discrimination Suit*, ON POINT NEWS, Apr. 19, 2009, http://www.onpointnews.com/news/would-be-hooters-guy-settles-discrimination-suit.html.

163. Patricia A. Casey, *Does Refusing To Hire Men as Food Servers Violate the Civil Rights Act? No: A Business Has a Right To Choose Its Own Character*, 82 A.B.A. J. 40 (Feb. 1996).

164. *But see* Guardian Capital Corp. v. N.Y. State Div. of Human Rights, 46 App. Div. 2d 832, 833 (1974) (holding that a employer could not fire male waiters in order to hire sexually attractive waitresses in an attempt to change the appeal of the business or boost sales).

exclusively for homosexuals, and therefore, hiring only homosexuals is a BFOQ. Even further, the character of many gay bars is sexual in nature, arguably even more so than Hooters, requiring bartenders to wear provocative clothing or no shirts at all. Alleging that their business is sexual in nature and that food or drink service is secondary to the main objective of titillating and enticing or acting as a safe haven from harassment and bigotry, gay bars likely have a strong case that being homosexual or bisexual is a BFOQ for being employed at a gay bar.

The issues of discrimination and exclusion based on sexual orientation have never been litigated because there is no federal law banning sexual orientation discrimination. However, there is an interesting case from Australia[165] that may shed some light on the nature and/or business purpose of gay bars and how courts may view a BFOQ defense, if asserted. In *Peel Hotel Pty Ltd*, the Victorian Civil and Administrative Tribunal court in Australia held that a gay business establishment was exempt from the Equal Opportunity Act of 1995, which prohibited discrimination based on age, gender identity, race, gender, and sexual orientation, among others.[166] The court held that the hotel bar was partially exempt from the law and would legally be allowed to restrict entry into the bar to homosexual males.[167] The owner argued that this exemption was necessary because otherwise compliance with the law would "adversely affect the safety or comfort of the venue for its homosexual male patrons."[168] The court gave much weight to the owner's statement that his business's focus was to "provide a safe, non-threatening, comfortable and enjoyable social environment for the gay male community."[169] The court found that allowing the hotel and bar to limit its customers was important because it provided an environment where gay males could be free from violence, insults, and harassment based on their sexual orientation.[170] The court also found that the hotel and bar was a safe place where gay males could be physically affectionate and fully express themselves.[171] The court stated that a consequence of denying the exemption would lead the hotel and bar to become flooded with lesbian and straight patrons, which would

165. Peel Hotel Pty Ltd, [2007] VCAT 916 (May 24, 2007) (unreported), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2007/916.html; Equal Opportunity Act 1995, § 6 (1995) (Austl.), *available at* http://www.austlii.edu/au/au/legis/vic/consel_act/eoa1995250/s6.html.

166. *Peel Hotel Pty Ltd*, [2007] VCAT 916.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

"undermine or destroy the atmosphere which the company wishes to create."[172] In other words, not granting the exemption would force the hotel and bar owner to significantly alter the essence of his business.

Even though the Australian Equal Opportunity Act of 1995 did not contain an express exemption under which the hotel and bar would fall, the court found that exempting the bar from the Act followed the spirit of the law: to promote, recognize, and accept everyone's right to equality of opportunity.[173] The court stated that because heterosexuals had mixed-gender venues in which they could safely socialize and meet potential partners, homosexual men should have the same opportunity in a safe venue.[174]

While this opinion is about refusing to admit heterosexual patrons, it does contribute to the discussion of whether owners of homosexual-oriented bars should be able to refuse to hire heterosexuals. The Australian court relied heavily upon the business owner's argument that his hotel and bar was a safe place for homosexual men to meet, socialize, and express themselves, in addition to being free from homophobic harassment and violence.[175] Similar arguments could be made for gay bars in the United States, especially in light of a high level of antihomosexual violence in the United States.[176] Gay bar and nightclub owners, arguing that the primary purpose of their business is to provide safe havens for homosexuals to express themselves and be free from harassment and violence, could make a very strong argument that being homosexual is a BFOQ to work for their businesses. In order to perform the primary function or services of the business, employees must be homosexual to ensure that the safe haven exists for homosexual patrons.

However, there are significant counterarguments to classifying sexual orientation as a BFOQ for gay bars and nightclubs. First, as was done in *Wilson*, courts could find that the primary purpose of a gay bar or nightclub is to serve drinks and play music, and the sexual and political nature of the bar is merely secondary. Additionally, even if

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Many Suffered From Anti-Gay Violence in 2008*, GAY & LESBIAN TIMES, Jan. 1, 2009, http://www.gaylesbiantimes.com/?id=13770; Nat'l Org. of Women, Come Out Against Homophobia: Did You Know?, http://www.now.org/issues/lgbi/stats.html (last visited Jan. 26, 2010); *see* Hate Crime Statistics, www.fbi.gov/ucr/hc2008/incidents.html (last visited Mar. 8, 2010); Hate Crimes and Violence Against LGBT People, Human Rights Campaign (May 18, 2009), www.hrc.org/about_us/13262.htm; *see also* Anti-Gay Violence Persists, Statistics Show, www.trib.com/news/state-and-regional/article_40ecbec9-be9-be68-567e-aec8-9e93f3f3a146.html.

courts note the differences between gay and straight bars, they may find that pouring drinks, acting as security, or bussing tables have nothing to do with the sexual and political character of gay bars. However, like the court in *Peel Hotel* found, it is not that being gay makes someone more qualified to pour a drink or clear a table, but rather the sexual orientation of patrons, as well as employees, contributes largely to the character and protectiveness of the bar itself. One's sexual orientation does not affect the way one checks identification cards, but rather one's sexual orientation contributes to the spirit, nature, and essence of the business, and should be considered a BFOQ.

Courts may also find that despite the social, sexual, and political nature of gay bars, they often have mixed clientele, and therefore mixed employees would be appropriate. However, as expressed in *Peel Hotel*, the ability to control whom a business owner hires allows him to control the nature of his business. One commentator on the Hooters litigation, Patricia A. Casey, argues that business owners should be able to control the character of their business, and that patrons at Hooters care more about "being in the presence of the Hooters girls [than] they do about the burgers and beer."[177] The same can be said for gay bars: it is not the drinks, music, or food that attract gay patrons to gay bars; it is instead the promise of being surrounded by like-oriented people, feeling safe, and having the opportunity to socialize with other homosexual individuals.

Opponents of sexual orientation as a BFOQ can also rely on Title VII jurisprudence that, generally, customer preference cannot be the sole basis for a BFOQ.[178] However, the desire to hire only homosexual employees goes beyond customer preference, a patron's desire to be served by gay bartenders; what is important is the ability to feel safe to express oneself, meet other homosexuals, and create a homosexual atmosphere.

Ultimately, if future versions of ENDA contain a BFOQ defense, gay bar and nightclub owners will at least have the opportunity to argue that certain positions within their businesses must be filled by homosexuals. While the certainty of the success of the argument cannot be clear, gay bar owners should at least have the opportunity to fight for their ability to create the character and essence of their business. If ENDA is going to grant religious institutions the ability to argue that they fall under the exemption, which allows the exclusion of homosexuals and bisexuals from employment based on their beliefs and practices, owners

177. Casey, *supra* note 163, at 41.

178. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (2009).

of gay businesses should have the same opportunity under a BFOQ defense.

B. Gay-Oriented Youth, Community, and Counseling Centers

Other gay-oriented businesses may also be able to assert effectively a BFOQ defense, if available under ENDA. More specifically, gay community centers or gay counseling services for youths could argue that certain positions within their organizations require employees to be homosexual or bisexual due to heightened levels of customer preference and privacy concerns.

Despite precedent stating that customer preference by itself cannot create a BFOQ, there have been cases in which customer preference is considered, especially in light of authenticity, genuineness, and privacy concerns.[179] In *Fesel v. Masonic Home of Delaware, Inc.*, a male nurse was denied employment by the defendant-nursing home and later filed a lawsuit alleging sex discrimination under Title VII.[180] The employer was a nursing home with mostly female residents.[181] The position in question, a nurse's aide, had duties that in part provided intimate personal care to both males and females, including but not limited to "dressing, bathing, changing of geriatric pads for incontinent patients, tending to patients with catheters, and assisting in the use of toilets and bed pans."[182] Nurses' aides also performed other nonintimate duties including making beds, reading and sorting mail, feeding, cleaning, and maintaining medical equipment.[183]

The court relied on case law that addressed privacy rights of customers and their impact on hiring decisions.[184] Some of these cases held, inter alia, that a male-only prison could preclude female corrections officers from certain duties in order to ensure privacy of inmates,[185] that a youth study center could restrict hiring based on gender for a position that required supervising and sometimes searching children,[186] and that

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179. *See infra* notes 180-198 and accompanying text.
180. 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).
181. *Id.* at 1346, 1347.
182. *Id.* at 1348.
183. *Id.*
184. *Id.*
185. Reynolds v. Wise, 375 F. Supp. 145, 151 (N.D. Tex. 1974).
186. City of Philadelphia v. Pa. Human Relations Comm'n, 300 A.2d 97, 104 (Pa. Cmwlth. 1973).

universities may be able to limit hiring of custodians for single-gender dormitories.[187]

The nursing home argued that hiring a male nurse's aide would undermine the essence of its business and operation because female customers would not consent to a male performing intimate personal procedures.[188] Additionally, the nursing home argued that this would cause several residents to leave the home in favor of one that employed female nurses' aides, therefore greatly affecting the survival of the business.[189] Relying on the intimate nature of the position and the assumption that female residents would leave the home, the court ultimately found that gender was a BFOQ in this case.[190]

Examining a youth center specifically, one court found that gender was a BFOQ for positions of youth center supervisors.[191] In *City of Philadelphia v. Pennsylvania Human Rights Commission*, the youth center in question traditionally hired males to supervise males and females to supervise females.[192] The court examined the BFOQ defense in Pennsylvania's Human Relations Act, which closely mirrors Title VII's language, and the court relied on EEOC guidelines and case law based on Title VII in making its decision.[193] The position's duties included supervising, transporting, and searching of youths, and overseeing showers.[194] While the court found that either gender was equally capable of supervising and searching the youths, it also found that children supervised by the opposite gender could experience trauma, irreparable harm, and emotional impairment.[195] Supervisors must be able to gain the trust, confidence, and respect of the troubled youths, and "aid them in regaining a proper perspective of the trying problems of growing up in a dangerous, hostile, [and] competitive world."[196] The court did not require the center to submit evidence of this, and found that it is "common sense that a young girl with a sexual or emotional problem will usually approach someone of her own sex."[197] Ultimately, the court found that

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187. Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214, 218 (D. Minn. 1992) (holding that it was a question of fact as to whether gender was a BFOQ for a custodian in all-female dorm).

188. *Fesel*, 447 F. Supp. at 1352.

189. *Id.*

190. *Id.* at 1352, 1354.

191. *See City of Philadelphia*, 300 A.2d at 97.

192. *Id.* at 98.

193. *Id.* at 100.

194. *Id.* at 106.

195. *Id.* at 102-03.

196. *Id.* at 103.

197. *Id.*

gender was crucial to successful job performance and therefore a valid BFOQ.[198]

When evaluating BFOQ defenses, courts have found that it is possible that privacy can be the central mission of the employer.[199] With respect to the integration of privacy rights and customer preference, courts will take customer preference into account "only when it is based on the company's inability to perform the primary function or service it offers."[200]

The line of reasoning in this case could be helpful in the event that a gay community center, youth outreach program, or gay counseling service asserts a BFOQ defense. A community center or counseling service is factually different from a nursing home, but privacy concerns of its customers may make for a valid argument. In light of the high levels of suicide and homelessness among gay youth,[201] community and counseling centers are vital resources. Physical privacy may not be a concern, but general privacy, trust, and comfort are important concerns of these institutions. Because courts have held that privacy is a valid BFOQ to an employer's mission,[202] community and counseling centers could argue that being homosexual is a BFOQ for working in certain positions, mainly as counselors, supervisors, and mentors. To have otherwise may alienate the customers, raise trust concerns, and cause customers to go elsewhere, and would therefore prohibit the center from performing its primary services.

Businesses like these would likely not be making this argument for profitability or competitive reasons. Rather, employers of gay counseling and youth-oriented services likely desire to hire homosexuals in order to be a welcome and safe place for troubled gay youth. It is not money, but rather necessity that gay youths or troubled gay individuals feel welcome at a business and by its employees.

However, this argument based on privacy concerns would likely face much opposition, specifically, that privacy concern cases are meant to be based on physical privacy, not mental or emotional privacy, or

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198. *Id.* at 104.

199. Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214, 216 (D. Minn. 1992).

200. Olsen v. Marriot Int'l, Inc., 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999) (quoting Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971)) (alteration in original).

201. Gay and lesbian youth are three times more likely to commit suicide than heterosexual youths, and suicide is the leading cause of death among gay teens. Also, high school drop out rates and homelessness is higher among gay youths than straight youths. Case Western Reserve Univ.—Safe Zone, Safe Zone Program: Statistics, http://www.case.edu/provost/lgbt/programs/statistics.html (last visited Jan. 26, 2010).

202. *Hernandez*, 793 F. Supp. at 216.

comfort.[203] The *Fesel* case, as well as other cases considering privacy issues, discussed positions with duties in which employees will see customers naked or partially naked, or include intimate physical touching. In *City of Philadelphia*, the position involved both intimate and emotional aspects.[204] In that case, the court's reasoning for finding a BFOQ was based on the need to gain trust and not on physical touching.[205] Youth centers and counseling services may not have this sort of physical proximity. However, youth centers and counseling services, especially for gay individuals, could argue that customers must feel safe and accepted by the employees in order for the business to survive. As in *City of Philadelphia*, where troubled females felt comfortable approaching other females, homosexual youths may feel comfortable approaching other homosexuals. Fears of violence, harassment, and oppression make it more likely that gay youths will trust supervisors and counselors who are homosexual.

In a BFOQ claim, youth centers and counseling services are sympathetic defendants.[206] They create a safe and private atmosphere for troubled and victimized individuals to seek help because most are nonprofits, and profitability is not their main objective. Courts may be willing to extend the privacy rationale for a BFOQ to these types of businesses.

C. Consequences of These Arguments

As previously stated, there may be legitimate instances in which being homosexual or bisexual is a BFOQ for certain positions, such as gay bar servers and gay youth center supervisors.[207] However, if these claims are successful, there is a danger that similar, straight businesses will make the same argument and will be able to perpetuate sexual orientation discrimination in their businesses.

Despite the noted differences between gay bars and straight bars, an owner of a straight bar may argue that his or her patrons come to the bar to be surrounded by other straight people and to be away from

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203. *Olsen*, 75 F. Supp. 2d at 1067.

204. City of Philadelphia v. Pa. Human Relations Comm'n, 300 A.2d 97, 103 (Pa. Cmwlth. 1973).

205. *Id.* at 199.

206. Welcome to Passages's Website, http://www.kcpassages.org/ (last visited Jan. 26, 2010); Affirmations, The Community Center for Lesbian, Gay, Bisexual & Transgender People and Their Allies, http://www.goaffirmations.org/ (last visited Jan. 26, 2010); L.A. GAY & LESBIAN CTR., 2006 ANNUAL REPORT, *available at* http://lagaycenter.org/site/DocServer/AR06_FINAL.pdf?docID=262 (last visited Jan. 26, 2010).

207. *See supra* notes 67-82 and accompanying text.

homosexual people, and therefore bartenders and servers in his or her bar must be straight. While there is significantly less evidence to suggest that straight bars are safe havens for straight people or cornerstones of any sort of heterosexual rights movement, reverse discrimination is just as actionable as traditional discrimination. If any straight bar or business owner can establish that his business's primary purpose is to foster and encourage a straight lifestyle, it could result in continued discrimination against homosexuals and bisexuals, and counteract the purpose of ENDA. Courts may fail to see the nuances between straight and gay bars, or may find that if gay bars can legally hire only gay people, straight bars should be able to legally hire only straight people.

VII. CLOSING

Ultimately, the inclusion or exclusion of a BFOQ defense in ENDA could have both positive and negative effects on both religious and gay-oriented businesses. The most puzzling aspect of ENDA's lack of a BFOQ defense is the absence of any real debate or concerns about its inclusion or exclusion. The BFOQ defense has been a vital part of Title VII, and is often, but unsuccessfully, asserted as an affirmative defense. Including a BFOQ defense would enable ENDA to mirror more closely Title VII, which floor debates have indicated to be the intent of Congress. However, excluding a BFOQ defense would better effectuate the purpose of ENDA, to eliminate sexual orientation discrimination in employment.

With the presidency of Barack Obama and a Democrat-dominated House and Senate, gay activists expect a great deal of legislative progress over the next several years. In fact, as recently as April 2009, the House of Representatives passed the Matthew Shepard Act, a piece of hate crime legislation that defines hate crimes as "those motivated by prejudice and based on a victim's race, color, religion, national origin, gender, sexual orientation, gender identity or disability."[208] The Act extended hate crime protection to sexual orientation and gender identity for the first time. This Act was previously stalled in the Senate due to President George W. Bush's threat to veto it.[209] With support from President Obama, there is hope that the bill will pass the Senate, and become law very soon.[210]

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208. Houses Passes Hate-Crimes Bills, http://thecaucus.blogs.nytimes.com/2009/04/29/house-passes-hate-crimes-bill/?scp=3&sq=hate%20crime&st=cse (Apr. 29, 2009, 6:31 p.m.).

209. Carol Costello, CNN, www.cnn.com/2007/politics/05/03/hate.crimes.bill/index.html (last visited Mar. 1, 2010).

210. *See supra* note 208 and accompanying text.

If this trend continues, LGBT activists can be hopeful that further federal protection of sexual orientation discrimination is soon to come. ENDA is an important piece of legislation, with or without a BFOQ defense, that will offer legal protection to a long-oppressed minority whom federal law has historically ignored.

Congress is now tasked with fine-tuning the language, scope, and defenses of ENDA, and will hopefully take a closer look at, and debate, whether or not to insert a BFOQ defense. Failure to weigh the repercussions of its inclusion or exclusion is irresponsible and unthoughtful, and could have far reaching effects that Congress has yet to contemplate.