



## **ENDA Endangers the Rights of Religious Employers**

**Forcing people to employ members of the LGBT community could create more problems than it solves**

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Lesbian, gay, bisexual and transgender rights have made incredible progress in a short time. One significant step came in June, when the U.S. Supreme Court ruled that Section 3 of the Defense of Marriage Act, which defined marriage as between a man and a woman for the purposes of federal law, violated the equal protection component of the Fifth Amendment.

The Cato Institute supported the DOMA decision, and filed briefs on behalf of Edith Windsor, the named plaintiff. In fact, the libertarians at Cato have supported gay marriage longer than nearly any institution in Washington.

But the Employment Non-Discrimination Act is different. Eighty-eight percent of Fortune 500 companies already voluntarily prohibit sexual orientation discrimination, so ENDA would, at best, be tacked on to a social movement that has done more to advance the LGBT community than any law could have. At worst, ENDA would open the door to litigation pitting the rights of religious employers and employees against LGBT rights. It makes little sense to expand some rights by curtailing others.

Free markets have already gone a long way in helping eliminate discrimination. If business owners discriminate, then they will find it difficult to compete against those who don't. Imagine two job candidates, one gay and one straight. The gay candidate is the most qualified, but the employer's distaste for homosexuality means he hires the straight candidate. His more gay-friendly competitor hires the gay candidate, and his business does better. Public outcry is another way free markets have helped eliminate discrimination. Take, for example, the public response against Chick-fil-A for opposing gay marriage: Boycotts were encouraged, and some businesses even severed ties with the company.

This was an acceptable free-market response, but forcing people to employ members of the LGBT community could create more problems than it solves. Unlike discrimination based on race, LGBT discrimination is closely tied to religious belief. While we can condemn those who don't want to associate with the LGBT community, we have no right to make them act against their deeply held religious convictions. The Constitution protects encroachment on all religious beliefs, not just progressive ones.

If courts interpret ENDA like other employment discrimination laws, it will be read to prohibit a "hostile workplace," which usually comes in the form of statements overheard between employees. For instance, if an LGBT employee overhears co-workers discussing how they believe homosexuality is a sin, then it could be considered an ENDA violation for which the employer is liable. A probable result of this

would be employer-instituted policies prohibiting all discussion that could possibly offend anyone; thus making the federal government a censor by proxy.

ENDA does include religious exceptions, but they just allow the government to decide which employers are "actually" religious, such as churches and Sunday schools, and which are not. ENDA also makes the question "who is a religious employee?" a legal issue. Under ENDA, a church can discriminate based on sexual orientation in jobs that are purely religious, such as a minister, but not, say, for a janitor. But what about parochial school teachers? Are they religious employees?

These are the kinds of problems that will come out of ENDA. No wonder people of faith feel increasingly embattled. I am not religious, but, as the saying goes, I will defend to the death the right to religious conscience.