

**Lambda Legal’s Analysis of H.B. 3685:**  
**Narrow Version of ENDA Provides Weaker Protections for Everyone**

On October 1, 2007, Lambda Legal released a preliminary legal analysis addressing the differences between the version of the Employment Non-Discrimination Act introduced into Congress on April 24th of this year (in a bill known as H.R. 2015, which was introduced by Representatives Barney Frank, Tammy Baldwin and others) and the version introduced on September 27, 2007 (in a bill known as H.R. 3685, which was introduced by Representative Frank and others).<sup>1</sup> As we pointed out, if it were enacted, H.R. 3685 would prohibit employment discrimination based on sexual orientation but, unlike H.R. 2015, would not prohibit discrimination against transgender individuals or people who are perceived as not conforming to gender stereotypes. We explained that H.R. 2015 was the much more protective bill not only for transgender people but also for lesbians, gay men and bisexuals. This statement explains in further detail Lambda Legal’s analysis regarding these two different versions of ENDA and responds to several questions raised regarding our position.

As an organization whose mission includes advancing the rights of lesbians, gay men, bisexuals and transgender people (as well as those with HIV), Lambda Legal seeks to protect the interests of all those we exist to serve, and not to advance the goals of some of our clients and community members at the expense of the others we represent. That is a duty most lawyers do their best to meet whenever they simultaneously represent multiple clients. We believe that obligation also applies to nonprofit legal organizations, which should serve all those whose interests they have the responsibility to protect without favoring members of one group to the detriment of members of another.

Being a legal organization, it therefore readily made sense to us that we should join what now is nearly 300 LGBT and allied groups across the country who are supporting H.R. 2015 and who are opposing its replacement by H.R. 3685.

Since the dispute began a few weeks ago over which bill deserves support, we at Lambda Legal have been trying to employ our expertise as civil rights lawyers knowledgeable about the legal needs of LGBT people. We are proud to be a leader among many speaking out in an unprecedented outpouring of community efforts to secure the best law possible to protect lesbians, gay men, bisexuals and transgender people against employment discrimination. In joining those who support only a version

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<sup>1</sup> See <http://www.lambdalegal.org/news/pr/lambda-legals-analysis-enda.html>.

of ENDA that would provide adequate protection to all LGBT people, we believe we are doing what we should to fulfill our professional responsibility as a public interest legal organization to protect all of the communities we serve.

Some have questioned whether those who are fighting for a version of ENDA that would prohibit both discrimination based on sexual orientation and discrimination based on gender identity and expression appropriately are considering the needs of those in states without statutory protection against sexual orientation employment discrimination.<sup>2</sup> They need only look, however, at the list of the numerous state and local groups from those very states who have joined in supporting H.R. 2015 rather than H.R. 3685 and who are working hard to secure a comprehensively protective version of ENDA. Those groups include (to name only a few) Equality Alabama, Equality Arizona, Equality Florida, Indiana Equality, Michigan's Triangle Foundation, Equality South Dakota, Equality Texas, Equality Utah, and Equality Wyoming.<sup>3</sup> This is clearly not a position held by those living only on the coasts or in states where adequate protections might be said already to exist.

As many people are beginning to become aware, the version of ENDA that was introduced in April of this year expressly includes a provision that would protect against employment discrimination based on "gender identity." "Gender identity," in turn, is defined in that bill as including "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual."<sup>4</sup> In other words, the version of ENDA originally introduced this year explicitly would cover not just discrimination based on actual or perceived sexual orientation, but also discrimination against both those who identify as transgender and those who appear, act or have other characteristics that are perceived as not conforming to sexual stereotypes. This earlier version of ENDA is intended to go beyond requiring employers not to treat lesbian, gay and bisexual employees differently from others based on their sexual orientation, but also to require employers not to discriminate against transgender employees or employees who differ from others because of their actual or perceived appearance, mannerisms or gender-related characteristics. It took several years of many groups' and individuals' hard work to convince members of Congress to include this expanded coverage as part of ENDA. Because these groups and individuals were able to convince House leadership that a

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<sup>2</sup> See <http://www.washblade.com/2007/10-12/view/columns/11405.cfm>. (editorial by University of Minnesota Law School Prof. Dale Carpenter, arguing that that opposition to a version of ENDA that does not include protection against discrimination based on gender identity and expression is coming from those "living in cocoons on the coasts and in large cities" who are "imposing gender and queer theory on the lives of millions of gay Americans throughout the South, Midwest, and West").

<sup>3</sup> See <http://www.unitedenda.org/>. Likewise, Lambda Legal has staff, offices, members, and clients in states without statutory protection against sexual orientation discrimination in employment and we are committed to fighting sexual orientation discrimination to protect lesbians, gay men and bisexuals in every state in the country.

<sup>4</sup> See H.R. 2015, § 3(a)(6) available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-2015>. H.R. 3685 (available at [http://thomas.loc.gov/home/gpoxmlc110/h3685\\_ih.xml](http://thomas.loc.gov/home/gpoxmlc110/h3685_ih.xml)) omits this definition as well as any reference to "gender identity."

broad version of ENDA that would protect lesbians, gay men, bisexuals and transgender individuals was the correct path to follow, the version of the bill introduced in April sought to protect against both sexual orientation discrimination and discrimination based on gender nonconformity.

The House leadership apparently concluded last month that they did not have enough votes to pass that inclusive version of ENDA through the House. They had several options at that point. One was to seek to employ further means (such as added party pressure, stronger lobbying, more constituent appeals, Congressional hearings, and increased public education) to rally additional support for the bill. Another was to delay consideration of H.R. 2015 (the bill introduced in April) until they felt they had enough votes for the bill to defeat hostile amendments and secure its passage. Instead, however, they decided to introduce H.R. 3685 and to call for a vote on that bill, which solely would provide protection against sexual orientation discrimination and would jettison H.R. 2015's broader scope. When this happened, groups and individuals who had worked hard to obtain a more inclusive version of the bill were extraordinarily disappointed. We believe this explains some of the sense of outrage that initially was voiced by some in response to this change in political strategy.

As a legal group, we endeavored to do what we think we do best – provide legal analysis of legislation and the law. A few politicians and blog contributors have questioned some of that legal analysis and our decision to release it publicly. We have reflected hard on that critique and, having done so, believe we have lived up to our reputation for legal acumen and leadership.

To recap: On October 1, 2007, we released a preliminary legal analysis addressing the decision of certain members of Congress to remove the prohibition of discrimination based on gender identity and expression that is in H.R. 2015 from the language of H.R. 3685. Our analysis subsequently was joined and expanded upon in a joint statement released on October 4, 2007 by Lambda Legal, the ACLU, the National Center for Lesbian Rights (NCLR), Gay & Lesbian Advocates & Defenders (GLAD) and the Transgender Law Center.<sup>5</sup> As explained in our preliminary analysis and in the joint statement, a significant concern exists about what might happen if a version of ENDA were to be enacted that prohibited only sexual orientation discrimination and not discrimination based on gender identity and expression. That concern is based not so much on the rulings in particular published opinions addressing state law sexual orientation employment discrimination statutes, but instead arises principally from our knowledge of what has happened in employment discrimination cases generally, particularly in the federal courts that would decide cases that would be brought in the future under any version of ENDA that may be enacted.

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<sup>5</sup> See <http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html>. Lambda Legal and these four other LGBT legal groups collectively have more experience litigating LGBT employment discrimination cases than anyone else in the country. Lambda Legal joined several of these groups in writing to members of Congress more than four years ago to make clear our shared view that any new version of ENDA that would be introduced had to include protection against discrimination based on gender identity and expression as well as discrimination based on sexual orientation.

As, NCLR Executive Director Kate Kendell explained in her statement of October 10, 2007,<sup>6</sup> we have witnessed federal courts rule that the ban on national origin discrimination in Title VII of the Civil Rights Act of 1964 does not prohibit discrimination against employees who, during work hours, sometimes use the language of their country of origin.<sup>7</sup> We likewise have seen federal courts rule that Title VII's prohibition on race discrimination does not prohibit discrimination against an employee for wearing a hairstyle often favored by people of a particular race.<sup>8</sup> Federal courts, including the U.S. Supreme Court, have ruled that the American with Disabilities Act does not prohibit discrimination against an employee that has occurred because the employer believes the employee has a disability that prevents the employee from doing the job if that belief is unjustified because the employee has taken steps to minimize the disability through medication or assistive devices such as a hearing aid or eyeglasses.<sup>9</sup> And, perhaps most infamously, the Supreme Court at one point ruled that Title VII does not prohibit discrimination against women who are pregnant because not all women become pregnant,<sup>10</sup> a ruling that Congress eventually overturned.<sup>11</sup>

The federal courts have grown more and more conservative due to appointments made under the administrations of President George W. Bush, President George H.W. Bush and the late President Reagan. As the above rulings indicate, many of the judges they appointed are profoundly unsympathetic toward plaintiffs in employment discrimination cases generally<sup>12</sup> and, as other cases show, many of those judges are particularly unsympathetic to lesbian, gay and bisexual plaintiffs. What concerns us is that, in employment discrimination cases brought under a version of ENDA that might be enacted in the future, a similarly overly restrictive view of that law's scope might be adopted by at least some courts if that version of ENDA has language prohibiting discrimination based on sexual orientation but not gender identity and expression.

Some people contend that it already is firmly settled that it is illegal to discriminate against someone who is perceived as gender nonconforming, as a result of

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<sup>6</sup> See [http://www.nclrights.org/site/PageServer?pagename=press\\_ENDAlambdasupport101007](http://www.nclrights.org/site/PageServer?pagename=press_ENDAlambdasupport101007).

<sup>7</sup> See *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

<sup>8</sup> See *Rogers v. American Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981).

<sup>9</sup> See, e.g., *Sutton v. United Airlines*, 527 U.S. 471 (1999).

<sup>10</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>11</sup> See 42 U.S.C. § 2000e(k) (adopted by the Pregnancy Discrimination Act, P.L. 95-555, Stat. 2076 (Oct. 31, 1978)).

<sup>12</sup> See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 451-52 (2004) (describing "a troublesome anti-plaintiff effect in federal appellate courts" for employment discrimination claimants along with a bias against plaintiffs at the trial level).

*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, the Supreme Court said that Title VII required an employer to prove that its decision to deny a woman partnership in the firm was not motivated by a discriminatory purpose, when that decision followed comments by the firm's existing partners about her not acting in stereotypically feminine ways. Lambda Legal, among many others, believes (and, in fact we have argued and are arguing in litigation right now) that, properly understood, the *Price Waterhouse* decision means that it is a form of sex discrimination prohibited by Title VII for an employer to take adverse action against an employee or job applicant due to sex stereotypes. Fortunately, that currently is the majority view of the federal bench. If that understanding were codified in the current statutory language of Title VII, those contending that discrimination based on gender nonconformity already has been adequately addressed in federal law would have a point. Indeed, a significant part of what those who are fighting to get a more inclusive version of ENDA passed is precisely that: to establish in express statutory language what we believe is the teaching of the *Price Waterhouse* case.<sup>13</sup>

Unfortunately, not all courts have yet accepted the majority view that *Price Waterhouse* means that discrimination based on gender nonconformity is barred by Title VII and some academics and conservative judges have disagreed with the position.<sup>14</sup> Even were there full agreement among the bench with the majority understanding of this aspect of the *Price Waterhouse* decision, it is widely agreed that the United States Supreme Court has become more conservative and antagonistic toward employment discrimination claims since 1989 when *Price Waterhouse* was decided. Decisions like *Ledbetter v. The Goodyear Tire & Rubber Company*, 127 S. Ct. 2162 (2007), certainly demonstrate that the currently composed Court is not adverse to overturning long-accepted understandings of Title VII in the interest of protecting employers against suit.<sup>15</sup>

This is the explanation why we and the nation's other principal LGBT legal groups uniformly believe that a version of ENDA that does not prohibit discrimination based on gender nonconformity not only wrongly excludes protection for transgender people, but also does not provide adequate protection to lesbians, gay men and bisexuals. Lesbians, gay men and bisexuals need adequate protection against discrimination based on gender nonconformity – as well as sexual orientation – for two reasons. First, many lesbians, gay men and bisexuals do not conform to gender stereotypes. Certainly not all, but many appear or have mannerisms or other characteristics that at least are perceived as

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<sup>13</sup> The language of Title VII likewise could be amended explicitly to write into Title VII's statutory language that that is what Title VII provides. There has been opposition to amending Title VII, however, and, given the overlap that exists between sexual orientation discrimination and discrimination based on gender nonconformity, making this express in ENDA was agreed to be the appropriate way to achieve this result by those who drafted and introduced H.R. 2015.

<sup>14</sup> See, e.g., *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058, 1066, 1067-68 (7th Cir. 2003) (Posner, J., concurring).

<sup>15</sup> See *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18. On July 31, 2007, the House of Representatives voted to overturn the Supreme Court's ruling in the *Ledbetter* case by passing H.R. 2831, the Lily Ledbetter Fair Pay Act, by a margin of 225 to 199.

different from some people's stereotypes of what a "real" man or woman should be like. When those members of our community are discriminated against on that ground, they need as strong a form of protection as can be provided. We strongly believe that *Price Waterhouse* provides protection, but because not all judges agree and the Supreme Court could change its mind on the point, the most secure protection is clear statutory language codifying the rationale of *Price Waterhouse*. In addition, many employers are able to hire well-paid, talented lawyers at big law firms to come up with arguments to protect businesses against liability, without regard to the merits of whether an employee was discriminated against or not. As pointed out above, these lawyers repeatedly have been able to characterize discrimination based on race, national origin, disability and sex as something else – something not legally prohibited – and we fear that, even when a lesbian, gay man or bisexual has been discriminated against based on sexual orientation and not gender nonconformity, those lawyers will argue that what was going on was actually discrimination based on gender identity and expression, which makes it very important to have a law that does not permit that dodge.

Some have asked, why, if those concerns are valid, legal and political organizations didn't oppose versions of ENDA introduced in prior years. The simple answer is that we have become more aware of the problem over time and, as the federal courts have grown more conservative, we have grown more concerned.

The following exposition of the current state of employment discrimination litigation may provide some additional appreciation of why that concern is a reason to oppose the more recently introduced version of ENDA, even without there being significant citable cases from states that have sexual orientation laws but that do not have laws prohibiting discrimination based on gender identity and expression. This explanation may be particularly helpful to those who have not talked, as we have, with many people who have been fired, denied a job or promotion or harassed at work because of their sexual orientation. Based on the thousands of calls from LGBT people Lambda Legal receives every year, what we know is that most of the people who find themselves out of a job due to anti-gay bias or who suffer harassment or other discrimination based on sexual orientation – even in the states with laws expressly prohibiting employment discrimination based on sexual orientation – are never able to find a lawyer to represent them, and therefore never file suit.

There are several reasons for that. In the first place, most people who have been discriminated against at work on any ground (particularly those who have just been fired) cannot afford the typical \$2,500 to \$10,000 retainer for costs that most plaintiffs' employment discrimination lawyers require up front, even when those lawyers have agreed to take the case on a contingency basis. In addition, many plaintiffs' side lawyers will not accept a client in a sexual orientation anti-discrimination case. In some instances, this is because of bias; in others, it is because the lawyers do not feel knowledgeable about the issues; in yet others, it is because the lawyers do not believe the recovery will be certain or large enough to justify their commitment of resources. Indeed, even public interest legal organizations like ours can take but a limited number of sexual orientation employment discrimination cases each year and generally accept only

the strongest cases in our efforts to secure advantageous precedent that will assist those whose cause we champion.

If someone who has experienced sexual orientation employment discrimination is able to retain a lawyer, it is an unfortunate reality that some lawyers who take on those cases lack the experience necessary to handle the cases appropriately. For example, even though it is well-established that Title VII of the Civil Rights Act of 1964 does not prohibit employment discrimination based on sexual orientation, every year federal courts dismiss cases that uninformed lawyers have filed under Title VII asserting that their client was discriminated against based on sexual orientation<sup>16</sup> or emphasizing in their pleadings comments or other conduct demonstrating an employer's anti-gay bias.<sup>17</sup>

But, say the plaintiff has a more experienced, knowledgeable attorney who properly has pled a sexual orientation anti-discrimination case in state court in the states where there is a statute prohibiting such discrimination – or in federal court for sex discrimination or sexual harassment in violation of Title VII. Most employment discrimination cases based on any prohibited ground of discrimination end up settling without there ever being a published opinion or publicity about them.<sup>18</sup> Even those cases that are not settled may result in an unreported decision that is never appealed or may be dismissed with an opinion that is not made publicly available. This is particularly true in state courts, whose trial court decisions frequently are not published or available on line and whose appellate decisions as well may not be published or made available to on-line legal research systems.

As a result, there currently are very few published decisions addressing any of the issues that arise in sexual orientation employment discrimination cases in the states that have statutes prohibiting discrimination based on sexual orientation but that do not have statutes expressly prohibiting discrimination based on gender nonconformity – or that did not have such broader statutory protection at the time the cases were brought. This in turn makes it even more likely that employees whose cases might be characterized as “really” involving discrimination based on gender nonconformity rather than sexual orientation will have a hard time finding counsel to take their case, because plaintiffs’

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<sup>16</sup> See, e.g., *Simonton v. Runyon*, 225 F.3d 33, 34 (2d Cir. 2000) (noting that the plaintiff’s Title VII complaint alleged that he had been “subjected to an abusive and hostile work environment by reason of his *sexual orientation*”) (emphasis added); *Bibby v. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 1999) (“Because the evidence produced by Bibby -- and, indeed, his very claim -- indicated only that he was being harassed on the basis of his *sexual orientation*, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.”(emphasis added)).

<sup>17</sup> See, e.g., *Trigg v. New York City Transit Auth.*, 2001 U.S. Dist. LEXIS 10825, at \*17 (E.D.N.Y. July 26, 2001) (rejecting gender stereotyping claim because plaintiff’s “Amended Complaint is rife with references to sexual orientation, homophobia, and accusations of discrimination based on homophobia), *aff’d without opinion*, 50 Fed. Appx. 458 (2d Cir. 2002).

<sup>18</sup> See Labor Dep., Gibson, Dunn & Crutcher, *A Guide to Employment Discrimination Litigation*, C779 ALI-ABA 457, 525 (1992) (“Most employment discrimination suits are settled rather than litigated to judgment.”).

lawyers generally are not willing to take on cases that involve greater risks or whose chance of a significant settlement is diminished by a heightened risk of a loss, dismissal or recovery of only a minimal judgment. This likewise reduces the number of published cases that might address these issues. It also further buttresses the point that, when a statute prohibits discrimination based on sexual orientation but does not expressly prohibit discrimination based on gender nonconformity, that statute will end up providing lesser protection to lesbians, gay men and bisexuals than a statute that expressly prohibits both discrimination based on sexual orientation and discrimination based on gender identity and expression.<sup>19</sup>

This situation may be well-known to some people, but we believe that many who have demanded that they be shown the cases where there has been a problem because sexual orientation discrimination is prohibited but discrimination based on gender identity is not expressly banned as well are not familiar with the reality of actually litigating employment discrimination lawsuits. The demand for the production of such cases fails to understand how litigators actually do their work. It is not unusual for us to be confronted with situations where there is not a lot of case law on the precise issue presented in a case. When that occurs, we reason from what there is and make arguments based on deduction and analogy.

Which brings us to the critique a few people have raised to Lambda Legal's reference to *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), in our letter to Congressman Frank dated October 4, 2007.<sup>20</sup> We should make clear, first, that that case is not the ground of our concern about a limited version of ENDA. Instead, the explanation set forth earlier in, and at the close of, this letter is. The debate about that case is a sideshow to the real issues. The real question is whether, if H.R. 3685 were to become a law instead of just a bill, it would be adequate to provide protection to lesbians, gay men and bisexuals without ensuring that discrimination based on gender nonconformity is prohibited along with discrimination based on sexual orientation.

We continue to believe that the *Dawson* case is instructive. A number of aspects of the approach taken by the court in that case are similar to what we have seen in other troubling employment discrimination cases. The Court ruled against Dawn Dawson – without a trial and without her having an opportunity for a jury to hear her case – by discounting her testimony in order to grant summary judgment against her. *See Dawson*,

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<sup>19</sup> This is so because such a less inclusive statute will make it harder for lesbians, gay men and bisexuals to find a lawyer at all to file suit on their behalf. It further is so because, even if a lesbian, gay man or bisexual is able to retain counsel, the case may end up being undervalued in settlement negotiations, which happens when a case is perceived as less likely to result in a successful judgment. If the result in a case may be that some motivation (such as gender identity or expression) not prohibited by the state's sexual orientation employment discrimination statute was behind the employer's action, the employee is likely to recover less in settlement than if that motivation also is a prohibited ground of bias under the statute.

<sup>20</sup> See [http://data.lambdalegal.org/pdf/ltr\\_enda\\_frank.pdf](http://data.lambdalegal.org/pdf/ltr_enda_frank.pdf).

398 F.3d at 221-22, and 221, n.2.<sup>21</sup> We often see courts do this by putting a high bar on what it takes to get to trial and not accepting as adequate evidence of discrimination the plaintiff's own testimony about what happened or information about incidents that might be interpreted in more than one way.

In its decision, the Court of Appeals also expressly noted that whether discrimination based on gender nonconformity was actionable under Title VII is still somewhat of an open question in the Second Circuit (at least where a female employee is not put in a "Catch 22" situation of being denied employment opportunities if she acts "too" masculine yet also being denied those opportunities if she acts in traditional feminine ways, as was the case in the *Price Waterhouse* case as well as the Second Circuit's earlier decision in *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 109 (2d Cir. 2004)).<sup>22</sup> The Second Circuit additionally noted in *Dawson* that lesbian, gay and bisexual plaintiffs have had a hard time bringing gender nonconformity cases under Title VII because courts frequently see those plaintiffs as trying to bootstrap protection for what really may be sexual orientation discrimination claims into Title VII,<sup>23</sup> which the courts have been committed not to allow.

The *Dawson* case thus demonstrates a parallel to the concern that Lambda Legal and the other principal LGBT legal groups have raised about any version of ENDA that does not expressly prohibit discrimination based on gender identity and expression. We fear that defense counsel will argue, and some courts may rule, that a lesbian, gay or bisexual plaintiff was "really" being discriminated against based on gender nonconformity and that the plaintiff is trying to bootstrap protection under a sexual orientation discrimination theory, in just the same sort of ways that courts have treated

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<sup>21</sup> The Court of Appeals also noted that the district court found Ms. Dawson's case not strong enough to be entitled to a trial in significant part due to the fact that the manager of the salon who ultimately decided to terminate Dawson is a "pre-surgery male to-female transsexual who ... at the time of the events in question, was transitioning from appearing male to appearing female." *Dawson*, 398 F.3d at 214. Faulty reasoning such as this often is used against employment discrimination plaintiffs. Just as a woman might engage in sex-based employment discrimination against another woman (concluding that she herself is different from other women or that there can only be so many women at the job), so too a male-to-female transsexual might engage in employment discrimination based on gender identity and expression against another transgender person and particularly against a gender-nonconforming lesbian.

<sup>22</sup> See *Dawson*, 398 F.3d at 221.

<sup>23</sup> *Ibid.* at 218. It is unfortunate that cases such as *Dawson* and *Trigg* have miscited the *Simonton* decision to support this false bootstrapping concern, but the reality is that they have. See *Dawson*, 398 F.3d at 218; *Trigg*, 2001 U.S. Dist. LEXIS 10825, at 16-17. *Simonton* specifically stated that allowing effeminate gay men and masculine lesbians to invoke *Price Waterhouse* is not bootstrapping sexual orientation into Title VII, but instead merely treating all gender nonconforming employees equally. See *Simonton*, 225 F.3d at 38 (sexual stereotyping theory "would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."). What we are discussing in this statement, however, and the basis for Lambda Legal's concern, is not what the law on gender nonconformity currently is (or what, properly understood, it should be), but the problems that exist at present and that might be presented in the future given the limited experience and understanding of some plaintiffs' employment discrimination lawyers and the current state of the federal courts.

national origin discrimination as “only” language discrimination that is not prohibited, race discrimination as “only” hairstyle discrimination that is not prohibited, and sex discrimination as “only” pregnancy discrimination that at the time was not prohibited.<sup>24</sup> Thus, a non-inclusive version of ENDA risks having a court decide that an employee cannot pursue a claim for sexual orientation discrimination because it concludes that what was going on was discrimination based on gender nonconformity, but then not allow a Title VII claim by reading the *Price Waterhouse* case overly narrowly. In addition to obtaining secure job protection for transgender employees, we need to make sure that lesbian, gay and bisexual workers do not fall through the cracks by a court doing just what the *Dawson* court talked about, and we believe the best way of doing that is to fight for a version of ENDA that prohibits both discrimination based on sexual orientation and discrimination based on gender identity and expression.

Finally, we believe that Dawn Dawson’s case was hampered by the lack of language in New York’s Sexual Orientation Non-Discrimination Act (SONDA) expressly banning discrimination based on gender identity and expression.<sup>25</sup> While the Second Circuit concluded that Ms. Dawson did not have enough evidence to be entitled to a trial on her sexual orientation claim under New York state’s antidiscrimination law,<sup>26</sup> the court did not analyze whether or not the result would have been different if Ms. Dawson had been able to sue under a state law prohibiting discrimination based on gender identity and expression. While the result might have been no different given that the Court of Appeals affirmed the grant of summary judgment against her on her Title VII case even on a possible gender nonconformity theory, no one will ever know for sure because Ms. Dawson did not bring a gender identity and expression discrimination claim under SONDA, since its statutory language only prohibits discrimination based on sexual orientation, which it defines as “heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived.”

We want to emphasize one final concern: all of this somewhat complicated legal discussion may be obscuring something essential. The initial and the principal reason why Lambda Legal supports H.R. 2015 and opposes H.R. 3685 is that we believe that that is what we must do as an organization whose mission it is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals and transgender people not just through litigation but also through education and public policy work.<sup>27</sup> We believe it is wrong as

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<sup>24</sup> This concern is made even stronger by the fact that both H.R. 2015 and H.R. 3685 expressly prohibit claims that might be brought under ENDA on a “disparate impact” theory.

<sup>25</sup> See N.Y. C.L.S. Exec. §§ 291(1) and 292(27).

<sup>26</sup> See *Dawson*, 398 F.3d at 224-25.

<sup>27</sup> Some have suggested that LGBT groups supporting H.R. 2015 and opposing moving forward with a more limited version of ENDA were not on the scene prior to the current dispute over which strategy to follow in seeking ultimate passage of such a law. While we cannot dispute that more would have been better, Lambda Legal certainly has been working hard, consistent with our nonprofit status, to educate people about the need for ENDA since well before H.R. 2015 was introduced earlier this year. For example, our “Clock In for Equality” campaign has helped educate the public about the need for a strong ENDA, as did our national day of action for workplace equality, in which more than 240 organizations

a matter of principle to exclude protection for transgender people from ENDA. We also are concerned about the risk of adverse legislative history inferences if April's inclusion of gender identity and expression in H.R. 2015 were undone. Given that even Congressman Frank himself stated on the floor of Congress that he does not "expect the President" to sign H.R. 3685,<sup>28</sup> opposition to that bill absolutely cannot be portrayed as denying lesbians, gay men, and bisexuals protection they otherwise would have by trying to advance the cause of transgender individuals, because the passage of H.R. 3865 through the House itself provides no protection to lesbians, gay men and bisexuals this year. A bill that has not yet been enacted into law protects no one.

Some have said you should not stop fighting for a bill simply because it won't become law at present. We agree with that. But we also think that there are times that you have to fight for what you want, and this is one of those times. We are worried that, if all that passes is H.R. 3685, we may be told the next time around that we can't ask for a stronger bill than what passed the House previously and that we therefore should be satisfied with the less protective compromise some are advocating for this year. If the House leadership moves forward with its current plans and tries to pass H.R. 3685 and wait on consideration of H.R. 2015 until some later date, and if it succeeds with that plan, we sincerely hope we are proven wrong.

But, just as Congressman Frank has talked about his concerns over needing momentum to pass ENDA in some later Congress, we are worried about getting stuck. We are worried that, if we give in to diminished expectations, all that we will be able to pass under a friendlier administration will be a law that excludes transgender people from protection and that inadequately provides protection to lesbians, gay men and bisexuals. We all need to work together to ensure that that is not what happens, and that we instead obtain the strongest law that we possibly can.

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participated at events across the country. At LGBT Pride events this past summer, we gathered more than 10,000 signatures on petitions urging Congress to support the version of ENDA that was then pending. We further have sent out emails and alerts to our members and featured information on our website about ENDA long before the present dispute about the competing versions of ENDA arose.

<sup>28</sup> See <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=16310>.