



ENDA explosion

Storm of protest over move to drop gender identity delays job bias bill

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by Lisa Keen

A major controversy has erupted within the LGBT community over a decision by Rep. Barney Frank, D-Mass., to seek passage of a new version of the Employment Non-Discrimination Act that excludes gender identity. In the view of a major gay legal organization, it is also “riddled with loopholes,” making it a “far weaker bill” with seriously diminished ability to protect gay men and lesbians from workplace discrimination.

The controversy pits the political strategy of one of the LGBT civil rights movement’s most popular and respected leaders, the openly gay Frank, against the political commitment of more than 100 national, state, and local LGBT organizations to stand together as a community.

At issue is a question that, on the surface, appears to be about timing and political expediency. But, at its core, the issue is about the community’s reluctance to advance protections that help part of the community, while asking the other part to wait.

Caught in the crossfire is the Human Rights Campaign, the gay community’s largest group and its premier lobbying organization on Capitol Hill.

HRC clearly tried to walk a delicate line this week between representing the interests of the LGBT community and preserving its access to and support from members of Congress.

Following a 3½-hour meeting Monday night, HRC’s board issued a statement Tuesday saying it had voted to “reaffirm” its 2004 policy of supporting only a version of ENDA that includes protection based on gender identity. But that same statement also quoted HRC President Joe Solmonese as giving Frank what some activists are interpreting as a “green light” to go ahead with the new strategy.

Tuesday vote called off

Opposition to Frank’s two-bill strategy was so strong and grew so quickly during the past week that House Speaker Nancy Pelosi, D Calif., announced late Monday that a committee vote on the measure slated for Tuesday would not be held until “later this month, followed by a vote in the full House.”

Pelosi’s announcement came in a joint statement with Frank, Rep. Tammy Baldwin, D-Wis., the House’s only other out member; and Rep. George Miller, D-Calif., who chairs the House Committee on Education and Labor which is handling the legislation. The statement was unusually cryptic, saying only that the decision was based on their discussions with “with congressional leaders and organizations supporting passage of ENDA.”

But the clamor behind the scenes was anything but cryptic. LGBT organizations from around the country had been waging an unprecedented effort to stop the new version of the bill from proceeding. Many individual organizations—including Gay and Lesbian Advocates and Defenders in Frank’s home state—sent out e-mail alerts asking their members to oppose his strategy of first sending through one bill with sexual orientation only, then sending through a second bill with gender identity only.

More than 100 groups signed onto an October 1 letter to Miller, saying they are opposed to the “strategy and process” behind the new version.

Frank, on Friday, had issued an unusual five-page explanation of the strategy, saying that supporters of the legislation “have the votes” they need to pass ENDA “as it has historically existed, banning discrimination on sexual orientation”—that is, without gender identity.

“After we are successful in winning that vote,” said Frank, “I will urge the Committee on Education and Labor to proceed with our next step, which will be to continue the educational process that I believe will ultimately lead to our being able to add transgender protections.”

‘Riddled with loopholes’

But opposition within the LGBT community to Frank’s proposal had been mounting dramatically even before he issued his statement. And on Monday, Lambda Legal Defense and Education Fund issued a “preliminary analysis” of the new bill, saying it was “riddled with loopholes” that would diminish protections based on sexual orientation.

“The recent version is not simply the old version with the transgender protections stripped out,” said Kevin Cathcart, executive director of the group, “but rather has modified the old version in several additional and troubling ways.” Cathcart said there was a “huge loophole” that would allow employers to claim they are discriminating against gender *expression*, which the new measure doesn’t prohibit.

“You can’t be fired for being a lesbian or a gay man, but you can be fired if your boss thinks you fit their stereotype of one,” said Cathcart.

Lambda Legal Director Jon Davidson explained that this year’s original version of ENDA included a definition of “gender identity” to include “gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual.” That definition no longer appears in the new version, which includes only sexual orientation.

The new version also states that it does not prohibit an employer from excluding domestic partners from health insurance benefits while providing them to the spouses of heterosexual employees.

“The old version,” said Cathcart, “at least provided that states and local governments could require that employees be provided domestic partner health insurance when such benefits are provided to spouses.”

Frank acknowledged some changes in the new version of ENDA with sexual orientation. But he said there is “no language” in the bill that would enable an employer to say, “I’m firing somebody because they’re too swishy.” He said the changes involving partner benefits came about from lobbyists representing business during consideration earlier this year of the original ENDA bill. The only other significant change, he said, is the exemption for religious organizations.

“If we tried to restrict that [exemption],” said Frank, “we’d lose in committee.”

Focus on transgender

But while Lambda raised its concerns, the focus of the great bulk of complaints about the new bill this week was about its exclusion of transgender people. Frank said he wanted to include a prohibition on gender identity discrimination.

“The problem is,” said Frank, “they are great at trying to write a bill to make it stronger, but they’re rarely are helpful to us in getting the votes to get it through.”

In his five-page explanation for submitting separate bills, Frank said, “we do not have sufficient support in the House” to include gender identity in the primary ENDA bill.

“The question facing [the LGBT community and its supporters] is whether we should pass up the chance to adopt a very good bill because it has one major gap,” said Frank, in the statement. Frank said that public education and lobbying on gender identity was “much less far along” than that on sexual orientation discrimination.

Frank criticized what he said was “an unwillingness on the part of many, including leaders in the transgender community” to acknowledge that “there is more resistance to protection for people who are transgender than for people who are gay, lesbian and bisexual.”

Frank said a head count of support for the inclusive bill made it “very clear” that enough Democrats would throw their support behind a Republican-led effort to delete gender identity from the measure or simply vote against the bill.

While LGBT leaders told Frank they would prefer to not go forward with ENDA at all, rather than delete gender identity, Frank said that would be “a disaster--politically, morally, and strategically.”

“[I]nsistence on achieving everything at once,” said Frank, “would be a prescription for achieving nothing ever.”

Tidal wave of support

But that was the insistence heard loud and clear this week. First, two dozen national groups--led by the **National Gay and Lesbian Task Force** and the National Center for Transgender Equality--signed onto a letter Friday asking House Speaker Pelosi to “oppose any substitute legislation that leaves some of us behind.”

By Monday, that list had grown to 93--42 national groups and 51 state and local groups including Equality Ohio, Equality Toledo Community Action, Kaleidoscope Youth Center of Columbus and TransOhio, along with Equality California, the Empire State Pride Agenda, Equality Texas, Equal Rights Washington, Equality Illinois, and the Triangle Foundation of Michigan.

While the Human Rights Campaign signed onto the letter to Miller asking that the vote be postponed, it was noticeably absent from the letter to Pelosi stating opposition to the bill.

In a teleconference phone call Monday, NGLTF executive director Matt Foreman called the effort to oppose exclusion of gender identity in the bill as “a watershed moment” in the LGBT civil rights movement. He said the lobbying efforts to stop that over the last few days was “one of the most grueling and difficult” political experiences he’s ever experienced.

Speaker Pelosi initially backed Frank's two-bill approach, saying it "has the best prospects for success on the House floor."

"For my 20 years in Congress, ending discrimination against gays and lesbians has been a top priority of mine," said Pelosi, in a brief statement released to the press on September 28. "While I personally favor legislation that would include gender identity, the new ENDA legislation proposed by Congressman Frank has the best prospects for success on the House floor. I will continue to push for legislation, including language on gender identity, to expand and make our laws more reflective of the diverse society in which we live"

HRC reaffirms earlier vote

David Smith, vice president of programs for HRC, said the HRC board voted in 2004 to support ENDA only if it included gender identity. That, he said, left HRC in the awkward position this week of being "neutral" on Frank's new version of the legislation. On Monday night, the HRC board took another vote, to "reaffirm" its policy. The organization announced Tuesday that it would "not support the newly introduced sexual orientation only bill."

But in reaffirming its policy, HRC President Joe Solmonese issued statements that might be interpreted as political "winks" for the Frank strategy.

"Though we support a fully inclusive ENDA, we acknowledge the legislative strategy put forth by Congressman Frank and the Democratic leadership to obtain a clear path towards an inclusive bill in the future," said Solmonese. "We look forward to working with them to accomplish the goal all of us share--ending workplace discrimination against the entire GLBT community."

Mara Keisling, executive director of the National Center for Transgender Equality, called that statement "absolutely unacceptable."

"A hundred and ten other LGBT organizations have expressed their strong opposition to a strategy that takes trans people out of the bill," said Keisling. "This seems to be saying, they're not" opposing that strategy.

"Our policy *supports* a fully inclusive ENDA," said HRC spokesman Brad Luna. "It doesn't say we have to actively *oppose* a non-inclusive bill." So while the organization feels it cannot support the bill with just sexual orientation, he said, "we are not going to actively oppose that legislation."

NGLTF's Matt Foreman refused to comment on Solmonese's remarks, but he said he believes the community is prepared to oppose the ENDA bill with only sexual orientation.

Last month, in a subcommittee hearing on the bill, Rep. Baldwin discussed what she characterized as "confusion" around its inclusion of "gender identity." But Baldwin declined, through a spokesperson, a request for an interview and did not respond to e-mail inquiries concerning specific aspects of the legislation.

Baldwin was listed as one of 171 co-sponsors of the ENDA bill introduced earlier this year, known as H.R. 2015.

As of Tuesday, only four co-sponsors were signed onto Frank's new bill, H.R. 3685, which includes only sexual orientation. They are GOP Reps. Deborah Pryce of Columbus and Christopher Shays of Connecticut, and Democratic Reps. George Miller of California and Robert Andrews of New Jersey.

Only Miller, Andrews, and Shays are signed onto the companion H.R. 3686, which includes only gender identity.

Baldwin's press secretary, Jerilyn Goodman, said Baldwin's absence from the two new bills which Frank has put forward is "an expression of her disappointment with a two bill strategy" but she "remains committed to getting ENDA to the floor in as strong a form as is politically feasible."