

Employment Non-Discrimination Act

Background

The pursuit of justice has not always been easy or popular, but AFGE stands true to a basic tenet of worker fairness: an employee or job applicant should be judged by his or her ability to perform the job. In this light, AFGE strongly opposes employment discrimination on the basis of sexual orientation. Right now, it is not a statutory civil rights violation to fire a hard-working, dedicated federal employee simply because that worker is not a heterosexual--and that's not fair. Although this protection has been applied to federal employees for three decades, the current Special Counsel has systematically denied federal workers a process to remedy discrimination based on sexual orientation. Although there was no movement on the Employment Non-Discrimination Act (ENDA) during the 109th Congress in 2006, a bill to extend benefits to domestic partners, the Domestic Partnership Benefits and Obligations Act, was introduced in the Senate. AFGE supports ENDA and does not object to legislation extending benefits to domestic partners of federal employees. At the same time AFGE calls upon the Office of Special Counsel to fully perform its job of protecting federal employees from discrimination as directed by Executive Order 13087.

Executive Order 13087 Is Important, But It Is Inadequate

For more than 25 years, the Civil Service Reform Act of 1978 has made it unlawful to discriminate against a federal employee or applicant "on the basis of conduct which does not adversely affect the performance of the employee or applicant." Since that time, administrations--both Republican and Democratic--have interpreted the provision to prohibit discrimination against federal workers on the basis of their orientation. In 1998, President Clinton issued Executive Order 13087, establishing a uniform policy for the federal government that prohibits discrimination on the basis of sexual orientation in the federal civilian workforce. The Executive Order was based on earlier statutory safeguards against discrimination on the basis of race, color, religion, sex, national origin, handicap, and age. Although Executive Order 13087 is a clear interpretation of the intent of the Civil Service Reform Act, it is inadequate. Federal employees need the Employment Non-Discrimination Act (ENDA).

Executive Order 13087 Is Not Being Enforced

Executive Order 13087 is not being enforced by the Office of Special Counsel (OSC), an office with the mandate of protecting the merit system and federal employees, despite the directive of the Executive Order. Appointed in 2004, the Special Counsel, Scott Bloch, is blatantly disregarding not only principles of workplace fairness but also decades of OSC statutory interpretation. Materials educating federal workers about protections against discrimination based on

sexual orientation have been removed from the OSC website. Both the Bush Administration and the Office of Personnel Management (OPM) have reaffirmed that discrimination based on sexual orientation is prohibited in federal employment, with OPM directing workers to file complaints through the Office of Special Counsel. However, because the OSC is the only agency with enforcement authority against this prohibited personnel practice, Mr. Bloch is effectively robbing federal workers of any process to pursue protection and remedy against discrimination based on sexual orientation. AFGE believes that this policy must be upheld, and federal employees should have a judicial remedy if it is not upheld.

ENDA Provides Basic Legal Protections

- Extends federal employment discrimination protections currently based on race, sex, religion, national origin, age and disability to sexual orientation. ENDA extends fair employment practices and does not convey special rights.
- Prohibits public and private employers, employment agencies and labor unions from using an individual's sexual orientation as the basis for employment decisions.
- Provides for the same process as permitted under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act but has limited remedies. Remedies that are available for cases of statistically disparate impact (affirmative action, quotas or the prohibitions of policy or practice) are permissible under ENDA.

What ENDA Does Not Do:

- Does not cover most religious organizations and employers with 15 or fewer employees.
- Does not apply to the uniformed members of the armed forces and does not affect current law on lesbians and gays in the military.
- Does not require an employer to provide benefits for the same-sex partner of an employee.
- Does not allow the Equal Employment Opportunity Commission (EEOC) to collect statistics on sexual orientation.

Conclusion

AFGE strongly urges the Congress to pass ENDA legislation.