



HOUSE OF REPRESENTATIVES II

Employment Discrimination

By Katie Sylvan

Introduction

Employment discrimination is defined by the International Labor Organization (ILO) as “any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation.”

Employment discrimination is an ongoing problem throughout the world, and despite increased awareness and laws designed to ultimately end this kind of discrimination, it has by no means been eradicated and remains of major concern in most countries in the world. Some of the more blatant forms of discrimination have become less common, but at the same time, other forms of discrimination that are less obvious have arisen. Increased global migration has resulted in a significantly greater admixing of cultures and the blurring of national boundaries. This has led in turn to rising **xenophobia** and increased racial and religious discrimination. More recently, new forms of discrimination have arisen based upon disabilities, HIV status, and **sexual orientation**.

In the United States, employment discrimination is prohibited by a number of state and federal laws, as well as by ordinances passed by counties and municipalities. The United States Constitution prohibits discrimination by federal and state governments. While discrimination in the private sector is not specifically prohibited by the Constitution, it is now subject to an increasing body of federal and state laws.

While laws banning discrimination at work are a critical component in eliminating the practice, the laws by themselves are not sufficient. Eliminating employment discrimination will also require effective enforcement institutions, unbiased education, training, and a method to monitor progress. The ILO sees the workplace as a strategic entry point for combating discrimination. Their report states, “When the workplace brings together people with different characteristics and treats them fairly, it helps to combat stereotypes in society as a whole. It forces a situation where prejudices can be defused and rendered obsolete. A socially inclusive world at work helps to prevent and to redress social fragmentation, racial and ethnic conflict and gender inequalities.”

Gary Becker, an American economist and winner of the Nobel Prize in Economic Sciences in 1992, did research showing that when racial and ethnic minorities are a small percentage of the total population, the cost of discrimination falls mainly on the minorities. However,

xenophobia—*intense or irrational dislike or fear of people from other countries.*

sexual orientation—*a person’s sexual attraction toward members of the same, opposite, or both genders.*



when these minorities represent a larger percentage of the population, the cost of discrimination falls on both the minorities and the majority. He found that if firms were able to specialize in employing mainly minorities and at the same time offer a better product or service, such a firm could avoid discrepancy in wages between equally productive black and white workers or males and females. This work led to the understanding by economists that market mechanisms impose penalties on profits whenever for-profit enterprises discriminate against individuals on any basis other than productivity. However bigoted managers may be, in the end, the profit penalty resulting from discrimination in the workplace will make profit-seeking enterprises great proponents of fair treatment.

Employment discrimination is a multi-faceted problem, and it includes discrimination based on age, sex, ethnicity, religion, sexual orientation, disability, and pregnancy status. More and more state laws have been addressing the issues of employment discrimination, but much additional work needs to be done, particularly in regards to education, before this problem can be eliminated.

Explanation of the Problem

History of the Problem

Discrimination has existed since the beginning of recorded time, and discrimination in the workplace has been around equally as long. In the United States, discrimination occurred early on in regards to the treatment of indigenous Native Americans tribes as well as to the treatment of slaves and of women.

The history of the fight for equality in America began as early as the late eighteenth century with Thomas Paine's article, "African Slavery in America," the first written article proposing the emancipation of slaves and the abolition of slavery. Such activism continued with the fight for women's rights, and in 1848, the First Women's Rights Convention was held, at which Elizabeth Stanton presented her Declaration of Sentiments proposing a constitutional amendment allowing women the right to vote.

With the start of the American Civil War in 1861, significant changes began to take effect. In 1863 President Abraham Lincoln signed the Emancipation Proclamation, ordering the liberation of the nation's slaves and making abolition one of the war's primary objectives. The end of the Civil War saw the ratification of the Thirteenth Amendment, which officially abolished all slavery and involuntary servitude. The Fourteenth and Fifteenth Amendments further guaranteed African Americans both citizenship and **suffrage**. Soon afterwards, the

suffrage—the right to vote in political elections.

Nineteenth Amendment, ratified in 1920, guaranteed women the right to vote.

Despite the strides that had been made in the fight for equality, it was not until the early 1960s that the first laws specifically addressing employment discrimination were passed. In 1963, the United States federal government passed the Equal Pay Act (EPA), which protects against sex-based wage discrimination in the work place for men and women that perform equal jobs. The following year, the Civil Rights Act of 1964 was passed. Title VII of this act prohibits all employment discrimination based on race, color, religion, sex, or national origin. Title VII also goes a step further by stipulating that an employer cannot discriminate against an individual based on his or her association with another individual of a particular race, religion sex, or national origin. The Civil Rights Act of 1964 also protects against **sexual harassment** (and all other types of discriminatory harassment) in the workplace, as addressed in the 1998 Supreme Court cases of *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*.

In 1967, Congress passed the Age Discrimination in Employment Act (ADEA), which prohibits employment discrimination against individuals who are 40 years of age or older. The legislation protects against all age discrimination in hiring, firing, promotions, and wages.

A few years later the Vocation Rehabilitation Act of 1973 was instated, aimed to combat federal employment discrimination on the basis of disabilities. It wasn't until the Americans with Disabilities Act of 1990 (ADA), however, that all forms of employment discrimination of qualified individuals (in both the private sector as well as state and local governments) on the basis of disability were banned. In 1998, the Supreme Court case *Bragdon v. Abbott* held that the ADA further protects HIV-positive individuals against employment discrimination. The following year, however, the Supreme Court severely limited the reach of the ADA in a series of cases, ruling that all measures taken to regulate an individual's disability must be taken into account when assessing whether or not that individual's disability should be covered by the scope of the ADA. For example, an individual taking medication for a mental condition may be unable to claim the ADA's protection when he or she has been discriminated against because of that condition.

More recently, Congress passed the Genetic Information Nondiscrimination Act of 2008 (GINA), which prevents employers from discriminating against an individual on the basis of his or her genetic information. The late Senator Ted Kennedy, a Democrat from Massachusetts, declared this piece of legislation to be the "first major new civil rights bill of the new century." Advances in the genetic arena serve as an aid to medical progress, as advances in the genetic foundation of illnesses give the advantage of earlier diagnoses of illnesses. And while early diagnoses and genetic testing make it such that an individual can

sexual harassment—*harassment (typically of a woman) in a workplace, or other professional or social situation, involving the making of unwanted sexual advances or obscene remarks.*

prepare and take measures to treat such illnesses, this information could also work against the individual in that an employer might hold such genetic information against an employee or potential employee when making workplace-related decisions. The Genetic Information Nondiscrimination Act protects against such discrimination, and ensures that an individual will not be penalized for early genetic testing.

Recent Developments

Twenty-one states and the District of Columbia have banned sexual orientation discrimination in employment. Fifteen states plus the District of Columbia have reformed their state civil rights code to include both sexual orientation and gender identity, while six other states have done so for sexual orientation, but not for gender identity.

There are two different facets to employment discrimination, and they have very different implications. The first of these is anti-subordination, which until recently was the major orientation of employment discrimination law. Anti-subordination laws were designed to prohibit practices that “enforce the inferior social status of historically oppressed groups.” These laws recognize that there are historically oppressed groups and that there is a need to correct the injustices of the past. These laws take the larger group into account and are less concerned with the individual. Policies such as racial and gender **quotas** arose as a product of anti-subordination legislation.

In contrast, anti-classification laws forbid taking race, gender, age, etc. into account at all in employment decisions. These laws are more focused on the individual than the larger group, and do not lead to quotas, since anti-classification demands that everything regarding employment decisions should be “blind.” Groups concerned with **reverse discrimination** would be more likely to favor an anti-classification approach to employment discrimination.

In 2009, the Supreme Court decided *Ricci v. DeStefano*, a landmark Title VII case. Twenty firefighters in New Haven, Connecticut sued the city for discrimination against them with regard to a potential job promotion. Nineteen of the firefighters were white and one was Hispanic, and all had passed the examination for promotion to management positions. City of New Haven officials invalidated the test results because none of the black firefighters who passed the exam had scored high enough to be considered for promotion. The city stated that they feared a lawsuit over the test’s adverse impact on a protected minority. The twenty firefighters filing the complaint claimed that they were denied the promotions because of their race, which constituted racial discrimination. The Supreme Court, in a 5-4 decision, ruled in favor of the firefighters, saying that the decision by the city to ignore the test results was a violation of Title VII of the Civil Rights Act of 1964.

quota—a fixed minimum or maximum number of a particular group of people allowed to do enter a country, undertake a job, enroll in college, etc.

reverse discrimination—the practice or policy of favoring individuals belonging to groups known to have been discriminated against previously.

A 2006 consulting group report for the First Annual HR Summit found that there had been a small decrease in discrimination charges filed with the Equal Employment Opportunity Commission (**EEOC**), likely as a result of more training efforts by the agency. That same year, the EEOC made fighting “systemic discrimination” a top priority of the agency and began focusing on catching “bigger fish.” The largest case in 2005 was *EEOC v. Abercrombie and Fitch Stores, Inc.*, a lawsuit that alleged that Abercrombie’s marketing efforts were directed towards a “classic all-American “ look and that minorities were given stock and night crew positions rather than sales associate and management positions. The courts ruled in favor of the plaintiffs with a settlement totaling \$50 million.

EEOC—an independent federal law enforcement agency that enforces laws against workplace discrimination.

Congressional Action

HR 2501, The Fair Employment Opportunity Act

Legislation has recently been introduced by two members of the House that would make it a federal crime to discriminate against unemployed workers simply on the basis of being unemployed. The argument is that this would effectively constitute racial discrimination since a large percentage of the unemployed are Latinos and African-Americans. This legislation is known as the Fair Employment Opportunity Act and has also been introduced into the Senate, where it has been met with debate.

Genetic Information Nondiscrimination Act

In 2008, Congress passed the Genetic Information Nondiscrimination Act, which made it unlawful to discriminate against a person on the basis of genetic information about that person. The law also bars group health insurance plans and health insurers from denying coverage to a healthy individual or charging that person higher health insurance premiums based solely on a genetic predisposition to developing a disease in the future. The act passed the Senate with unanimous support and the House with only one dissenting vote from Representative Ron Paul (R-TX). President George W. Bush signed the bill into law on May 21, 2008.

ADA Amendments Act

Also in 2008, Congress passed the ADA Amendments Act, an amendment to the American with Disabilities Act of 1990 (ADA). Congress found that while the ADA of 1990 was intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” in practice, the standards that were actually being used to define the disability were much higher than the original intent of the law. The purpose of the ADA

Amendments Act of 2008 was to carry out the ADA with “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection as intended by the original ADA.

Focus of the Debate

Liberal View

The liberal position on employment discrimination has been to consistently support all anti-discrimination legislation. The Employment Non-Discrimination Act (ENDA) is a bill proposed in the United States Congress that would prohibit discrimination against employees on the basis of sexual orientation or gender identity by civilian, nonreligious employers. ENDA, which is strongly supported by many liberals, has been introduced into almost every Congress since 1994, but has failed to pass. It was thought that with a Democratic majority beginning in 2006 the bill would be able to pass, but as a result of **transgender** inclusion in the bill’s text, final approval failed. The bill was reintroduced into the House in 2011, again with transgender inclusion, and was subsequently introduced into the Senate. President Obama supports the bill, while former President George W. Bush regularly threatened to veto the measure.

Conservative View

There has been conservative support for some anti-discrimination legislation, particularly earlier legislation that banned discrimination based upon race. However, conservatives now generally oppose anti-discrimination legislation. They have opposed the Equal Rights Amendment (ERA), an amendment that would prevent the denial of equal rights under the law “on account of sex,” for decades, and they continue to oppose the ENDA. With some exceptions, conservatives are opposed to gay marriage and they are fairly uniformly opposed to transgender rights. There is a move by many conservatives to repeal all anti-discrimination legislation, claiming that such laws promote reverse discrimination against white males in particular. They argue that anti-discrimination laws and quotas opened the door for all minority groups while preventing whites of equal ability from getting those same opportunities.

Presidential View

President Obama believes in ending employment discrimination, and he supports ENDA. He believes that anti-discrimination employment laws should be expanded to include sexual orientation and gender identity. However, he does say that employment discrimination is a difficult issue, particularly as it applies to religious organizations. He be-

t r a n s g e n d e r —
*identified with a gender
other than the biological
one.*

believes that a religious organization may have more leeway in being able to hire a person who is a believer in that particular religious faith.

In January of 2009, the President signed the Lilly Ledbetter Fair Pay Act, which restored protections against pay discrimination for women and other workers and ensures that all Americans receive equal pay for equal work.

Interest Group Perspectives

Cato Institute

The Cato Institute is a libertarian think tank that believes that characteristics such as race, gender and age have been used in the name of civil rights to distort the principles of equal opportunity that our country is based upon, and, in doing so, has harmed the free markets in our society. The Cato Institute opposes racial quotas as these are in violation of the principle of equal opportunity. They also believe that the original intent of the Age Discrimination in Employment Act, which had a narrow focus, has been distorted by various public-interest groups that work towards an ever-expanding interpretation of the law, well beyond its original intent. Former Senator Jacob K. Javits (R-NY) was the principal sponsor of the ADEA, and he emphasized the narrow scope of the law. He said, “We in America pride ourselves on our free enterprise system, particularly on the market as the only really objective test for the acceptance or rejection of the worth of goods and services.” The ADEA was designed to counter the “widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.” Section 2 of the ADEA states that “the purpose of this Act is to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in the employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” In practice, however, the ADEA has been expanded to protect all individuals over the age of 40 and not just due to arbitrary discrimination. This constitutes over 40% of the entire workforce. The Cato Institute sees potentially huge economic costs resulting from the ADEA as businesses are forced by the expanded use of the law to make economically unsound employment decisions.

Heritage Foundation

The Heritage Foundation is a conservative think tank whose mission is to promote conservative public policies based on **free enterprise**, limited government, individual freedom, traditional American values and a strong national defense. While there is support in principle for equality and fairness, the Heritage Foundation believes that the intent of many of the antidiscrimination laws has been violated. For example, the Lilly Ledbetter Fair Pay Act would allow pay discrimination lawsuits

free enterprise —an economic system in which private business operates in competition and largely free of state control.

years or even decades after the discrimination occurred. They believe that the Act has more to do with making money for plaintiff's attorneys than it does with eliminating discrimination in pay. The think tank supports the amendment (SA 25) proposed by Sen. Kay Bailey Hutchinson (R-TX), which is based on her Title VII Fairness Act (S 166). This amendment would start the limitations period clock running when an employee reasonably suspects, or should reasonably suspect, that he or she has been discriminated against.

The Richard Dawkins Foundation

The Richard Dawkins Foundation supports scientific education, critical thinking and evidence-based understanding of the natural world in the quest to overcome religious fundamentalism, superstition, intolerance, and human suffering. The Foundation believes strongly that there cannot be religious discrimination in hiring by **faith-based organizations** that are receiving federal funding. People should not be denied employment or be fired as a result of not subscribing to a particular religious faith, even when that organization is based upon that faith.

faith-based organization—an organization that promotes and provides services on behalf of a particular religious group or denomination.

Possible Solutions

The possible solutions to the problem of employment discrimination are complex, particularly since employment discrimination is not a single entity but rather is based on multiple different factors, including sex, age, disability, gender identity, and genetic information. As has been demonstrated by the inability to pass the ENDA, lumping all of these factors together into a single bill has been extremely challenging. Conservatives and liberals can agree on many areas of employment discrimination, particularly as they relate to gender, race and age, but the issues of sexual orientation and gender identity have proven to be much more difficult, since for many people these issues are tied into religious and moral beliefs.

Separation of Bills into Different Components

One possible solution is to separate new legislation into different components of employment discrimination. That has already been done in many areas, as can be seen with the Equal Pay Act, Age Discrimination in Employment Act, Americans with Disabilities Act and Genetic Information Nondiscrimination Act. A bill similar to ENDA but not including transgender identity might have a much better chance of overcoming congressional opposition. Provisions outlawing transgender identity could then be included in a separate bill. Groups supporting transgender rights would take issue with this, but it might allow a bill to pass that encompasses most of the areas of employment discrimination related to sexual orientation.

More Stringent Limitations on the Expansion of Legislation

Another solution would be to pass legislation related to employment discrimination that limits the ability of attorneys and special interest groups to expand the bills far beyond their original intent. This would require carefully worded language and even then it would be difficult to prevent legal action to expand the scope of these bills. Even so, such efforts might make it easier for lawmakers, policymakers, and employers to adhere to the original intent of certain anti-discrimination laws.

protected class—*characteristics or factors which cannot be targeted for discrimination and harassment.*

Restriction of Anti-Employment Discrimination Laws

A more controversial strategy would be to prevent further anti-employment discrimination laws from being passed in order to prevent reverse discrimination against potential employees who are not included in a protected class. Since many anti-discrimination laws compel employers to give preference to job applicants of a particular race or gender, many opponents claim that these laws in turn discriminate against white males in particular who are of equal or perhaps even better ability. Many may also claim that for the sake of economic growth, hiring decisions should be based solely on worker productivity rather than race, gender, and other personal characteristics. Despite the validity of these arguments, however, it will likely prove to be extremely difficult to prevent or repeal any type of anti-discrimination provision.

Questions a Bill Should Address

A good bill will address all the separate components of employment discrimination and attempt to satisfy the majority of businesses and workers in the US. This might require passage of several different bills rather than a single comprehensive bill. The bill should include a timeline for instituting the new regulations, and also address how these regulations will be implemented and monitored. If any funding is required to implement regulations, the bill should also address how this funding will be obtained and subsequently allocated.

Summary and Conclusion

Employment discrimination in the U.S. has been a longstanding problem based on historical injustices that has endured to modern times. Much has been done to address the issues of employment discrimination as evidenced by the passage of numerous bills, starting with passage of Title VII of the Civil Rights Act of 1964. However, employment dis-

crimination is not static, and new areas continue to arise that must be addressed, such as those related to genetic information and transgender identity. Despite all of the legislation that has been passed, employment discrimination remains an ongoing problem. While the bills that have been passed provide a significant amount of protection, many employers continue to violate the rights of employees as can be seen by the numerous lawsuits related to employment discrimination that have been filed and considered by the nation's courts. Eliminating employment discrimination entirely will be a difficult task and will require new legislation, more stringent ways to enforce the legislation, and more comprehensive education for employers concerning this issue.

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