S. HRG. 107–307

THE EMPLOYMENT NON-DISCRIMINATION ACT

HEARING

BEFORE THE

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

S. 1284

TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

FEBRUARY 27, 2002

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C O N T E N T S

STATEMENTS

WEDNESDAY, FEBRUARY 27, 2002

	Page
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts	1
Jeffords, Hon. James M., a U.S. Senator from the State of Vermont	3
Wellstone, Hon. Paul D., a U.S. Senator from the State of Minnesota	4
Gifford, Charles K., President and Chief Executive Officer, FleetBoston Financial Corp., Boston, MA; Lucy Billingsley, partner, Billingsley Co., Dallas, TX; Robert L. Berman, Director of Human Resources and Vice President, Eastmen Kodak Co., Rochester, NY; and Richard G. Womack, Director, Department of Civil Rights, AFL–CIO, Washington, DC	7
Harkin, Hon. Tom, a U.S. Senator from the State of Iowa	7
Lane, Lawrence, Long Island, NY; and Matthew Coles, Director, National Lesbian and Gay Rights Project, American Civil Liberties Union	20

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Charles K. Gifford	30
Lucy Billingsley	20
Robert Berman	21
Richard Womack	33
Larry Lane	34
Matthew Coles	36
American Psychological Association	37
Letter to Senator Kennedy, dated March 7, 2002, from Elizabeth J. Clark, Executive Director, NASW	39
Department of the Treasury Report	40
Response to questions of Senator Enzi from the Occupational Safety and Health Administration	45
Letter to Senator Kennedy, dated February 27, 2002, from Robert E. Higgins, Waterville, Maine	48
Letter to Senator Enzi, dated March 13, 2002, from Bobby Jackson, Vice President, National Programs, National Safety Council	51
Letter to Ms. Elizabeth Birch, Human Rights Campaign, dated February 25, 2002, from W. Leo Kiely, III, President and CEO, Coors Brewing Co.	53
Letter to Senator Kennedy, dated February 14, 2002, from Jack Krumholtz, Microsoft Corp.	54
Steven L. Miller	54
New Balance Athletic Shoe, Inc.	55
Letter to Senator Kennedy, dated February 28, 2002, from Walden Asset Management, Boston, MA	57
Kim Wisckol	58

THE EMPLOYMENT NON-DISCRIMINATION ACT

WEDNESDAY, FEBRUARY 27, 2002

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:20 a.m., in room SD–430, Dirksen Senate Office Building, Senator Kennedy (chairman of the committee) presiding.

Present: Senators Kennedy, Harkin, Mikulski, Jeffords, Wellstone, Reed, Clinton, and Collins.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

We apologize to all the witnesses this morning. We had a vote that started and is continuing, so members will be coming to the hearing although some of them are engaged in the floor activity.

I will put my full statement in the record and make just a very brief comment.

The stains of discrimination in this country and in our society have really been there since the Constitution of the United States and are enshrined in the Constitution, and we have spent a great deal of time in national debate and discussion about how we are going to free ourselves from forms of discrimination. We fought a civil war, and then, with the brilliance of Dr. King and national leadership in the early 1960's, we began to make progress in freeing ourselves of the forms of discrimination on race and religion, on ethnicity. We passed changes in the immigration law which eliminated the national origin quota system in the Asia-Pacific Triangle. We have made progress in eliminating discrimination on the basis of gender. And in recent years, we have made important progress in eliminating discrimination based on disability.

There is an extremely important additional area whose roots are different from these other situations but are also deeply rooted in the same kind of intolerance and bigotry, and that is discrimination against gays and lesbians in the workplace and generally in terms of our society.

This legislation is focused on discrimination in the workplace. This committee is very familiar with the challenges that we are facing in terms of discrimination in the workplace. This legislation has been before the Congress in one form or another for close to 25 years, and it is time we take the steps to enact it. It is my intention to move this legislation through our committee at a very

early time in terms of our markup and to work with our leadership to get the time to pass this legislation.

In each of the introductions to the legislation, we have addressed the concerns, alleged concerns, of those who have raised points that they thought needed further clarification. I do not think any piece of legislation has been reviewed and re-reviewed and re-reviewed over a period of time, and all of these concerns have, I think, been addressed.

So we are interested in hearing this morning from a number of leaders in our business community, financial services, and others in the workplace who know this issue in a very real way, and we look forward to their comments.

If other members wish to make brief comments, we would welcome that, as long as we keep it to just those who are here. We are always glad to hear from all of our members, so we will recognize Senator Jeffords and Senator Wellstone for any comments they might have.

[The prepared statement of Senator Kennedy follows:]

PREPARED STATEMENT OF SENATOR KENNEDY

Immigrant workers are vital to our nation as never before. In my home state of Massachusetts and across the country, the energy and dedication of immigrant workers has helped to reinvigorate communities and served as an engine of economic growth. In recognition of the important contributions of immigrant workers, we must do more to protect their health and safety on the job.

It is simply unacceptable that fatalities for Latino workers increased by more than 11 percent in the year 2000. It is not right that more than one-quarter of workers in the meatpacking industry, primarily immigrants, experience a serious injury or illness on the job. It is outrageous that child farmworkers, who make up only 8 percent of working minors, account for 40 percent of work-related fatalities among minors.

The workers who toil long hours in the fields each day to bring us the food we eat are overwhelmingly immigrant workers. The wages they earn are not enough to live on. Yet, the dangers they face on the job are enormous. The Environmental Protection Agency estimates that as many as 300,000 farmworkers suffer pesticide poisoning each year.

Sadly, our health and safety laws offer little in the way of protections to farmworkers. Even the minimal guarantee of adequate drinking water and toilet facilities, is only offered to workers on larger farms. In agriculture, unlike in other occupations, children are allowed to perform hazardous work. Farmworkers are not protected by our safety standards when it comes to dangerous machinery or-the threat of electrocution.

Immigrant workers face extreme hazards in many other areas of work, from construction to meatpacking to retail work. In addition, many of the heroes involved in the clean-up of Ground Zero were also immigrant workers. According to a recent report by the Natural Resources Defense Council, these workers were not provided nor required to wear the proper respiratory equipment to keep them safe. As late as October, the National Institute of Environmental Health Sciences found "very few workers wearing even the

most basic equipment." Nearly every one of the 350 mostly immigrant day laborers who worked at ground zero examined by the New York Committee on Safety and Health, suffered from respiratory problems.

Ground Zero workers should have been told about the U.S. Geological Survey's findings that the air around Ground Zero was as caustic as liquid drain cleaner. These workers stepped up for our nation and we in Congress must now strengthen the protections for the safety and health of immigrant workers.

Recently, the Administration proposed new initiatives to protect immigrant workers. While I am pleased that the Department of Labor will expand the range of bilingual services available to workers, I am struck that the Administration is slashing the budget for proven immigrant worker safety training programs at the same time.

The Administration's budget cuts the Susan Harwood Training Grant program, which has been critical to training immigrant workers to protect themselves in my home state and around the country. The Administration proposes cutting these vital grants by nearly 65 percent. This is no way to show our commitment to protecting immigrant workers.

It has been a year now that America's workers have been waiting for the Department of Labor to adopt a new ergonomics standard. We must act boldly to protect immigrant workers from the nation's leading cause of workplace injury. I look forward to hearing from the Secretary of Labor on this issue at the Committee's hearing on March 14th.

It is time to end the double standard that endangers our nation's farmworkers. All farmworkers should have access to clean drinking water and toilets on the job. Child farmworkers should be protected against workplace hazards that we don't tolerate for other children and our approach to pesticides must put their health first.

We must also do more to protect immigrant workers from unfair retaliation when they come forward to report unsafe working conditions. Effective enforcement of our safety and health laws depends on workers who bravely speak up, and we must insure that these voices are heard.

The time is long overdue for strengthening the health and safety protections for immigrant workers who contribute so much to our nation. I look forward to the ideas of today's witnesses on the steps we must take to protect these important workers.

OPENING STATEMENT OF SENATOR JEFFORDS

Senator JEFFORDS. Thank you very much, Mr. Chairman. I will not be long.

I am pleased that the full committee is having this hearing today on the Employment Non-Discrimination Act, ENDA. This is very important legislation. I believe the principles of equality and opportunity should be applied to all Americans and that success at work should stem from performance, not prejudice.

I was pleased to have been the lead Republican sponsor on the bipartisan legislation with Senator Kennedy in the 103rd, 104th, 105th, and 106th Congresses. I am now proud to be the lead Inde-

pendent sponsor of this tripartisan legislation in the 107th Congress.

ENDA will help put an end to insidious job discrimination by extending to sexual orientation the same Federal employment discrimination protections already provided based on race, religion, gender, national origin, age, and disability.

ENDA will achieve equal rights, not special rights, for gays and lesbians. ENDA simply protects a right that should belong to every American—the right to be free from discrimination in the workplace because of personal characteristics unrelated to successful performance on the job.

Since we first introduced ENDA in 1994, we have listened to the concerns expressed about the legislation and made changes to address these issues while maintaining the overall substantive goal of the bill. We came within one vote of passing ENDA in 1996, and I remain hopeful that Congress will be able to pass this legislation in the very near future.

Thank you again, Mr. Chairman, for holding this hearing, and I thank all those who are here today to demonstrate to this Nation what needs to be done and what should be done, and we cannot help but get it done.

Thank you.

The CHAIRMAN. Senator Wellstone has been a strong advocate on this issue from the first days he has been in the Senate, and we welcome his comments this morning.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Thank you, Mr. Chairman. I will be very, very brief.

I was listening to Jim, and I am proud to have been an original cosponsor of the 103rd, 104th, 105th, and 106th, and I will be proud to be an original cosponsor of ENDA, which we will pass as the law of the land to end discrimination against people by sexual orientation.

The CHAIRMAN. Good for you.

Senator WELLSTONE. I am done.

The CHAIRMAN. All right.

Senator JEFFORDS. That is a record.

Senator WELLSTONE. Wait a minute. If you feel that way, I have more to say. [Laughter.]

Senator JEFFORDS. No, no. That is quite all right.

The CHAIRMAN. It is a privilege to introduce the first panel of witnesses to discuss workplace discrimination and the Employment Non-Discrimination Act.

Every witness on this panel has had extensive business or labor experience. It is good to see Chad Gifford from my home State of Massachusetts. Mr. Gifford is president and CEO of FleetBoston Financial Corporation, a company he has served since 1966. Mr. Gifford is also director of Massachusetts Mutual Life Insurance Company and NSTAR Corporation. We look forward to hearing why his years of business experience have led him to support ENDA. He has been a long-time friend as well to me and to my family.

Lucy Billingsley is a business owner from Dallas, TX, where she co-founded Billingsley Company in 1978. Billingsley Company represents a diverse a group of companies that perform a broad range of real estate activities. We thank Ms. Billingsley for being here to share a small business owner's perspective on employment nondiscrimination. We are grateful for your presence.

Robert Berman serves as director and vice president of Human Resources for Eastman Kodak Company. Mr. Berman has 19 years of experience in a variety of key human resource positions. The committee looks forward to hearing about his experience with Kodak's nondiscrimination policy.

Richard Womack is director of the AFL-CIO Department of Civil and Human Rights and serves as the primary spokesman for the AFL-CIO on a broad range of social issues involving workers' rights, human rights, and civil rights. We are extremely interested in hearing from Mr. Womack on behalf of the AFL-CIO.

Before we begin I have a statement from Senator Murray.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Mr. Chairman: I want to personally extend my gratitude to you for scheduling this important hearing and for all your efforts on behalf of this important piece of legislation.

Your leadership in this area is one of the main reasons that we have come so close to correcting this injustice. Today's hearing is another step in getting this important initiative enacted into law.

I believe the testimony presented today will give us the clear evidence we need to make a forceful case that ENDA is long overdue and that Congress is well behind the curve of many in private industry in protecting gays, lesbians and bisexuals against employment discrimination based on sexual orientation.

I have been pleased to be involved in the effort to get ENDA passed and signed by the President since its original introduction in June 1994.

The current bill was introduced last July. I am proud to be one of the 43 cosponsors of this legislation.

This is a bipartisan bill. Additionally, further changes have been made to accommodate recent Supreme Court decisions on state immunity and free association rights of voluntary, non-profit organizations. The bill also further expands the exemption for religious organizations.

These changes were made to perfect the legislation and to increase support for ENDA.

ENDA is simply an effort to ensure basic civil rights for all workers regardless of sexual orientation. Passage of the Employment Non-Discrimination Act is a legislative accomplishment that we should all take great pride in.

There are many examples of employment discrimination against gays and lesbians.

A few years back I meet with two constituents who told a disturbing stories about discrimination in employment because of their personal sexual orientation decisions. These two individuals were denied basic employment protections that we all have come to take for granted. Sue Kirchofer from the Seattle area, was fired

not simply because she was gay, but because she chose to use her own vacation time to attend the Gay Gaines as a soccer player. Mark Richards-Wetzel was fired for no reason other than being gay—his employer went so far as to point out to him that even if they had fired him because of his sexual orientation he would have no legal recourse as it was not illegal in Bellevue Washington. The employer basically said to Mark that it was OK to terminate him without cause because he was gay—discrimination of this kind is allowed.

I cannot believe that there is one member of this Committee who would support open discrimination against honest, hard working Americans. I believe we are all united in our opposition to employment practices that discriminate against anyone based on race, religion, ethnic origin or sex. Not one member of this Committee would stand and claim that. the Civil Rights Act was a mistake or created too many problems for businesses. Yet without passage of ENDA we are in effect condoning gross violations of basic employment rights and guarantees.

We came so close to passing ENDA in the 105th Congress. While the loss was disappointing, I think the message was clear—there is bi-partisan support in the U.S. Senate for extending basic civil rights and human. dignity to all workers. The vote in the last Congress while disappointing did serve to elevate this issue and generate a great deal of discussion about what ENDA is and what it is not.

In fact, last month the Majority Leader indicated again that passage of ENDA is one of his legislative priorities for this year.

ENDA simply extends fair employment practices to gays, lesbians and bisexuals—not special rights or protections, but fair employment practices. This is only about employment. It just guarantees workers that they will not be treated any differently because they are gay.

Many companies, states and local governments have responded to this glaring hole in our civil rights statutes by enacting policies and laws that prohibit discrimination in the work place against gays, lesbians and bisexuals based on their sexual orientation.

Fifty-nine percent of Fortune 500 companies include sexual orientation in their non-discrimination policies. I am proud that major companies in my state like Microsoft, Boeing, Costco, Nordstrom, Washington Mutual, Safeco, and the Weyerhaeuser Company have such policies. That is a who's who of companies in the Northwest.

Governments have acted as well. Eleven states, the District of Columbia and 122 Cities and counties ban anti-gay discrimination in private work places, as well as in public-sector jobs. Many county, state and local governments in my state have such a ban.

It is obvious to me and it should be to members of this committee that the private sector and many of our local communities have rightfully corrected the wrong in our civil rights laws that offers no federal protection to gays, lesbians and bisexuals against work place discrimination because of their sexual orientation.

Congress is far behind corporate America and local governments in doing what is right. We should act and pass ENDA as soon as possible.

Furthermore, I applaud President Clinton for issuing in May 1998 an executive order banning discrimination based on sexual orientation in the federal civilian work force. Once again, Congress needs to follow the lead of others by passing ENDA.

I want to thank the Chairman for his leadership and support of this important issue. I want to thank the witnesses who have come here today to tell us about the discrimination that occurs and will continue to occur until we enact ENDA. I also want to thank the witnesses from many of our nation's top companies who have done the right thing and have banned discrimination based on sexual orientation.

Finally I want to urge my Colleagues to support S. 1284 so we can move this bill out of Committee and on to the floor. Thank you.

The CHAIRMAN. Mr. Gifford, we welcome you back to the committee. We always benefit from your comments and look forward to hearing from you now.

STATEMENTS OF CHARLES K. GIFFORD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FLEETBOSTON FINANCIAL CORPORATION, BOSTON, MA; LUCY BILLINGSLEY, PARTNER, BILLINGSLEY COMPANY, DALLAS, TX; ROBERT L. BERMAN, DIRECTOR OF HUMAN RESOURCES AND VICE PRESIDENT, EASTMAN KODAK COMPANY, ROCHESTER, NY; AND RICHARD G. WOMACK, DIRECTOR, DEPARTMENT OF CIVIL RIGHTS, AFL-CIO, WASHINGTON, DC

Mr. GIFFORD. Thank you, Senator Kennedy, and thanks to the committee for this opportunity, and I do think it is an opportunity.

On behalf of FleetBoston Financial's 45,000 U.S. employees, I would like to thank you again for the opportunity to share our company's perspective——

The CHAIRMAN. Excuse me, Chad. Could you hold for just a moment? We have been joined by Senator Harkin.

Mr. GIFFORD. I certainly do not want to get ahead of a Senator.

Senator HARKIN. No, no. You have been ahead of me for a long time, Chad. [Laughter.]

Mr. GIFFORD. I beg to differ.

OPENING STATEMENT OF SENATOR HARKIN

Senator HARKIN. Thanks, Mr. Chairman. I appreciate it.

I am sorry that I have another Appropriations Committee meeting I have to attend, but I just want to say that I thank you, Mr. Chairman, for holding this important hearing and for starting to move this legislation. I hope we can get this legislation out and get it voted on and get it passed on the Senate floor in short order.

This is basically about fundamental values in America. The people who do their jobs, pay their taxes, and contribute to their communities should not be singled out for unfair discrimination.

We have made significant strides since the passage of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, which prohibits job discrimination based on race, background, gender, or religion; and of course, in 1990, we passed the Americans with Disabilities Act, which prohibits discrimination based upon disability.

But we are long past due to pass legislation to prohibit discrimination based on sexual orientation, and that is what ENDA is all

about. Too many hard-working Americans are being judged today on their sexual orientation rather than on their ability and qualifications. All the work that Senator Kennedy and I and Senator Jeffords did over all these years on discrimination based on disability was the same kind of thing—not based upon your abilities or what you can do, but based on something that had nothing to do with these fundamental American values.

Now we should close this final chapter of discrimination against people in our society, and that is what this bill does. It closes that final chapter, and the sooner we get it closed, the better off I think our country will be.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator HARKIN. Thank you, Chad.

Mr. GIFFORD. Thank you, Senator.

Again, I am delighted to be here and thank you all and want to voice our unequivocal support for the Employment Non-Discrimination Act.

When FleetBoston Financial identified its core values, the decision to focus on diversity was clear and obvious. A competitive business strategy not only embraces diversity, it depends on it and takes full advantage of it. It is a strategy that requires us in a global economy to recruit and retain the best talent and to create an environment in which everyone can excel.

As the number one retail bank in New England and the number one small business lender in the United States, we need our work force to reflect the increasingly pluralistic communities we serve. This includes the gay and lesbian community as well as members of many other minority groups.

To adequately serve such diverse communities, we must ensure that each and every member of FleetBoston's work force has the opportunity to succeed. To do that, we have adopted policies that we believe foster a workplace where creativity, knowledge, and life experience are exchanged freely. As an essential element of those policies, our nondiscrimination policy expressly states, and has for many years, that the company will not discriminate on the basis of sexual orientation.

The business reasons are compelling. I am reminded of this fact each time I meet with a member of the FleetBoston gay and lesbian family. When we talk, they remind me of how tiring it can be to stay in the closet and how much energy is wasted and how focus is diverted from their job when they feel they must conceal so much of who they are. Their lives and our business would be greatly diminished if a gay and lesbian employee only brought a piece of themselves and not their whole self to work every day because of the fear of discrimination.

Our policy has been broadly embraced and we believe has resulted in a stronger, richer company whose satisfied and engaged employees better serve our customers, our shareholders, our employees, and our communities.

The trend among corporations today indicates that this business rationale is widely shared by the most successful companies in America, some of whom join me here today. In fact, the closer a company is to the top of the Fortune list, the more likely it is to

include sexual orientation in its nondiscrimination policy. While nearly 60 percent of the Fortune 500 have such policies, a full 86 percent of the Fortune 50 do.

I am proud of the leadership that my corporate colleagues and our company have demonstrated on this front and encourage the Congress to follow this lead. This legislation is an opportunity to further advance the work we have already begun. FleetBoston stands with thousands of companies across America that have already successfully addressed discrimination based on sexual orientation in the workplace. ENDA will guarantee that this progress continues and accelerates.

In the wake of the attacks on our country on September 11, we believe that we must be galvanized to a stronger collective purpose. The lack of workplace protections based on sexual orientation leaves a gaping hole in America's commitment to equal opportunity and is an invitation to the perpetuation of stereotype and prejudice.

I urge the Congress to come together and see to it that discrimination against gays and lesbians in the workplace will soon be viewed as an unacceptable relic of another time.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Gifford may be found in additional material.]

The CHAIRMAN. We have been joined by Senator Collins. Welcome.

Senator COLLINS. Thank you.

The CHAIRMAN. Ms. Billingsley?

Ms. BILLINGSLEY. Thank you for inviting me here today. I am proud to be here in strong support of ENDA.

I am Lucy Billingsley. Our company, Billingsley Company, is in real estate in Dallas, TX. We are in multifamily development, industrial development, commercial office development, and master plan communities and have 30 employees.

My role here today is to speak on behalf of small businesses. Small businesses represent over 40 million jobs in this country, the entrepreneurial spirit of this country, and is a source from which my significant neighbors on this panel once sprang.

Mr. GIFFORD. True, true.

Ms. BILLINGSLEY. OK, thank you. I wanted a little concession there. [Laughter.]

Like countries, the essence of every business is our rights, the protection of our rights, and those establish the foundation of our culture. Equal opportunity is one such right.

For small businesses, our people are clearly our biggest asset. We need as business owners their focus, their commitment, and their dedication to develop the future we dream of.

So, selfishly, what do I want? I want employees who are talented, skilled, high-energy, high-integrity, and dedicated to my cause.

What does that have to do with ENDA? ENDA does the right thing. It permits our people not to go to work with the burden, the fear, the distraction of discrimination and prejudice. And prejudice does not just impact the victim. It establishes a corporate culture. It impacts everybody in the culture.

ENDA permits the employees in small businesses to trust their employers. And selfishly again for me, it gives me lower turnover, higher morale, and better productivity.

What does ENDA not do? ENDA does not impact companies with fewer than 15 employees. ENDA does not require quotas. It does not collect statistics, and it does not give same sex benefits.

There is no administrative burden whatsoever to my organization resulting from the passage of ENDA.

One truth is that our country is a country of equal opportunity, and it is rare that an individual gets to stand up and speak on behalf of that, so it is a thrill to be able to do that. This is a truth that I am proud to speak for.

I am also honored to be able to support a bill that represents the values that my children already live by.

Thanks.

The CHAIRMAN. Very good. Thank you.

[The prepared statement of Ms. Billingsley may be found in additional material.]

The CHAIRMAN. Mr. Berman?

Mr. BERMAN. Mr. Chairman and members of the committee, on behalf of the Eastman Kodak Company and its more than 70,000 employees, I would like to thank you for the opportunity to share with the committee my company's perspective on the value of including sexual orientation among the Federal protections from workplace discrimination.

Kodak is the world leader in imaging and a major participant in the $225 billion info-imaging industry. For over 100 years, when people think of pictures, they think of Kodak.

Our company's mission begins with the following pledge. We will build a world-class, results-oriented culture based on our values of respect for the dignity of the individual, uncompromising integrity, trust, credibility, continuous improvement and personal renewal, and recognition and celebration.

These values guide every action that we take as a company and as representatives of Kodak. We believe that conducting business according to these values is key to achieving an environment where every person matters and every person is fully enabled to contribute to his or her maximum potential.

Kodak's dedication to these values has guided its relationship with employees throughout its history.

In keeping with our statement of company values, we have included sexual orientation in our nondiscrimination policy since 1986. Since that time, we have officially recognized a network to support gay and lesbian employees—the Lambda Network at Kodak; added domestic partner coverage to our benefit plans in the United States; launched a winning and inclusive culture strategy to further integrate our policies with the day-to-day work of our major manufacturing facility in Rochester, NY; and have appointed the company's first chief diversity officer, who is guiding Kodak's progress toward its diversity goals.

The positive Kodak experience coupled with our values leads us to the conclusion that a Federal law will positively reinforce the efforts of Kodak and the rest of American business to ensure the fair treatment of individuals regardless of sexual orientation.

It is an understatement to say that it is unusual for a company to support legislation that invites further Federal regulation of our business. However, Kodak believes that protection against discrimination because of one's sexual orientation is a basic civil right.

This issue is so fundamental to core principles of fairness that we believe the value of Federal leadership outweighs concerns we might otherwise have about Federal intervention with our business.

It is key to point out that we do not view ENDA as creating a mandated benefit. Kodak does not support federally-mandated benefits. In our estimation, nondiscrimination on the basis of sexual orientation is among those basic principles inherent in our Nation's fundamental civil rights laws. Through those principles and laws, we have agreed as a nation that people should be treated fairly in the job market and the workplace.

The Employment Non-Discrimination Act is in tune with the fundamental sense of fairness valued by Americans. A Federal declaration would provide important leadership pointing the way for individual companies.

Since Kodak first testified in 1996, numerous improvements have been made to the legislation. We applaud efforts by the authors, the committee, and the Human Rights Campaign to address concerns raised by business, such as specifically stating that business does not have to provide domestic partner benefits. It is unmistakably clear that the goal here is to have individuals judged on merit rather than prejudice or stereotype.

Kodak's review of the bill indicates that there has been a significant effort to ensure that ENDA's provisions are consistent with Title VII. This is extremely important to business. Language that is clear and has been interpreted by the courts is essential to avoiding confusion and inadvertent noncompliance with the law.

We look forward to working with the chairman and the committee to bring additional positive change and clarification as you move through the markup process.

ENDA embodies the values already contained in Kodak's corporate values, our nondiscrimination policy, as well as the principles intrinsic to our Nation's fundamental civil rights laws. The Employment Non-Discrimination Act is a logical extension of the fundamental value of fairness to an area that has been neglected for far too long.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Berman may be found in additional material.]

The CHAIRMAN. Mr. Womack?

Mr. WOMACK. Chairman Kennedy and members, we would like to thank all of you for holding this important meeting today. And Mr. Chairman, we would also like to wish you a belated happy birthday.

The CHAIRMAN. Thank you very much.

Mr. WOMACK. As director of the AFL-CIO's Civil and Human Rights Department, we are here to reaffirm the AFL-CIO's strong, steadfast, and passionate support for this much-needed, long overdue civil rights bill. Why? Because when people have to go to work

each day with fear in their hearts, our Nation fails to live up to its promise of basic fairness for all.

Mr. Chairman, the AFL-CIO was founded on the belief that citizens should be treated equally in the workplace and throughout our democratic society. We further believe that trade unions and employees alike have a responsibility to ensure that workers are judged based on their performance, not on their real or perceived sexual orientation.

Our steadfast support for the bipartisan Employment Non-Discrimination Act is part of our commitment to these principles which are a fundamental American value—that people who do their jobs, pay their taxes, contribute to their communities should not be singled out for unfair discrimination. Most Americans and many employers believe that this kind of discrimination is wrong.

So we are pleased and heartened to join with our employers here today to talk about the fact that it is wrong, it is un-American, for people to be discriminated against based on their sexual orientation.

I am also pleased that our collective fight against discrimination has already resulted in the enactment of employment non-discrimination laws which cover sexual orientation in 12 States. Twelve States is not enough. There are 50 States in these United States, and all States should be covered. That is why we believe that enactment of this legislation is very key; that it is only a Federal law which will then level the playing field.

We encourage you, and we will work with you to make sure that this happens. We believe that most folks—and we will say a resounding 83 percent of the American population—believe that discrimination based on sexual orientation is wrong. That says a lot, Mr. Chairman. When 83 percent of the population believe it is wrong, it is time for us to act and to do something about it.

Yet despite State laws and public opinion, it is still legal to fire working men and women in 38 States. That is why we believe that we must enact this piece of legislation, and we must work together to make it happen.

So I say to you and to other members who are here today that we must consciously choose to mold an America that believes in all of its people and treats all of its people fairly and equally. This can only happen if we—you and us—work together collectively to make it happen.

We are committed to this. We will work hard in terms of our own labor movement, working with our community allies and with like-minded employers to make this happen.

Today we come here to say to all that America must change; America must do better. We must help America move toward the fact that it embraces all of its citizens, whether they be heterosexual, gay or lesbian. They must all be treated fairly. There is no reason in this America why anyone should be treated differently solely because of their sexual orientation.

We know first-hand as African Americans what it is like to be treated differently. Therefore, we stand boldly and we say boldly that we will fight to enact this piece of legislation with you and with other members.

And I would say that because of the leadership of Senator Jeffords, Senator Harkin, Senator Wellstone, and yes, Senator Collins, and others who are not here—I will mention Senator Specter as well—we know that these are the folks who will lead this fight and will fight to make this happen.

So as I close, Mr. Chairman, let me say again that this is a fight worth fighting for, and we will fight with you to make it happen.

Thank you very much.

The CHAIRMAN. Thank you very much. I think we got the drift of your testimony.

[The prepared statement of Mr. Womack may be found in additional material.]

The CHAIRMAN. I think Ms. Billingsley pointed out very accurately, and it is probably worthwhile pointing out, exactly what this bill does and what it does not do. I does not authorize disparate impact claims; it does not mandate domestic partner benefits; it forbids quotas or affirmative action; and it prohibits the EEOC from gathering data on sexual orientation.

So, Ms. Billingsley, let me ask you how much of a burden is it on small business to comply with this; how much of an administrative burden do you think it would be in terms of small businesses?

Ms. BILLINGSLEY. There is really absolutely no administrative impact. All this bill does is say that I cannot fire someone solely because of their sexual orientation. That is not an administrative issue. That is an action of will.

So all it does is say that I have to do the right thing. I can hire and fire people based on merit, performance, and all the standards that we all judge people by for every other discriminatory issue.

The CHAIRMAN. Let me then ask the panel—there are those who say if we pass this, we will have an influx of lawsuits, and therefore, it will provide additional burdens on the private sector. Let me hear from the members of the panel on this.

Mr. Gifford, you are in a State, Massachusetts, that has this law as a matter of law in the State. Tell me what has happened to your company, and what do you know about the businesses that you support. Has there been a notable influx of additional burdens on businesses in terms of legal cases brought against them?

Mr. GIFFORD. No, Senator Kennedy.

The CHAIRMAN. Do you think that is a red herring?

Mr. GIFFORD. Based on my understanding of the law, there should not be a significant increase in litigation as we see it. Litigation, right or wrong—I have different views on that, sir—is here in this country, and a big company is going to face it continuously; but no, I do not think this would significantly increase that issue.

The CHAIRMAN. Ms. Billingsley?

Ms. BILLINGSLEY. Anyone can sue me today just as they could sue me tomorrow. This bill has no impact on the capacity to sue.

The CHAIRMAN. Mr. Berman?

Mr. BERMAN. I would echo that. We have had sexual orientation included in our nondiscrimination policy since 1986, and since the incorporation of that into our policy, we have seen no additional major influx of activity surrounding that, and we have felt very strongly that it has had a very positive impact on our work environment.

The CHAIRMAN. Mr. Womack?

Mr. WOMACK. Mr. Chairman, let me say emphatically that anyone who discriminates should be sued. I will say that up front. People said it when we passed the Civil Rights Act of 1964, that there would be massive lawsuits. They said it when we passed the disability rights act, that there would be massive lawsuits. And they will say it here. That does not make it real. Anyone who practices or indulges in discrimination, I say should be sued.

Now, on the other hand, I will say that most Americans believe in fairness, so I do not see a massive amount of lawsuits. So I would say that those who preach this are wrong.

The CHAIRMAN. Thank you.

Senator Collins?

Senator COLLINS. Thank you very much, Mr. Chairman.

I appreciate your holding this hearing on this very important issue today. I have a hearing ongoing in Governmental Affairs Committee on Enron and a meeting with Maine's Governor who is in town, but I felt strongly that it was important that I come to this hearing for a while to explore some issues with our panelists today, and I appreciate the testimony of all of you.

To me, the key issue before us is how we can best promote acceptance, true acceptance, of the underlying principle that we all endorse—or, I think virtually everyone here endorses—of nondiscrimination. And the question for me is how best to achieve that goal.

You have talked, Mr. Gifford, about the progress that has been made in the business community in adopting nondiscrimination policies in the workplace. Similarly, I, along with many of my colleagues in the Senate, have signed nondiscrimination pledges and just do not consider sexual orientation at all in hiring and as a result have benefited from the services of gay and lesbian employees.

States also have acted to pass their own discrimination laws. But some States, including my home State of Maine, have repeatedly rejected laws that are similar to ENDA. In fact, the State of Maine, the voters of Maine—it was not the legislature; in fact, the legislature passed and the Governor signed a nondiscrimination law—but the voters of my State have three times rejected laws that are similar to ENDA at the State level. I supported those laws. In fact, when I ran for Governor in 1994, I was one of the few candidates who endorsed a gay rights law and said that I would sign one if I were elected Governor.

So the question to me and the question I want to ask all of you is if we impose a Federal law which some may view as an unwanted edict imposed from Washington, is that really going to promote acceptance and compliance with the underlying principle that we all want to see? To me, that is the difficult issue here, particularly since the voters in my State have three times, and most recently just in the year 2000, a high-turnout election, rejected a similar attempt which I supported at the State level.

Are we going to advance the cause by passing Federal legislation?

Mr. Gifford?

Mr. GIFFORD. Well, first of all, Senator, I am glad that I am a CEO at this hearing and not that other hearing you are about to

attend. [Laughter.] And I prefer to stay with you, Senator Kennedy.

Senator Collins, I am not a constitutional scholar. I am here to share the experience of one large company. And if we have a nondiscrimination policy that includes sexual orientation, our company is the better for it.

To me, in terms of States' rights and so forth, again, I am not sure that I am equipped to handle that. However, I would say that I think it is a horrible message to the rest of the country, to all of us together, whether individual States have signed or not, where it is, as my colleague Mr. Womack said, legal to discriminate in some States. I just believe that is wrong.

Senator COLLINS. Ms. Billingsley?

Ms. BILLINGSLEY. We have the luxury of being the leaders of our businesses and leaders in our community; and if leadership can stand up and say, "This is right; I will do it," then I think that we affect the culture positively. I think we bring the culture around to supporting it. Many, many people already support it, and the next generation, if we do not do it, they are going to do it, because they do not even see the question.

Senator COLLINS. Mr. Berman?

Mr. BERMAN. Again, from my standpoint, I agree. I think there is a positive opportunity here that emanates from a strong statement by Federal leadership, and I do believe that that strong statement can have a very positive impact on the workplaces throughout the country, and I believe it will fundamentally help our business and what we are trying to accomplish and help all of American business.

Senator COLLINS. Mr. Womack?

Mr. WOMACK. Senator, as I reflect and look back and think about what happened in the 1960's when there was the issue of passing a civil rights bill, if we had waited for the States to say this was the right thing to do, we would not have had a civil rights bill. If we had waited for every person in these United States to come to that point, where would we be today?

I say the same thing today. When 83 percent of the American people say it is time to move forward, I believe that this Congress has a responsibility to act. One State or two States should not be the driving force in this whole mechanism.

As my colleague has said, we must set the example. Elected officials represent all of the people, and I think that we must send a signal that this is the right time to do the right thing. It is time.

Senator COLLINS. Thank you.

Mr. Berman, I understand you have a couple of recommendations for changes in the bill. Could you very quickly tell us what those are?

Mr. BERMAN. Yes. Essentially, we absolutely applaud the progress that has already been made in clarifying the bill's language. We would place very strong emphasis on ensuring the greatest possible consistency with the language in Title VII.

Just to cite one example, looking at Section 5, Retaliation and Coercion Prohibited, we agree that no individual should be subject to threats or intimidation, especially in the workplace. The reference to "a person" in Section 5(b) with regard to coercion may un-

intentionally convey personal liability to employees in an individual capacity in the workplace rather than "a covered entity" which is a Title VII term. This would not be consistent with Title VII, which imposes liability on employers based on conduct by supervisory employees acting in their official capacity and not as individuals.

We would suggest that ENDA should not change Title VII precedents.

Senator COLLINS. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Harkin?

Senator HARKIN. Thank you, Mr. Chairman, and again, I thank all of you for being here this morning.

This is not a very usual sight that this committee has leaders of industry and the AFL-CIO sitting at the same table agreeing on something, so this is a pretty significant day today.

Every time ENDA has come up over the last few years, a certain buzz starts. There is a certain argument against it that floats around for a while, and that is put away; then, another one floats up and circulates for a while, and then it goes away. Now, it seems like the new buzz that is going around that I am hearing from those who are opposed to this is that this will be the first civil rights bill that we have ever passed that covers personal choice, and where is it going to end once you do that.

They say disability, race, religion, and so on are different, but this is a personal choice—you choose to be gay, you choose to be lesbian—and this is going to cover it. So that is the new buzz that I have been hearing around now, and I just wonder how you might respond to that or if you have given it any thought; if you have not, fine. Think about it.

Mr. GIFFORD. I think, Senator Harkin, that those who have studied this subject have spent some time trying to understand it, that the expression is not "sexual preference" but "sexual orientation," and I believe there is a very significant difference. When a person is gay and lesbian, that is who they are, and I think that is what they should be respected for, no more and no less.

Senator HARKIN. Very good.

Any other observations on that?

Mr. WOMACK. Senator Harkin, I agree with what my counterpart has said. I also agree that it is not what a person chooses to be. Just like in any other circumstance, people come with certain cultures and certain differences. We must respect those cultures and those differences. So I would say that in terms of being gay or lesbian, it is not a choice, that a person just chooses to be.

From everything that I have known—they used to have a good saying that "Some of my best friends are . . .," and I would say that having been associated with and working with and knowing individuals who come from a gay and lesbian background, I do not think it is a matter that they have chosen to do this whole thing; it is just a matter of lifestyle. Everybody has a lifestyle.

So I would say again here that we look at things differently sometimes, and we do not look at it in the right vein. Some of folks are still in the dark ages and just need to be enlightened, and I am sure you will help do that.

Senator HARKIN. I was just checking my notes from my staff. In fact, religion is a personal choice, is it not?

Ms. BILLINGSLEY. That is right.

Mr. WOMACK. Yes.

Senator HARKIN. We choose what religion to belong to. So would we say, okay, then, we cannot have this covered in our discrimination laws? That is a personal choice, isn't it? Yet we do not permit discrimination based upon religion, either, do we?

Mr. WOMACK. Right.

Senator HARKIN. So I hope that ends that. This just started buzzing around right now.

The other issue is affirmative action, that somehow this mandates some kind of affirmative action. I want to ask the employers who are here about that. You do not see this as mandating some affirmative action proposal in ENDA?

Mr. GIFFORD. We do not see that in any way whatsoever.

Mr. BERMAN. Ditto.

Ms. BILLINGSLEY. Absolutely not.

Senator HARKIN. I have one last question. Again, the opponents of this say this is going to hurt employee morale. I do not understand that, but that is what I hear. Has it had any effect on employee morale in your companies?

Mr. GIFFORD. I would comment on that with some vigor, Senator Harkin—and again, I can only speak to the experience within our company—but the experience within our company is 180 degrees different from that.

I think our company and the overwhelming number of employees—of course, not everybody, but the overwhelming number—want a company that respects everybody. I can tell you that I probably have more letters on the pride they take in our diversity policy from people within the company than almost any other subject.

Mr. BERMAN. I would echo that from the perspective of Kodak. We have put enormous resources into fostering an inclusive culture within our corporation. And the feedback that we receive from our employees is tremendous in terms of how those efforts have enabled them to be able to get things done more productively in the workplace than ever before.

Mr. WOMACK. Senator Harkin, coming out of the labor movement, a labor movement of 13 million members, we know that everyone will not react the same. We understand that. We know that we have to fight discrimination wherever it is, even within our own ranks within the labor movement. We fought for the Civil Rights Act because it would help us to change some attitudes within our own movement. We believe that ENDA will do the same thing.

You know, these questions that are being raised are not new. These questions were raised years and years ago—the same questions, just a different aspect of them. So I am saying here again that we have to address it the same way we did then, and we will do it now.

Senator HARKIN. Thank you all very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Clinton?

Senator CLINTON. Thank you very much, Mr. Chairman, and thank you for holding this hearing.

Clearly, this is an issue that I believe is long overdue to be addressed and to pass ENDA, and I want to thank the panel. I am sorry I had to be late, but based on what I have heard since I arrived, this is one of the more distinguished and effective panels that I have had the privilege to hear.

I particularly want to thank Mr. Berman, representing a wonderful company in New York which has had a policy that prohibits discrimination based on sexual orientation since 1986. I hope the testimony from the business representatives here—Ms. Billingsley and Mr. Gifford, I thank you both for being here with Mr. Berman—will be widely distributed, because people need to hear what each of you has to say. And I thank you, Mr. Womack, for your passionate advocacy of this particular legislation.

I think it is important to remind ourselves what ENDA does, because as Senator Harkin made reference, there is a lot of misconception about what this bill will do. It is not going to change people's attitudes overnight—we know that—neither did the civil rights laws of the 1960's, but that was not a reason to avoid doing what was right at that time, just as it is not a reason to avoid doing what is right at this time. And what ENDA does is extend Federal employment discrimination protections that are currently provided based on race, religion, sex, national origin, age, and disability to sexual orientation.

I think we can all agree that it was not the end of the world when we ended employment discrimination as a matter of law on any of these other bases, and certainly it should be clear that the evidence supports this legislation, and even in the absence of the kind of strong evidence that we have heard testimony about today, it is simply the right thing to do, which is long overdue.

We also know that it extends fair employment practices, not special rights, to lesbians, to gays, to bisexuals, to heterosexuals, to everybody. This should not be an issue. What should be an issue in your employment is your job performance—can you or can you not do the job? Is your behavior connected appropriately with the job or not? We need to get beyond holding status in any way against someone who is seeking and holding employment.

This also prohibits public and private employers, employment agencies, and labor unions from using an individual's sexual orientation as the basis for employment decisions. So it is not just a question of hiring, it is also firing, promotion, and compensation. On the next panel, we will hear very eloquent and moving testimony from Lawrence Lane, also from New York, about what happened in his experience.

We also know that ENDA provides for the same procedures and similar but somewhat more limited remedies as are permitted under Title VII and the Americans with Disabilities Act. So even thought the law would say do not discriminate, the remedies available are actually not on the same level as they are under Title VII and ADA. And of course, it applies to the Congress the very same procedures, which is absolutely appropriate.

Now, what ENDA does not do is cover small businesses with fewer than 15 employees; it does not cover religious organizations, including educational institutions; it does not apply to the uniformed members of the armed forces, although many of us believe

that it should; it does not allow for quotas or preferential treatment; it does not allow for disparate impact or the imposition of affirmative action; and it does not allow the EEOC to collect statistics on sexual orientation or compel employers to do so, and does not apply retroactively.

So it is very important that we clearly lay out what this bill does and what it does not do and that we take into account the evidence that we have heard today with respect to employers who actually practice diversity and hire and fire and compensate on the basis of job performance, not on the basis of one's status, one's religion, one's race, one's sexual orientation; that this is not as dramatic or revolutionary a step as many people have advocated that it is.

And I hope that as we move forward with the consideration of ENDA—and the chairman has been the champion of its passage for several years now—we can get those facts out and make it absolutely clear what is done by the legislation and what is left undone and not covered at all.

So Mr. Chairman, I thank you for bringing such effective and compelling witnesses to this committee, and I hope that their testimony is widely circulated, particularly to our colleagues who have doubts and concerns and, frankly, fears about what this would mean, because it is something that I think Senator Collins is absolutely right in addressing. We should just be honest about it, put it on the table, and make clear that people have some very deep concerns and fears that are not founded, and we can help to disabuse them.

I hope that the testimony of our four witnesses today will be widely circulated and made available to all of our colleagues, and I thank the witnesses for being here.

The CHAIRMAN. Well-said, expressing the feeling of all of us. It is very, very helpful. As I said, we have a very diverse group here representing a wide variety of different interests, all with a similar message and a very powerful and compelling one that ought to respond to many of the questions that have been raised, because they have real life experience and are really telling it like it is, and that is a very strong message, that we must continue to progress toward freeing ourselves from this form of discrimination, and that America will never be America until we do.

So you have all been very helpful in moving this process forward.

Ms. Billingsley, I was interested in a number of things that you said, but you also mentioned at the end of your testimony that this is a value that your children have learned to live by as well. How many children do you have?

Ms. BILLINGSLEY. I have four children, and I think it is a value that they already live by. They were surprised that I was coming here to address this issue.

The CHAIRMAN. There it is, there it is. We are surprised that we have to be here addressing it, too, and I think that once we get it passed and signed into law, we will ask why it took so long. But I think you have all been enormously helpful to us in bringing that day closer.

Thank you very, very much.

The CHAIRMAN. On the next panel, I am particularly pleased to welcome Lawrence Lane, who will share his personal experience

with us. From June 1997 to September 1999, Mr. Lane was employed as a regional manager of the New York region for Collins and Aikman Floor Coverings. Despite his strong background in business and excellent job performance, Mr. Lane was fired because he is gay.

Mr. Lane, I appreciate your willingness to testify about your personal experience.

Matthew Coles has been director of the ACLU's National Lesbian and Gay Rights and AIDS/HIV Projects since January 1995 and has been a leader in the lesbian and gay civil rights movement for over 20 years. Among his contributions, Mr. Coles wrote California's statewide law banning employment discrimination based on sexual orientation in 1992. He has taught at Stanford University, the University of California Boalt Hall School of Law. Mr. Coles, we are extremely interested in hearing your perspective.

Mr. Lane?

STATEMENTS OF LAWRENCE LANE, LONG ISLAND, NY; AND MATTHEW COLES, DIRECTOR, NATIONAL LESBIAN AND GAY RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION

Mr. LANE. Mr. Chairman, before I begin, I would like to thank you and all the members of the committee for holding today's hearing.

As someone who has personally experienced employment discrimination on the basis of my sexual orientation, I know that I speak for many when I say that your leadership on this legislation and the leadership of Senators Lieberman, Jeffords, and Specter gives me hope that 1 day soon, employment discrimination on the basis of sexual orientation will be prohibited by Federal law.

My name is Larry Lane, and I currently live in Long Island, NY. From June 1997 to September of 1999, I was employed as the regional manager for the New York region of Collins and Aikman Floor Coverings, Inc., corporately based in Dalton, GA.

At the time I was hired, the New York region was viewed by company management as dysfunctional. Revenues were lower than desired, sales positions were unfilled, and so on.

I worked to turn the region around and received nothing but considerable praise from my superiors for my outstanding performance. My first and only review rated my performance as "exceeds requirement." The review concluded: "Larry is doing an outstanding job. He is already having a positive impact on the New York zone."

In the summer of 1998, I received a voice mail from the vice president of sales stating: "I feel like you have really come into your own there in New York. You built a great team, and some pain along the way for sure, with people leaving you naked in some territories, but I swear it is amazing how much better we are there than we have ever been, so a big credit to you."

On a regular basis, I continued to receive positive praise. In the fall of 1998, the president of the company sent me a letter which stated: "You have assembled a great team from the office to the field, and I have never felt better about our prospects in New York."

At one of our annual budget meetings in December of 1998, following my year-end presentation, my boss left me a voice mail stating: "You did a great job." The positive feedback just continued.

In late summer to early fall of 1998, an employee, one of the sales representatives that I supervised, learned that I was gay and "outed" me. This was done without my knowledge, told to a number of other direct reports in my region, again that I was gay.

Thereafter, one of my direct reports confronted me about my homosexuality in an aggressive and threatening way. Another of my direct reports was similarly displeased by the news that he was working for a gay man. Both of these men openly used the term "faggot" in the C and A offices and informed one of their coworkers that they did not work for me and in fact wanted to get me out of the company.

In the spring of 1999, these two sales representatives began a campaign to get rid of me. Without telling me they were doing so, they began writing and calling my supervisor with false complaints about me.

On June 24, 1999, based on these complaints and unaccountably, without talking to me to get my side of the story at all, I was placed on probation and advised that my job was in jeopardy. They explained that I was hired to build the team in New York and that based on feedback from several of my people, I was failing to get this critical phase of my job done. They refused to provide any specific information to me but told me to return to New York and "reflect on what may be causing this dissension among my people."

Until June 24, 1999, when I was suddenly and without warning placed on probation, I had received no negative feedback on my performance, received no discipline, oral or written, was not admonished, warned, or otherwise criticized, had not received any negative evaluations, was not accused of any wrongdoing, and was not cited for violating any company rules. In short, my performance was by all accounts excellent and faultless.

After holding individual meetings with all those who reported to me, all evidence pointed to these two account managers as being the individuals who were causing the quote-unquote "dissension among my people."

Shortly after I was placed on probation, one of the account managers again called my supervisor, this time with the news that I had made a confession that I was gay. My supervisor immediately passed this information along, and soon, all of top management was aware of my sexual orientation.

In the weeks that followed, management decided to terminate me. On September 1, 1999, my supervisor and the vice president of sales fired me. When asked if this had anything to do with my performance or work ethic, the vice president of sales turned to me and stated: "Let us just say you do not fit."

I knew that in the majority of jurisdictions in this country, there would be nothing that I could do. Solely because of the anti-discrimination protection afforded by the City of New York was I able to challenge the discriminatory practices that caused me to lose my job by bringing suit under this New York City law.

Mr. Chairperson, this is what happened to me. If I had worked in almost any other city in New York State or, unfortunately, in

almost any other State in this country, I would have had absolutely no recourse. Frankly, I was fortunate. New York City law prohibits this kind of discrimination. But I do not believe that my right to work without fear of harassment or fear of being fired because of my sexual orientation should depend on where I live in the few limited areas that prohibit such discrimination.

One's success in the workplace should depend on performance and ability and not be subject to the ignorant views and lack of acceptance that many times still exists toward lesbians and gay men.

Greater awareness of this problem is needed. To my knowledge, a large part of the population believes that this protection already exists. Most of the people I have spoken with were shocked and indeed outraged to learn that this basic protection does not already exist nationally.

I would like to thank you again for holding this hearing and for the leadership that you and other members of this committee and the U.S. Senate have shown in seeking to provide a remedy for those who, like me, are victims of sexual orientation discrimination in the workplace.

Thank you.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Lane may be found in additional material.]

The CHAIRMAN. Mr. Coles?

Mr. COLES. Thank you, Mr. Chairman. I want to thank the committee for inviting me here.

I would like to start by saying that the story that you just heard is an aberration and an isolated incident. I cannot do that.

I am the director of the ACLU's Lesbian and Gay Rights and AIDS Projects, and I am here on behalf of my colleagues from the ACLU all across the country, and on behalf of my colleagues at Lambda Legal Defense Funds, Gay and Lesbian Advocates and Defenders in Boston, and the National Center for Lesbian Rights. We handle most of the sexual orientation discrimination complaints that come up in the country today, and I can tell you very sadly that the story that Mr. Lane just told you is far from isolated.

We represent the x-ray technician in eastern Washington who never knew a single day of peace on her job until she was hounded out of it by an employer who told her frankly that he hated her because she was, in his words, "a faggot."

We represent the inspirational choral teacher in Alabama who thought he had kept his family life completely private until the day that he lost his job—a choral teacher whose students begged the school board to hire back later on.

We represent the shoe factory worker in Maine who, in the words of the Federal Circuit Court of Appeals, "toiled in a frighteningly hostile work environment" until he too lost his job.

We represent the championship volleyball coach in Utah. We represent the talented young lawyer in Georgia. We represent the hardworking accountant in Pennsylvania—and on and on and on. We represent the people for whom the promise that what matters in the workplace in America is hard work and dedication has turned out to be an empty promise.

And the people whom we represent are just the tip of the iceberg. For most lesbians and gay men, the price of survival in the workplace comes down to this. Separate the two things that matter most in your life—family and work—and make sure that one never knows anything about the other, and then do it all the time.

You have to imagine the idea of a job where there is not a trace of the person who is the most important person in your life. You have to think about a workplace in which not only does the person who is the most important person in your life never shows up there—there are no phone messages, no pictures—nobody in the workplace knows that he or she exists. And you have to imagine a place where your career is on the line if you slip and talk about what she thought about a television show you both watched last night.

You have to imagine a workplace there nobody can know that you are married or that you hang around with married people or that you go to the kinds of places that married people go. And then, you have to imagine doing this all the time, every day, for good. It is a balancing act that exacts in terms of human emotion a terrifying price.

The answer to that problem both for the people whom we represent like Mr. Lang and for those people who protect themselves by splitting their lives in two is the legislation that you have in front of you. ENDA provides really what simple justice demands—that nobody should lose their job because of who they are.

To the people we represent and people like Mr. Lane, it gives a remedy. To the vast remainder of people who protect themselves by splitting their lives, it gives them a promise, and the promise is the price of keeping your job is not denying your family.

Now, look, I am a lawyer. That remedy is important, but the promise is much more important. Our civil rights laws in America do not work because we are able to haul people who violate them into court. Our civil rights laws work because Americans are decent, law-abiding people, and we decide as a matter of national policy that people will not lose their jobs because of religion. Businesses go along with it. They go along with it because our laws really are a statement about what kind of society we want to be.

Senator Collins talked about mandates from Washington. I know that States and businesses do not like it when Washington micromanages the way they work, but the American people look to the Federal Government for leadership on basic, fundamental American values. When you pass a law saying that you cannot lose your job because of your sexual orientation, you are not endorsing being lesbian or gay, and you are not endorsing heterosexuality, either. When we passed a law saying that you could not discriminate on the basis of religion, we were not endorsing Christianity or Judaism or being a Muslim or being an agnostic. We were endorsing that very basic value that says everybody deserves the same fair opportunity to go as far as their brains and their guts and their grit will take them. And if we pass a law saying that discrimination based on sexual orientation in the workplace is wrong, we will be saying that same thing, giving that same message, saying we really believe in that promise.

Let me tell you, as Mr. Lane has told you and the spokespeople before told you, that that x-ray technician in eastern Washington, that volleyball coach in Utah, that shoe factory worker in Maine—they need that promise from the Federal Government. They and we all need a law making sexual orientation discrimination in employment illegal, and we need it now.

Thank you.

[The prepared statement of Mr. Coles may be found in additional material.]

The CHAIRMAN. Thank you both very much.

Mr. Lane, we know it is never easy to talk about the personal challenges that one faces, but you are enormously courageous to do so, and it is very helpful in terms of the whole understanding of the issue in very real human terms. You make an extraordinarily effective presentation, and the facts surrounding your circumstances are so overwhelming and compelling, it speaks again to the importance of having this kind of legislation.

Let me ask you if you could talk a little bit about what happened in your workplace that made you believe you were being disciplined and fired from your job because of something other than job performance. You talked a little bit about that, but I am wondering if you might be able to spend another moment or two on that subject.

Mr. LANE. Certainly. Thank you.

What was so unusual about the situation was it coming so completely out of nowhere. In other words, there was no lead-up to the June 24th event in which I was put on notice. It took me by complete surprise.

The other element was the fact that they would not provide any details. In other words, they would not say what happened, what led up to this, what they were told, what was said, who said it—no details whatsoever. "Go back, and you figure it out."

The other aspect was that the entire meeting centered on the quote-unquote "dissension" among the group within the region. And I specifically asked "Are you sure?"—because I knew I was already having some difficulties with both of these two individuals—"Are you sure that we are not talking about one or two individuals?" And they got extremely defensive, coming back and saying, "No, no, no; it is across the board. Go back, figure it out."

It was really through a process of elimination. It kept popping into my head, but I did not really want to focus on the fact that sexual orientation could have really been the issue. So by really systematically going around my region, interviewing, meeting with each individual person and people saying, "You need to talk to So-and-So," brought the final conclusion, and then certainly through the discovery process and through the conversations that we have had since, it became crystal clear that this was the situation.

The CHAIRMAN. And what did that mean to you? Was there a sort of disbelief? What can you tell us about your own internal reaction to this?

Mr. LANE. Well, from the first meeting to the termination was about 90 days, and that was 3 months of hell. I am a businessperson. I love business, I love everything about business. I have always enjoyed it, and I do not do it halfway. I pour my en-

tire soul into what I do, and I enjoy it. And I saw this particular position at Collins and Aikman as a great challenge and opportunity, and I had poured myself into it—maybe you could call it "workaholism" or what-have-you—it encompassed me.

So when this happened, and so out of the blue and again without any details, I really just beat myself up for 90 days, or shortly before that, when I started to realize that this was what this was all about. It was just devastating. And even the residual impact afterward has been very tough. I did not think I would start to get all choked up toward the end of my testimony, but I did, because that residual impact is still there.

The CHAIRMAN. Let me ask you, Mr. Coles, why have you determined that ENDA as opposed to the patchwork of State and municipal laws currently in effect is necessary to sufficiently prevent discrimination and provide the remedies?

Mr. COLES. Well, very basically, because a patchwork of State and municipal laws leaves the vast majority of people in this country uncovered. If you work for the Government, you can perhaps make a constitutional claim or a civil service claim. And there are now 12 States that prohibit sexual orientation discrimination in employment, and if you are lucky enough to live in one of them, you are protected. But if you are like the vast majority of Americans, and you live in those other 38 States, and you work in private industry, there is basically no coverage, and unless we have Federal coverage—you know, Senator, when we passed the 1964 Civil Rights Act, just about half the States had civil rights laws that prohibited race and sex discrimination. And when this body passed the ADA, about one-third of the States had it.

It has never been the case that the Federal Government has waited for all the States to act before moving on discrimination. The Federal Government has provided leadership, and we need that leadership to protect people.

The CHAIRMAN. A recent poll found that 42 percent of Americans think that a Federal law prohibiting employment discrimination on the basis of sexual orientation already exists. What factors in your opinion lead to this misperception?

Mr. COLES. Two things. I think Americans widely believe that if you do your job effectively, it cannot be taken away from you anyway, and most people are shocked to learn that employers actually do not need to have a reason to take away your job.

But more than that, in the last 20 years, I think this country has gotten to see how little sexual orientation has to do with ability and how much of what we all grew up with thinking was the truth about lesbians and gay men turned out not to be the truth, and I think people just assume that of course this is a problem that we must have taken care of; it does not make any sense.

The CHAIRMAN. Senator Mikulski?

Senator MIKULSKI. Thank you very much, Mr. Chairman.

I was not here earlier because I was chairing another hearing. A cordial welcome to the witnesses.

Mr. Chairman, I ask unanimous consent that my full statement go into the record.

Mr. Chairman, I am not going to ask any questions. I believe that our witnesses have been questioned all too often in their lives.

I think their statements stand on their own and are most eloquent and most persuasive.

Change never comes easily, and change particularly in civil rights does not come easily. On Sunday night, I was watching a movie about Rosa Parks and the Montgomery boycott. I lived during that period and I am a student of nonviolent movement. As a result of the Montgomery boycott, Dr. King made certain demands on the bus company in behalf of the African American community. When you read those demands, you are shocked by how modest they were. They asked for two things—one, that African Americans could sit anywhere they wanted on a bus; and second, that there would be the expansion of employment opportunities to African Americans to work in the bus company.

Forty-4 years later, that seems so modest. And I believe that when we pass this legislation, this legislation in and of itself is quite modest. All it does is end discrimination. It bestows no further rights. I believe that this is only the first step that we need to take, but I believe it needs to be a quick step.

So, Mr. Chairman, I hope we can move this through the committee expeditiously, I hope we can move it to the floor, and I hope we can close this very large gap in our civil rights laws.

Thank you for appearing today.

[The prepared statement of Senator Mikulski follows:]

PREPARED STATEMENT OF SENATOR MIKULSKI

I am proud to cosponsor the Employment Non-Discrimination Act. This bill would close a very large gap in our civil rights laws. Job discrimination on the basis or race, ethnicity, gender, and religion has long been prohibited. Yet it is still legal to hire and fire a person based on their sexual orientation. This is outrageous—for a country that prides itself in equal rights for all and believes in "the American Dream."

Today, when I look back at the Civil Rights Movement of the 1960's, I am shocked by how modest the demands of the African American Community actually were. If we can pass this piece of legislation, in the future we will look back and think what a modest, obvious step it was, and wonder why it took so long.

All this bill does is to end workplace discrimination. It does not bestow special rights. It simply offers Gay and Lesbian Americans the same protection against unfair discrimination in the workplace that other groups have—no more, and no less.

Why is ENDA Important? Americans believe hard-working people should be rewarded for their efforts, and commended for their skills. Yet all over the country, gays and lesbians are being held back at work—or even fired not because they are incompetent, but simply because they are gay.

I firmly believe that people should be judged based on their individual skills, competence, and unique talents, and nothing else. Sexual orientation does not affect job performance, so it should not be a consideration.

And most Americans agree. Eighty-five percent support equality in employment for gays and lesbians. Seventy-nine percent believe that we already have a federal law that makes it illegal to fire someone based on sexual orientation.

What would ENDA mean to people? It means protection for the man from Cumberland, Maryland who was fired after years of working as a stockbroker for a financial services company after the company found out he was gay, saying he was not "compatible" with the community. And protection for the man who worked at a New Carrollton hotel who was told by his manager not to tell clients where he lived, because that fact made it obvious that he was gay—and who was later fired without warning.

The federal government is lagging behind. 10 states and the District of Columbia already have laws that prohibit job discrimination on the basis of sexual orientation. My own state of Maryland is one of 7 states with Executive Orders prohibiting discrimination in the public sector. And many companies already include sexual orientation in their non-discrimination policies.

Gay Americans are part of the American mosaic. They are entitled to the same rights and freedoms as every other American citizen—no more and no less. Change in civil rights comes slowly, but we are long overdue in making sure that they have protection against unfair discrimination in the workplace.

My hope is that someday we will look back on this and wonder what took us so long. We all deserve to live in an environment where people are treated fairly and with the dignity they deserve.

I urge my colleagues to vote for this important bill, and I hope we can move it quickly to the floor.

The CHAIRMAN. Thank you very much.

Senator Reed?

Senator REED. Thank you very much, Mr. Chairman, for holding this hearing. It is an extremely important topic, and let me echo the comments that Senator Mikulski has made and also apologize for not being here; I too had to chair another meeting today.

This is an issue that is long overdue. It is about justice, and it is about, frankly, being smart about treating people and getting the best out of them. I would note that in my home State, we have an entire delegation that is a cosponsor of this legislation, and we have a statewide law which bans discrimination based on sexual orientation. We have Fortune 500 companies that have already stepped to the plate, like CVS and Hasbro and Textron, and I think they have done it for two basic reasons—it is the right thing to do—it is about fairness and it is about justice—and it is also a very good way to get the very best workers to work for you.

So on those two grounds, I would hope we could propel this legislation forward, and I am just sorry that I could not be here for the testimony. Thank you, Mr. Lane and Mr. Coles, for your testimony.

I particularly regret not hearing Chad Gifford, who is a wonderful community leader in our part of the country.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Clinton?

Senator CLINTON. Thank you, Mr. Chairman, and I want to thank these witnesses as well.

Mr. Lane, what is the status of your efforts to seek remedy under the New York City provisions?

Mr. LANE. We are pretrial. We actually have a trial date of March 18. C and A did file for a summary judgment specifically as

it relates to the sexual orientation, and thankfully, we did win that in our favor and now await trial.

Senator CLINTON. We wish you well. Of course, it is striking that you at least have the opportunity to make your case because of the New York City law. I greatly appreciate your willingness to come and speak with us about this. It will add to the arguments that we have as we try to take this legislation to the floor and to eventual passage.

Mr. Coles, could you clarify for the record what the experience has been in States and cities that do prohibit discrimination based on sexual orientation? Have they been flooded with lawsuits and employers endlessly tied up in court? What has happened?

Mr. COLES. What has happened is just about what you would expect. If you assume that lesbians and gay men are about 5 percent of the work force, which is what most statisticians tell us is probably the right assumption, and you look at the number of complaints that have been filed under the existing laws—and we have had one law, Wisconsin, for over 20 years and several others throughout the nineties—you get just about as many complaints and lawsuits as you do based on race discrimination and gender discrimination.

And I will say frankly that I think the number of lawsuits that you wind up having is certainly smaller than we had when the 1964 Civil Rights Act first passed. When Congress passed the 1964 Civil Rights Act, I think the idea of civil rights as a part of American life was a new idea, and there was a lot of resistance. I do not think that that is true now, and I think that when we make it clear that discrimination on a certain basis should not happen, most employers comply.

Senator CLINTON. Well, those have certainly been the reports that I have reviewed. I think there was a 2000 GAO study of litigation following the passage of 11 of the State laws which found that only 1.4 percent of the total discrimination claims in 1999 were based on sexual orientation. So it has not proven to be burdensome to courts or burdensome to employers, as some people had feared.

Mr. Chairman, I think that your long-time support of civil rights legislation going back to the 1964 Act and so many ways since then gives you a standing that the rest of us do not have to support and champion this legislation, and I appreciate that, as is your custom, you are once again going forward with it, and I thank the witnesses for being here today to help us put this back on the legislative agenda and try to be successful in the Senate and hopefully in the House and have a signing ceremony perhaps sometime this year. Thank you very much.

The CHAIRMAN. I want to thank Senator Clinton and thank our other colleagues for their participation. This has been a good hearing.

It is my intention to mark up this legislation in March and get it on the agenda, and we will do the best we can to get it on the floor. I think it is one of the real priorities for us in this Congress, and we have every intention to press it and push it and further it.

We thank our witnesses for being here and thank many of our national leaders who have joined us as witnesses to this hearing this morning in the audience and have been incredible advocates

in helping move this country forward to the time when this legislation will become law.

The committee stands in recess.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF CHARLES K. GIFFORD

On behalf of FleetBoston Financial's 45,000 U.S. employees, I would like to thank the Committee for the opportunity to share our company's perspective on the issue of diversity and discrimination in the workplace and to voice our unequivocal support for the Employment Non-Discrimination Act.

When FleetBoston Financial identified its core values, the decision to focus on diversity was clear. A competitive business strategy not only embraces diversity, it depends on it and takes full advantage of it. It's a strategy that requires us, in a global economy, to recruit and retain the best talent and to create an environment in which everyone can excel.

As the number one retail bank in New England and the number one small business lender in the United States, we need our workforce to reflect the increasingly pluralistic communities we serve. This includes the gay and lesbian community, as well as members of many other minority groups. To adequately serve such diverse communities, we must ensure that each and every member of FleetBoston's work force has the opportunity to succeed.

To do that, FleetBoston Financial has adopted policies that we believe foster a workplace where creativity, knowledge and life experience are exchanged freely. As an essential element of those policies, our non-discrimination policy expressly states, and has for many years, that the company will not discriminate on the basis of sexual orientation.

The business reasons for doing so are compelling. I am reminded of this fact each time I meet with a member of the FleetBoston Financial gay and lesbian community. When we talk, they remind me of how tiring it can be to stay "in the closet and how much energy is wasted, and how focus is diverted from their job, when they feel they must conceal so much of who they are. Their lives and our business would be greatly diminished if a gay and lesbian employee only brought a piece of themselves, and not their whole self, to work every day because they lived in fear of discrimination

Our policy has been broadly embraced and, we believe, has resulted in a stronger, richer company whose satisfied and engaged employees better serve our customers, our shareholders, our employees and our communities.

The trend among corporations today indicates that this business rationale is widely shared by the most successful companies in America—some of whom I join here today. In fact, the closer a company is to the top of the Fortune list, the more likely it is to include sexual orientation in its non-discrimination policy. While nearly 60 percent of the Fortune 500 have such policies, a full 86 percent of the Fortune 50 do.

I am proud of the leadership my corporate colleagues and I have demonstrated on this front and encourage the Congress to follow our lead. This legislation is an opportunity to further advance the work we have already begun. FleetBoston Financial stands with thousands of companies across America that have already successfully addressed discrimination based on sexual orientation in the workplace. ENDA will guarantee that this progress continues and accelerates.

This bill is about fairness, and it is more than fairly crafted. It upholds the values that make this country work, without imposing costly mandates that make our work harder. And, a well-enforced non-discrimination law will have the net effect of discouraging the discriminatory behaviors that burden individuals, diminish morale and decrease the productivity that makes our nation, great.

In the wake of the attacks on our country September 11, we all must be galvanized to a stronger collective purpose in this new era. The lack of workplace protections based on sexual orientation leaves a gaping hole in America's commitment to equal opportunity and is an invitation to the perpetuation of stereotype and prejudice. I urge the Congress to come together and see to it that discrimination against gays and lesbians in the workplace will soon be viewed as an unacceptable relic of another time.

PREPARED STATEMENT OF LUCY BILLINGSLEY

Thank you for the opportunity to share my views with the committee on the harmful effects that discrimination has on businesses in America. As a small business owner from Dallas, I want to express my strong support for the Employment Non-Discrimination Act.

I am founder and partner of Billingsley Company, a dynamic, quality-driven firm that performs a broad range of real estate activities in the state of Texas including

raw land acquisition, project development and property management. I am also a life-long Republican.

My team of 30 employees manages a growing work load that includes commercial, residential and industrial development projects across the state of Texas. We have built 10 office buildings making a total of 1.2 million square feet in International Business Park, a 300-acre office park west of the Dallas North Tollway. Two years ago we embarked on our first multi-family community development that consists of 548 units on 24.4 acres in Austin Ranch. We are currently building the second phase of 455 additional townhouses and lofts. And our industrial holdings total nearly 5 million square feet in Texas in various stages of development.

To accomplish our work, Billingsley Co. depends on each and every one of our employees giving 100 percent of themselves each day they are in the office. We have a business imperative to see to it that our workplace is a collaborative environment where employees can work hard together to beat the competition, regardless of individual differences including sexual orientation. As a small business, we can afford nothing less.

Some might voice concern that adding federal workplace protections for gays and lesbians will be a costly burden to America's small business owners. But actually, not doing so would be the more costly route.

When people trust their employer they will be more adaptable to changing business forces. Inclusive workplace policies can improve recruitment and lower turnover, boost productivity and lead to business opportunities.

Rather than be a distraction, a uniform federal law banning sexual orientation discrimination will give businesses the right focus. By paying attention to the quality of the work being done and not to factors that have nothing to do with job performance, all of America's businesses will perform better. Our company wants to deal with other companies that are agile and can respond quickly to business needs. Discriminatory work environments can restrict openness and flexibility and reduce creativity and productivity.

A federal non-discrimination law will help to prevent the type of discrimination that burdens companies and gives rise to costly grievances and lawsuits. That is why, in our view, companies that fail to offer real protection from discrimination or harassment are not just hurting their employees, but they are also hurting themselves and America.

Moreover, we support this bill because it is narrowly tailored to address the specific problem that gays and lesbians face in the workplace. ENDA would not place an excessive burden on businesses. It already contains an exemption for the smallest businesses in America. It prohibits preferential treatment, including quotas. It does not compel employers to collect statistics on the sexual orientation of their employees. It does not require employers to provide benefits for same sex partners of employees.

This bill upholds the American values of equal opportunity in the workplace, if not an equal guarantee of success. It is the law of the land that employment discrimination based on race, gender, religion, ethnic origin and other non-performance related considerations is unacceptable. It is time to include sexual orientation. It is the right thing to do. It is the sensible thing to do. Most importantly, it is good for business.

PREPARED STATEMENT OF ROBERT BERMAN

Mr. Chairman and Members of the Committee. On behalf of Eastman Kodak Company and its more than 70,000 employees, I would like to thank you for the opportunity to share with the Committee my company's perspective on the value of including sexual orientation among the federal protections from workplace discrimination.

Kodak is the World Leader in Imaging and a major participant in the $225 billion "infoimaging industry". For over 100 years, when people think of pictures, they think of Kodak. Our objective as a company is for all our customers, from motion picture studios to photojournalists, records managers working with microfiche and digital storage, hospital radiology labs, graphics designers, young parents, our nation's defense and homeland security forces and many others, to be able to take, share, enhance, preserve, print and enjoy images—whether for memories, for information, or for entertainment.

We have achieved and maintained our position as the industry leader in an increasingly competitive, global marketplace, by following two simple strategies: We provide to our customers the best value and highest quality products in the infoimaging industry, and we create an environment in which our employees can

perform to their full potential. In the same way that we value each and every one of our customers, we also value each and every one of our employees.

Our company's mission statement begins with the following pledge: We will build a world-class, results-oriented culture based on our six key values: Respect for the Individual; Uncompromising Integrity; Trust; Credibility; Continuous Improvement and Personal Renewal; and Recognition and Celebration. These values guide every action we take as a company and as representatives of Kodak. We believe that conducting business according to these values is key to achieving an environment where every person matters and every person is fully enabled to contribute to his or her maximum potential. Kodak's dedication to these values has guided its relationship with employees throughout its history.

In keeping with our statement of company values we have included sexual orientation in our non-discrimination policy since 1986. By recognizing the need to protect our employees without regard to sexual orientation, Kodak was at the forefront of a rapidly growing trend in corporate America. Approximately sixty percent of the Fortune 500 companies have now instituted similar policies, and that number grows steadily.

In 1992, the company officially recognized a network to support gay and lesbian employees—the Lambda Network at Kodak. This Network has been extremely effective in raising awareness of workplace issues related to sexual orientation. This has been accomplished by membership focus in two important areas: education and support. As an example, since its inception, the Lambda Network has directly impacted several hundred senior Kodak managers through its Annual Management Educational Event. And, hundreds of other employees have been provided with education and support through numerous workshops, presentations, and other forms of direct interaction.

As of January 1, 1997, Kodak's U.S. benefit plans allowed coverage for domestic partners. We recognized that employees in domestic partnerships also utilize and appreciate the benefits to address personal and family issues. Kodak believes that this coverage is an important part of our benefits package and is a tangible demonstration of our commitment to our corporate values.

In addition, several years ago we launched a strategy to further integrate our policies with the day-to-day work of our major manufacturing facility in Rochester, New York. Our Winning and Inclusive Culture Strategy has been a critical element in the transformation process within Kodak. The strategy uses leadership capability building, employee education and realignment of many of our human resource practices to build an environment in which our employees feel valued, are respected, are able to make full use of their talents, and are recognized for their contributions.

More recently, Kodak reaffirmed its commitment to diversity by appointing May Snowden the company's first Chief Diversity Officer. She is guiding Kodak's progress toward its diversity goals with the aims of fully engaging the talents of all employees and maximizing the support we enjoy from the external communities we serve.

We strive to make Kodak an organization worthy of our employees' talent and participation where each of us can freely contribute ideas and do our best work. At Kodak, we know that our prime source of sustainable competitive advantage is our people and the effectiveness of their work together. Diverse opinions and fresh ideas create the most competitive solutions. We believe our work environment fosters diversity that is reflective of our customers and our community.

The positive Kodak experience coupled with our values leads us to the conclusion that a federal law will positively reinforce the efforts of Kodak and the rest of American business to ensure the fair treatment of individuals regardless of sexual orientation.

It is an understatement to say that it is unusual for a company to support legislation that invites further federal regulation of our business. However, Kodak believes that protection against discrimination because of one's sexual orientation is a basic civil right. This issue is so fundamental to core principles of fairness that we believe the value of federal leadership outweighs concerns we might otherwise have about federal intervention with our business.

It is key to point out that we do not view ENDA as creating a mandated benefit. Kodak does not support federally mandated benefits. Our benefit package already includes a rich array of healthcare, retirement and other work-life options. In our estimation nondiscrimination on the basis of sexual orientation is among those basic principles inherent in our nation's fundamental civil rights laws. Through those principles and laws, we have agreed as a nation that people should be treated fairly in the job market and the workplace.

The Employment Non-Discrimination Act is in step with trends in the nation's most successful businesses, and is in tune with the fundamental sense of fairness

valued by Americans. A federal declaration would provide important leadership, pointing the way for individual companies.

Since Kodak first testified in 1996 numerous improvements have been made to the legislation. We applaud efforts by the authors, the Committee and the Human Rights Campaign to address specific concerns raised by business. These changes, such as specifically stating that business does not have to provide domestic partner benefits, make clear that the goal here is to have individuals judged on merit rather than prejudice or stereotype.

Kodak's review of the bill indicates that there has been a significant effort to ensure that ENDA Is provisions are consistent with Title VII. This is extremely important to business. Language that is clear and has been interpreted by the courts is essential to avoiding confusion and inadvertent noncompliance with the law.

We believe there are still provisions of the bill that require amendment to ensure greater consistency with Title VII. I have outlined examples of the bill's provisions that we would ask the committee's attention. Regarding Section 5, Retaliation and Coercion Prohibited, we agree that no individual should be subject to threats and intimidation, especially in the workplace. The reference to "a person" in Section 5(b) with regard to coercion may unintentionally convey personal liability to employees in an individual capacity in the workplace rather than a "covered entity"—which is a Title VII term. This would not be consistent with Title VII which imposes liability on employers based on conduct by supervisory employees acting in their-6ffic'ial capacity, and not as individuals. We would suggest that ENDA should not change the Title VII precedents.

Regarding Section 11, Construction, we bring to your attention the use of the term 66nonprivate" conduct in Section 11(a). Our concern is that this is an ambiguous term that could be used to shield prohibited conduct and prevent employers from taking appropriate action. For example, harassment may occur in a private setting, off the employer's physical premises, while employees are engaged in company business or a company-sponsored event Under federal and state law and our company's policy, we would need to take prompt remedial action to end such conduct and prevent its reoccurrence. The "nonprivate" conduct language may significantly impair an employer's ability to do that We would suggest referring to non-business activity to be consistent with Title VII, state laws and our policy against sexual harassment.

We look forward to further working with the Chairman and the Committee to bring additional positive change as you move through the mark-up process. All efforts to simplify and clarify its language are essential to avoiding confusion and inadvertent noncompliance with the law.

ENDA embodies the values already contained in Kodak's corporate values, our nondiscrimination policy, as well as the principles intrinsic to our nation's fundamental civil rights laws. The Employment Non-Discrimination Act is a logical extension of the fundamental value of fairness to an area that has been neglected for far too long.

PREPARED STATEMENT OF RICHARD WOMACK

Chairman Kennedy, I would like to thank you and all of the Members of your Committee for holding today's important hearing on S. 1284, the bipartisan Employment Non-Discrimination Act (ENDA). As the director of the AFL-CIO's Civil Rights Department, I am here today to reaffirm the AFL-CIO's strong support for this much-needed and long-overdue civil rights bill.

The AFL-CIO has long supported federal laws that prohibit discrimination in voting, housing, public accommodations, education, and employment. In fact, the 1964 Civil Rights Act specifically prohibits discrimination in employment largely due to the tireless efforts of former AFL-CIO President George Meany. Although the 1964 Civil Rights Act didn't initially include an employment non-discrimination provision, the AFL-CIO demanded and ultimately secured the inclusion of Title VII in this landmark civil rights law.

Mr. Chairman, the AFL-CIO is founded on the belief that citizens should be treated equally in their workplaces and throughout our democratic society. We further believe that trade unions and employers alike have a responsibility to ensure that workers are judged based on their performance—not their real or perceived sexual orientation. Our steadfast support for the bipartisan employment non-discrimination act is part of our commitment to these principles.

I am pleased to be joined at this hearing today by employers who recognize that employment discrimination based on sexual orientation is wrong and un-American. I am also pleased that our collective fight against discrimination has already resulted in the enactment of employment non-discrimination laws which cover sexual orientation in 12 states: California, Connecticut, Hawaii, Maryland, Massachusetts,

Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, Wisconsin, and Washington D.C..

Mr. Chairman, what makes me the most hopeful about the future, however, is the fact that a resounding 83% of the American public now oppose employment discrimination based on sexual orientation.

Yet, despite our advances in state law and public opinion, it is still legal to fire working men and women in 38 states because of their sexual orientation because there is no federal law that prohibits employment discrimination on the basis of sexual orientation. As a result, working people all across the country continue to be denied employment opportunities on the basis of something that has no relationship to their ability to perform their work.

S. 1284 would address this problem by prohibiting discrimination in the workplace based on someone's real or perceived sexual orientation. This legislation would cover virtually all public and private sector employees except those employed by the military, religious organizations, and small businesses.

Mr. Chairman, union members know all too well how many employers use dismissal, harassment, and intimidation of workers for reasons unrelated to job performance against their employees. Our experiences trying to give working families a voice at work have taught us why it is so important that workers be judged on their work, not their religious preference, not their race, not their national origin, or their gender. These experiences have also convinced us that while discriminating against someone in the workplace for those reasons is already against the law, discriminating against someone in the workplace because of their real or perceived sexual orientation should also be against the law.

Mr. Chairman, I would like to end my remarks today by thanking you once again for holding this important hearing and by congratulating you and Senators Lieberman, Jeffords, and Specter for your leadership on this issue.

We look forward to continuing to work with you to ensure that the Employment Non-Discrimination Act is passed by your Committee and the Senate this year. In our view, enacting this legislation is a matter of basic fairness and justice. Thank you.

PREPARED STATEMENT OF LARRY LANE

Mr. Chairman, before I begin I would like to thank you and all of the Members of this Committee for holding today's hearing on the Employment Non-Discrimination Act. As someone who has personally experienced employment discrimination on the basis of my sexual orientation, I know that I speak for many when I say that your leadership on this legislation—and the leadership of Senators Lieberman, Jeffords, and Specter—gives me hope that one day soon, employment discrimination on the basis of sexual orientation will be prohibited by federal law and a thing of the past.

My name is Larry Lane and I live in Long Island, New York. From June 1997 to September of 1999, I was employed as the Regional Manager of the New York region for Collins & Aikman Floorcoverings, Inc., corporately based in Dalton Georgia with approximately 800 employees. The company manufactures and sells carpeting. I was hired to supervise 8 sales representatives in the New York region, which includes most of New York State, New Jersey, Delaware and parts of Pennsylvania.

At the time I was hired, the New York region was viewed by company management as "dysfunctional." Revenues were lower than desired, sales positions were unfilled, and the New York office had to be relocated. For the next 21 months, I worked to turn the region around, and received nothing but considerable praise from my superiors for my outstanding performance.

My first and only review authored by my boss the Eastern Area Vice President and signed by his superior the Vice President of Sales rated my performance as "Exceeds Requirement." It continued, that I was "extremely hard working," "very focused on business," and "very professional." The review concluded: "Larry is doing an outstanding job . . . he is already having a positive impact on the New York zone."

In the summer of 1998, after having been at the job for about one year, I received a voice mail from my boss, stating, "you're really doing a terrific job at this point." In the same time frame, I received a voice mail from the Vice President of Sales stating: "I feel like you've really come into your own there in New York. You built a great team and some pain along the way for sure with people leaving and leaving you naked in some territories, but I swear it is amazing how much better we are there then we've ever been, so a big credit to you . . ." I also received a voicemail from the Executive Vice President of the company stating, "You're putting together

a phenomenal team and (doing) just a great job . . ." The positive voice mails continued.

In the fall of 1998, after I had completed the job of relocating the NY office and having a showroom built, the President of the Company sent me a letter dated October 21". which stated: "Phenomenal job on the showroom . . . You've assembled a great team from the office to the field, and I have never felt better about our prospects in New York."

In December of each year, at annual budget meetings I would present a summary of the prior year and provide my game plan for the New Year. In December of 1998, after being on the job for 17 months, and following my year end presentation, my boss left me a voice mail stating: "You did a great job yesterday, Larry . . . several people came up to me and frankly said, '. . . he did an excellent job'. . . and I think you really impressed a lot of people . . ." The positive feedback continued.

In the late summer—early fall of 1998, an employee, one of the sales representatives that I supervised learned that I was gay and "outed" me—that is, told a number of other direct reports in my Region that I was gay—without my knowledge.

Thereafter, one of my direct reports confronted me about my homosexuality in an aggressive and threatening way. He came up to me at a work party and said, "You know that the whole region knows that you're gay and we don't got a problem with it, but if we were to let corporate know, there would be a problem." Another of my direct reports was similarly displeased by the news that he was working for a gay man. Both of these men openly used the term "faggot" in the C&A offices and informed one of their coworkers that they didn't want to work for me and—in fact—wanted to get me out of the Company. In.the spring of 1999, these two sales representatives began a campaign to get rid of me. Without telling me that they were doing so, they began writing and calling my supervisor, the Eastern Area Vice President, with false complaints about me. They questioned my integrity, told my supervisor that they could not trust me and said that I was secretive.

On June 24, 1999, based on these complaints and, unaccountably, without talking to me to get my side of the story at all, my supervisor and his boss, the Vice President of Sales, placed me on probation and advised me that my "job was in jeopardy." They explained that I was "hired to build the team in NY" and that based on feedback from "several of [my] people" I was failing to get this "critical phase of [my] job done." They refused to provide any specific information to me, but told me to return to New York and "reflect on what may be causing this dissension among my people."

Throughout my 21 month period of being with the company and, indeed up until June 24, 1999, when I was suddenly and without warning placed on probation, I had received no negative feedback on my performance, received no discipline, oral or written, was not admonished, warned, or otherwise criticized, had not received any negative evaluations, was not accused of any wrongdoing, and was not cited for violating any company rules. In short my performance was, by all accounts, excellent and faultless.

After holding individual meetings with all those that reported to me, all evidence pointed to these two account managers as being the individuals that were causing the quote unquote "dissension among my people." Shortly after I was placed on probation, one of the account managers again called my supervisor, in July 1999, this time with the news that I had made a "confession" that I was gay. My supervisor immediately passed this information along to the Vice President of Sales and soon the whole top management team was aware of my sexual orientation. In the weeks that followed, management decided to terminate me. On September 1, 1999, my supervisor and the Vice President of Sales fired me. When asked if this had anything to do with my performance or work ethic the Vice President of Sales stated, "Let's just say you don't fit" at Collins & Aikman.

I knew that in the majority of jurisdictions in this country there would be nothing that I could do. However, I thought I had heard there might be some protection for me under some New York City law. It was not until I started to.meet with several different attorneys that I found out that I was one of the lucky individuals that indeed would have protection under New York City's civil rights law that actually does cover Sexual Orientation. Solely because of the anti-discrimination protection afforded by the City of New York was I able to challenge the discriminatory practices that caused me to lose my job by bringing suit under the New York City law.

Mr. Chairperson, this is what happened to me. If I had worked in almost any other city in New York State, or unfortunately, in almost any other state in this country, I would have absolutely no recourse. I hope that hearing about what happened to me helps others to realize that there are many gay people who simply have no protection. Frankly, I was fortunate. I worked in New York City and New York City law prohibits this kind of discrimination. But I don't believe that my right to

work without fear of harassment or fear of being fired because of my sexual orientation—should depend on whether I live in the few limited areas that prohibit such discrimination. One's success in the workplace should depend on performance and ability and not be subject to the ignorant views and lack of acceptance that many times still exists toward lesbians and gay men.

Greater awareness of this problem is needed. To my knowledge a large part of the population believes this protection already exists. Most of the people I have spoken with were shocked and outraged to learn that this basic protection does not already exist nationally.

I would like to thank you again for holding this hearing and for the leadership you—and other members of this Committee, and the United States Senate—have shown in seeking to provide a remedy for those who—like me—are victims of sexual orientation discrimination in the workplace. Thank you.

PREPARED STATEMENT OF MATTHEW COLES

My name is Matthew Coles. I am the Director of the Lesbian & Gay Rights Project at the American Civil Liberties Union. I am here for my ACLU colleagues from across the nation, and for my colleagues at Lambda Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders and the National Center for Lesbian Rights.

We are the lawyers who handle most of the cases involving discrimination against lesbians, gay men and bisexuals. We are the people who represent the X-Ray technician in eastern Washington who never knew a day of peace at work and was eventually hounded out of her job by a supervisor who hated her because she was, in his words, "a faggot." We are the people who represent the shoe factory worker in Maine who, as the federal appeals court in Boston put it, "toiled in a wretchedly hostile environment," before he lost his job. We are the people who represent an inspiration choral teacher in Alabama, who thought until the day he was fired that he'd successfully kept his family life private, and whose students begged the school board to bring him back. We are the people who represent the championship volleyball coach, the hard working accountant, the talented young lawyer, the world weary mechanic, and on and on and on all of whom learned to their shock that the American promise that talent and hard work are what matter was, for them at least, an empty promise.

There is little that we can do for most of those people. If they work for government, they can claim limited protection under the constitution, and sometimes under civil service. In 12 states, they are fully protected by civil rights laws that prohibit discrimination based on sexual orientation. But if like most Americans, they work for private businesses in the other 38 states, they are just out of luck.

But those people we represent are the tip of the iceberg. For most lesbian/gay Americans, survival comes down to this: separate the two most important parts of your life, work and family, so that neither ever knows anything about the other. And then pray that you never slip up.

Imagine making certain there is no trace of the most important person in your life where you work; imagine not just that she or he never appears there, but that no one who works there can ever be allowed to know she or he exists. Imagine knowing that you risk your career if you slip and mention her name, much less casually say what she thought of the show you saw on tv last night. Imagine that your future depends on no one knowing that you are married, or that you hang around with other people who are married, or go to places where married people go. Now imagine that you have to keep this up. For good. It is a balancing act that exacts a price in human emotion that it is terrifying.

The answer, for both the people we represent and the vast numbers who protect themselves by splitting their lives apart, is the bill you have before you. ENDA provides what simple justice demands; that no one should lose a job because of who they are. For the people we represent and others like them, it offers a remedy. For the rest, it provides a promise that denying family is not the price of having work.

While the remedy is important, it is that promise that matters most. Civil rights laws work not because we are able to haul those who disobey them to court, but because most Americans are good, law abiding people. When we say that as a nation that no one should lose a job because of religion, most businesses accept that.

Most people accept it because our laws are above all, a statement about what we believe as a people. So too with a law against sexual orientation discrimination. And what we say with a federal civil rights law banning employment discrimination based on sexual orientation is not that we endorse being gay, or being

heterosexual, any more than our federal civil rights laws against religious discrimination endorse being Christian, or Jewish or Muslim or agnostic. A law against

sexual orientation discrimination says that we really believe the American promise that every one should have a fair chance to go where their brains and guts and grit can take them. A law against sexual orientation discrimination says that we really believe in that promise, and that we want it to be real. That isn't much, and yet it is everything.

The X-Ray technician in Washington, the shoe worker in Maine, the choral teacher in Alabama, and those silent thousands, they all need the promise. We all need a federal law banning employment discrimination based on sexual orientation and we need it now.

STATEMENT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

The American Psychological Association (APA) is the largest scientific and professional organization representing psychology in the United States. Its membership includes more than 155,000 researchers, educators, clinicians, consultants, and students. Our mission is to advance psychology as a science, as a profession, and as a means of promoting human welfare. We are writing to express our support for the Employment Non-Discrimination Act. It is the empirically-based position of our association that discrimination based upon sexual orientation is "detrimental to mental health and the public good" (APA Council resolution adopted February 1993).

PREVALENCE OF DISCRIMINATION BASED ON SEXUAL ORIENTATION

Research has found that over one-third of GLB African Americans and more than one-half of GLB whites have experienced discrimination based upon sexual orientation (Krieger & Signey, 1997). Furthermore, depending upon an individual's race/ethnicity, discrimination based upon sexual orientation may be coupled with various other forms of discrimination. Researchers examined biases against women, African Americans, and homosexuals in hiring practices and found that African American gay men were the most likely group to be discriminated against (Crow, Fok, & Hartman, 1998).

Data on hate crimes further demonstrates how victimization based upon sexual orientation can have negative consequences for individuals. Discrimination and hatred directed at gay, lesbian, and bisexual (GLB) individuals is manifested through higher rates of victimization than that experienced by the general population. For instance, according to the FBI Uniform Crime Reports, of the 1,487 sexual hate crimes reported in 1999, nearly 69% (1,025) were directed toward male homosexuals.

A recent study found high percentages of GLB individuals reported as being the victim of a hate crime (Herek, Gillis, & Cogan, 1999). Of the nearly 2,000 GLB individuals surveyed, roughly one-fifth of the women and one-fourth of the men reported being the victim of a hate crime since age 16. One woman in eight and one man in six had been victimized within the last five years. More than half the respondents reported anti-gay verbal threats and harassment in the year before the survey.

Researchers at the University of California at Los Angeles (UCLA) found that of the 2,900 individuals surveyed, GLB persons were more likely to attribute their discrimination to sexual orientation than were heterosexual individuals (Mays & Cochran, 2001). Over 25% of GLB respondents (compared to 2% of heterosexual respondents) indicated sexual orientation as the basis for their being discriminated against. Additionally, GLB individuals were more likely than heterosexual individuals to report that discrimination made life harder and had interfered with their leading a full and productive life.

MENTAL HEALTH EFFECTS OF DISCRIMINATION

The effects of discrimination and victimization based upon sexual orientation can have far-reaching consequences. GLB individuals may experience more psychological distress than the general population, not as a result of innate biological etiology of sexual orientation, but as a result of a social context that stigmatizes homosexuality (Waldo, 1995). According to researchers, psychological distress among GLB individuals may arise from a constant state of being in a minority status that is emphasized and condemned (Meyers, 1995). Research has indicated that social stigma based upon sexual orientation may be a risk factor for psychological distress, depression, and anxiety (Cochran, 2001). In a study of 741 adult gay men, there were significant relationships between those individuals who experienced prejudicial events (e.g., insults and discrimination) and negative mental health outcomes. Similarly, other studies have linked risk of depression and suicide among gay and lesbian adolescents and adults to anti-gay discrimination (Bradford, Ryan, & Rothblum, 1994; Cochran & Mays, 1994; Meyer, 1995).

GLB individuals report higher rates of perceived discrimination than do heterosexuals (Mays & Cochran, 2001). Such perceived discrimination may interfere with an individual's psychological well-being. Researchers at UCLA examined the prevalence of discriminatory experiences and their relationship with indicators of psychiatric morbidity among GLB and heterosexual individuals. Using data from a large, nationally representative survey, the researchers asked individuals who identified themselves as either GLB (73) or heterosexual (2844) about their lifetime and day-to-day experiences with discrimination (such as their interpersonal and work experiences). The researchers also assessed one-year prevalence of depressive, anxiety, substance dependence disorders, current psychological distress, and self-rated mental health. Perceived discrimination was not only associated with stressful life circumstances, but it was also related to mental health status. Individuals who reported higher levels of discrimination were also more likely to report "poor" or "fair" mental health, psychological distress, and mental disorders.

Researchers have also examined the deleterious mental health effects of criminal victimization based upon sexual orientation. GLB persons suffer more serious psychological effects from victimization based upon sexual orientation than they do from other kinds of criminal injury (Otis & Skinner, 1996). In their case, the association between vulnerability and sexual orientation is particularly harmful because sexual identity is such an important part of one's self-concept. Gay men and lesbians who have been victimized due to their sexual orientation report feeling less safe in the world, view people as more malevolent, reveal a diminished sense of self-mastery and appear to attribute personal set-backs to sexual prejudice (Herek, Gillis, & Cochran, 1999). Hence, for gay men and lesbians, crimes based upon sexual orientation negatively impact their view of the world in addition to causing other harmful mental health outcomes (e.g., post-traumatic stress disorder).

DISCRIMINATION IN THE WORKPLACE

Discrimination against GLB individuals in the workplace is prevalent and has deleterious consequences. For instance, in a study of student affairs employees, over one-fourth of the 249 individuals surveyed reported having been discriminated against based upon sexual orientation during the job search process. Additionally, those individuals who disclosed their sexual orientation were more likely to report discrimination (Croteau & Destinon, 1994). Within medical settings, about one-third of the GLB physicians and medical students surveyed reported that, because of their sexual orientation, they had been denied employment, refused medical privileges, denied a promotion, loan, or referrals from other physicians, or were fired from their positions (Schatz & O'Hanlan, 1994).

Anti-discrimination policies in the workplace can also affect job satisfaction and productivity. GLB individuals are more likely to report discrimination in organizations that do not have policies against GLB discrimination. Furthermore, such policies not only affect prevalence of discrimination but also impact worker performance. GLB individuals who report higher levels of perceived discrimination based upon sexual orientation are more likely to have negative work attitudes and fewer work promotions (Ragins & Cornwell, 2001). Research has found that an atmosphere of tolerance, as demonstrated by anti-discrimination policies, may lead to higher levels of job satisfaction and job commitment among GLB individuals (Burton, 2001). A survey of 744 GLB individuals indicated positive employee outcomes for supportive anti-discrimination policies (Day & Schoenrade, 2000). The researchers found a significant relationship between self-disclosure, anti-discrimination policies, and top management support for equal rights and organizational commitment. Additionally, anti-discrimination policies and top management support were also related to job satisfaction.

CONCLUSIONS

In sum, psychological research findings indicate that GLB individuals report significantly higher levels of discrimination based upon sexual orientation than do heterosexual individuals. These findings are especially troubling given that discrimination and stigmatization may lead to greater vulnerability of negative mental health outcomes. Research documents that workplace discrimination based upon sexual orientation is common and negatively affects employees, as well as employers. However, studies have found that supportive anti-discrimination policies, as well as top management support, can help increase job satisfaction, as well as increase organizational commitment among GLB individuals. Thus, it is critical for employers to create a work environment that does not tolerate discrimination based upon sexual orientation.

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NASW,
March 7, 2002.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, DC 20510-2101.

DEAR SENATOR KENNEDY: On behalf of the 150,000 members of the National Association of Social Workers (NASW), I am writing to urge you to support the Employment Non-Discrimination Act (ENDA). ENDA will prohibit employment discrimination on the basis of sexual orientation in the same way that existing legislation prohibits discrimination on the basis of religion, gender, national origin, age, and disability. ENDA remedies this gap in federal non-discrimination protection by prohibiting employers, labor unions, and employment agencies from using an" individual's sexual orientation as the basis for employment decisions, including hiring, firing, and promotion. In many jurisdictions it is still perfectly legal to.discriminate against gay men and lesbians in the workplace because of their sexual orientation. In fact, qualified diligent Americans are denied employment opportunities because. they are, or are perceived to be gay, lesbian or bisexual.

ENDA provides exemptions for small businesses and religious organizations that are consistent with the exemptions provided in Title VII of the Civil Rights Act. These exemptions do not create any "special rights" for gay men and lesbians. They merely extend the same legal protections against discrimination provided for other

individuals who have historically been denied equal employment opportunities. Employment decisions should be based entirely on one's performance and aptitude to do a job, not on an individual's sexual orientation. ENDA enjoys bipartisan support in both the House and Senate; moreover, it manifests nondiscrimination policies currently in place at major corporations such as AT&T and Xerox. Twelve states, and more than 205 cities and counties have legislation prohibiting employment discrimination.

Professional social workers have a rich tradition 6f activist concern regarding societal inequities such as discrimination and racism. NASW works to improve the quality of life for women, children, families, and vulnerable populations as we ensure through prudent legislation that individual rights and liberties are not abrogated. NASW policy supports the enactment and enforcement of laws and.regulations that. protect civil rights and individual choice for all Americans.

Discrimination in employment based on immutable characteristics is intolerable. We profoundly urge you to illustrate your commitment to the protection of civil liberties and to the interest of gay men and lesbians by supporting ENDA. NASW affirms that all human beings should have the right to work and pursue employment without unfair and prejudicial practices. ENDA engenders a better America for ill citizens.

Sincerely,

ELIZABETH J. CLARK,
Executive Director.

DEPARTMENT OF THE TREASURY REPORT

EXECUTIVE SUMMARY

The Department of the Treasury, as head of the President's Retirement Security Task Force, has undertaken a review and analysis of the impact of placing a percentage cap on employer stock holdings by 401(k) participants. In formulating its conclusions, the Treasury Department has examined information provided by the Department of Labor, reviewed surveys of 401(k) participants conducted by the Employee Benefits Research Institute (EBRI) and the Investment Company Institute, and held discussions with a number of benefit administrators of plans that hold employer stock. Based on this review, the Department concludes that placing arbitrary caps on individual 401(k) account holdings in employer stock would have a widespread impact on 401(k) plan participants and potentially severe disruptive effects on the stock prices of several major companies. Data show that as many as 1 in 5 of 401(k) participants would be forced to change their investment allocations if employer stock holdings were limited to 20 percent. Moreover, at one major company, for example, enforcement of a 20 percent limit on employer stock holding would precipitate the sale of hundreds of millions of shares, an amount equal to almost 16 times the daily trading volume. At another company, it would be 37 times daily trading volume.

BACKGROUND AND HISTORY

Pension schemes in the United States have always been voluntary. Private pensions, as a form of employee compensation, have been a competitive tool employed by firms to attract employees. The nation's pension system has evolved in recent years into one that emphasizes two of the country's quintessential values: personal responsibility and freedom of choice. This evolution provides workers much greater opportunity than ever before to build retirement savings, but also imposes a greater degree of individual responsibility in preparing for retirement.

Since 1974 the labor and financial markets have undergone major change. As the economy has evolved from one based on heavy industry to one based on the provision of information and services, the work force has become increasingly mobile and highly educated. For the typical American worker, job and even career changes have become commonplace. During the same period, as a result of deregulation, financial markets have made a wide array of new investment vehicles available to consumers. This has provided the average consumer the opportunity to build wealth through a broader range of investments offering higher rates of return for long-term savings than the traditional passbook account. As the relationships between workers and employers and consumers and financial markets have evolved so has the pension system. This is reflected through current federal policies that provide incentives for retirement wealth development through tax advantaged portable vehicles like Individual Retirement Accounts and defined contribution plans.

Since today's workers are less likely to be tied to an individual firm for their entire careers than their parents were, they must increasingly look to their own resources to build sufficient wealth for a secure retirement. Today's workers need plans that allow them to undertake retirement planning independently. Under defined benefit plans, most retirement planning and investment decisions are left to the employer. Pension contributions for employees are placed in a common fund that is controlled by the employer. The employer decides on the size of contributions, their timing, and the choice of assets in which the fund is invested. This results in a one-size-fits-all type of system that does not account for differences in employees' preferences for saving and the timing of consumption during their lifetime. And because all contributions become part of a consolidated overall fund, employees may have no sense of ownership of pension assets and no feeling of building personal wealth for the future. Since defined benefit plans are tied directly to employment with a specific firm they tend not to be portable when employees change jobs. Defined benefit plans offer the advantage of security in that benefits are guaranteed at a certain level. However, moving to a new job from one with a defined benefit plan often means a major sacrifice in future benefits, whether or not the move is voluntary.

Defined Contribution Plans

Defined contribution plans, about half of which are 401(k) plans, return most decision making to the individual.[1] Under a defined contribution plan individual employees have their own accounts in which they can build their own wealth. Employees are allowed, within limits set in the tax code, to choose the level of their pension plan contributions. In order to encourage higher rates of retirement saving, these limits were expanded by the Economic Growth and Tax Relief Reconciliation Act signed by the President last year.

Employees also have more latitude in choosing the timing of contributions with defined contribution plans. As an individual's circumstances change, 401(k) plans allow for higher contributions in some years than others. In virtually all plans, employees have the ability to choose the investment options in which their own contributions are invested, and in many others they can allocate both their own and their employer's contributions into investments of their own choosing. This freedom to allocate, among investments allows employees to choose the tradeoff between risk and return that suits them best. It also allows individuals to adjust their portfolios from one with higher potential returns and higher risk early in their careers to one that provides smaller but surer returns as they approach retirement.

The Role of Employer Stock in Defined Contribution Plans

Employer stock is an integral part of many 401(k) plans, particularly among those sponsored by America's largest firms. It may be offered as one of a number of investment options to which employees may allocate 401(k) assets. Employers may make matching contributions to employees' accounts in the form of company stock. Employees may be given specific incentives to invest in company stock. For example, some firms offer matches in the form of company stock or cash, but provide a higher match if the employee chooses his or her employer's stock. Some plans allow employees to sell matching contributions of employer stock at any time. Other plans require that employer stock provided by the employer as a matching contribution be held for an extended period of time.

Providing matching contributions in the form of company stock can have a number of benefits for both employers and employees. Companies may benefit from tax and cash flow advantages. Many companies believe that giving employees company stock builds their employees' loyalty to the company and gives them a greater economic incentive to work to promote the company's long-term economic prospects. Employees benefit directly when employers provide greater matching contributions to their 401(k) accounts. Also, research shows that employees themselves are more likely to participate in their company's 401(k) plan when their employer offers matching contributions.

Most defined contribution plans that include employer stock as an investment option or as a matching contribution are found in very large companies. For instance, for plans with fewer than 500 participants, the overall percentage of assets held in employer stock is less than I percent. In contrast, for plans with more than 5,000 participants, the overall percentage of assets held in employer stock is 26.6 percent.

[1] For purposes of this report we will refer to 401(k) plans, but the discussion and recommendations generally apply to all defined contribution plans. There are about 50 million defined contribution plan participants, of which about 42 million are 401(k) participants. Some workers may participate in more than one type of defined contribution plan.

Large companies are also the ones more likely to offer their workers other retirement savings vehicles such as a defined benefit pension plan.

ISSUES AND CONCLUSION

Recently introduced legislation on retirement security proposes to limit the holdings of company stock by individual plan participants in their 401(k) accounts. These proposed limits are expressed as a maximum percentage of the value of all 401(k) assets that an individual can hold in the form of company stock. The caps that have been discussed are 10 percent, which is the limit placed on company stock in defined benefits plans, or 20 percent. The proposals exempt employee stock ownership plans (ESOPs) from these restrictions.

In preparing its recommendations on enhancing retirement security, the President's Retirement Security Task Force sought to enhance workers' investment options, including their ability to diversify their 401(k) accounts according to their individual situations. The Task Force rejected the idea of imposing federal limitations on those options by arbitrarily setting a ceiling on the amount of employer stock a worker may hold in his or her own 401(k) plan. Also, the Task Force wanted to avoid establishing rules that discouraged employers from matching workers' own contributions to their 401(k) accounts. The Task Force—and the President—concluded that the most appropriate public policy is to give workers as much flexibility as possible while encouraging employers to provide matching contributions, and to give employees regular disclosures regarding their accounts and financial education so that employees make informed investment decisions.

The next section explains the President's proposal and the following section sets forth in greater detail why the Administration opposes arbitrary, federally imposed caps on workers' holdings of employer stock in their 401(k) plans.

THE PRESIDENT'S RECOMMENDATION FOR ENHANCING WORKER CHOICE

Asset diversification is a bedrock principle of prudent long-term investing. Congress established 401(k) plans to promote individual retirement saving. But a plan requirement mandating that all or a portion of an employee's 401(k) account be invested in employer stock runs counter to this diversification principle. Concentration of employer stock in a worker's retirement plan creates a double risk for workers—if their company fails, they lose their jobs and that portion of their retirement savings. At the same time, employer matching contributions are a form of compensation and as such an employee should have a right to invest them as the employee sees fit.

The President has recommended that Congress require that employees be free to sell company stock contributed to their 401(k) plan by their employer at any time after they have been participating in the company's 401(k) plan for three years. An employee stock ownership plan (ESOP) will not be subject to the diversification rules as long as no (1) participant elective contributions (i.e. 401(k) contributions), (2) matching contributions, or (3) employer contributions which are used to pass the 401(k) nondiscrimination tests, are made to the plan.

This change balances the desire of some companies to offer company stock as matching contributions with employees' freedom to pursue a retirement savings plan appropriate to their situations. Allowing employees to freely hold or sell employer stock would have a disciplining effect on companies—employees will want to hold stock in good companies. In most 401(k) plans, workers already have considerable autonomy to diversify both their own contributions and their employer's matching contribution, except for employer stock. This change ensures that autonomy extends to all assets in a worker's 401(k) plan.

The three-year period is not a requirement. Some companies today give their workers immediate freedom to sell employer stock. These companies should be applauded and their practices would be unaffected by the change we are proposing. For other companies, however, the proposed change is a substantial departure from their current practice. In particular, many of these companies want their workers to feel directly invested in their company's future prospects by giving them an equity stake in the company. A three-year wait before guaranteeing workers' freedom to diversify allows employers to build that incentive without locking in a substantial portion of a worker's retirement security to employer stock.

CONGRESS SHOULD NOT ARBITRARILY LIMIT EMPLOYEES' INVESTMENT OPTIONS IN 401(K) PLANS

Arbitrary caps have serious drawbacks. They fail to consider that workers make investment decisions regarding their 401(k) accounts in the broader context of their household's complete portfolio of retirement savings. Caps imposed on 401(k) ac-

counts may be easily circumvented, both by employers and employees, and may in fact create incentives for both to do so. Arbitrary caps also would cause disruption in the market for certain large company stock, as substantial amounts of stock in certain companies would have to be sold at once. Caps may also discourage employer contributions to their employees' accounts, leaving the employees worse off. In turn, reduction in employer contributions may discourage workers' participation. Finally, assets in 401(k) accounts belong to the workers and the government should not arbitrarily restrict how they choose to invest their funds.

Arbitrary caps ignore workers total retirement portfolios

For some individuals, holding higher levels of employer stock within their 401(k) plan may be desirable, particularly if they are well diversified outside of their 401(k) plan. Purchasing employer stock through a 401(k) plan is a tax-effective way for employees to make that investment.

Many 401(k) participants also have defined benefit plans, profit sharing plans, IRAs and personal savings as part of their retirement savings. Thus, participants who may appear to be overly concentrated in employer stock when their 401(k) accounts are viewed alone may be. diversified over their portfolio of retirement assets. For instance, a spouse may have retirement assets that the couple took into account when deciding on their asset allocation in the other spouse's 401(k) account. Or a worker may have 401(k) or other retirement assets through a previous employer.

Data gathered in a survey of 401(k) participants undertaken by the Investment Company Institute[2] indicate that:

Thirty nine percent are covered by a defined benefit plan in addition to their 401(k) plan. (The same survey indicates that employees are likely to hold a higher percentage of total assets in company stock if their employer also offers a defined benefit plan. Respondents who have a defined benefit plan invest an average of 24 percent of overall assets in company stock, while those with none invest only 13 percent in company stock.);

Thirty three percent have IRAs; and

Twenty eight percent have spouses who are covered by a 401(k) plan, a defined benefit plan, or both.

Data from a recent survey by EBRI[3] suggest that 401(k) plans are more likely to include company stock as an option if the company also offers a defined benefit plan. In the survey, 60 percent of all 401(k) plans in which there is also a defined benefit plan offer employer stock as a 401(k) option, while only 35 percent of plans without a defined benefit plan do so.

Arbitrary caps will be difficult to administer

Unlike the 10 percent cap on employer securities held in defined benefit plans, caps in defined contribution plans must be enforced on a participant-by-participant basis. In a large plan, this would necessitate tens of thousands of individual computations annually (or even more frequently). It would also require divestment of employer stock on a participant-by-participant basis, with each participant then needing to give the plan administrator instructions on how to reinvest those proceeds. Efforts to minimize that complexity by using a plan-wide arbitrary cap do hot recognize that individuals may have allocations far below the cap. Changes in the value of employer stock and the value of all other assets in the plan further complicate these calculations and complicate the asset allocation decisions each participant must make.

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[2] 401(k) Plan Participants: Characteristics, Contributions, and Account Activity, Spring 2000, The Investment Company Institute. The study is based on a random digit dialing sample of telephone exchanges. Sample size is 1,181. Margin of error is plus or minus 2 percent. Half of all households surveyed had only bank or thrift deposits outside their company sponsored plans, 39 percent had stocks, bonds, annuities, mutual funds or real estate besides their primary residence.

[3] Vanderhi, Jack L., EBRI Special Report, Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members, January 31, 2002, Employee Benefit Research Institute. This was a survey of members of the International Society of Certified Employee Benefit Specialists. Since the sample is not representative of all 401(k) plans, the results should be interpreted as suggestive of, rather than representative of, the wider population of 401(k) plans.

Arbitrary caps will require a large number of 401(k) participants to sell employer stock that they currently own

We estimate that one out of every five 401(k) participants may have to sell employer stock if caps were imposed.[4] The proposed caps would require divestiture at a specified point in time after it has been determined that the cap has been exceeded. Forcing sales of all stock above the cap at a point in time could disrupt the market for those stocks where the amount that must be sold is sufficiently large to affect the stock price. At one major company, for example, enforcement of a 20 percent limit on employer stock holding would precipitate the sale of hundreds of millions of shares, an amount equal to almost 16 times the daily trading volume. At another company, it would be 37 times daily trading volume.

Increases in the market value of company stock could trigger the caps, forcing employees to sell the stock during periods in which it is outperforming other 401(k) assets. This dynamic could particularly disadvantage lower income workers who cannot afford to save outside the 401(k) plans. Higher paid workers would, of course, have the option of using assets outside the plan to purchase the stock once the caps were triggered.

Arbitrary caps may discourage company matches.

If most employees hold company stock that is already near the cap, the company will not be able to provide generous matches for new contributions in company stock without exceeding the cap. As a result, rather than making a matching contribution in cash, some companies may choose to reduce or eliminate the employer match. Clearly, workers are better off receiving employer stock as matching contributions to their own 401(k) contributions than receiving no matching contribution at all. Reductions in company matches would likely lead to reductions in the amount of employee savings. Studies show that the amount of a company's match is a key determinant of employee contribution rates.

401(k) accounts represent a form of compensation and property that belong to the employees

Arbitrary caps on employees 401(k) investment choices challenge fundamental notions of private property rights. 401(k) participant contributions and matching contributions are a form of employee compensation, and government should not restrict or limit employees ability to invest their assets as they see fit. Rather, government policies should promote the ability of employees to make informed, educated decisions about how they wish to allocate their assets. This is why the President's retirement security proposals include a renewed call for incentives for employers to provide employees with free, professional investment advice. It is also why the President is calling for quarterly statements of 401(k) plan performance to empower employees to track and manage their 401(k) assets in a manner best suited to their own individual retirement needs.

Workers and firms using other tax-preferred vehicles may easily circumvent arbitrary caps

Imposing an arbitrary cap on employer stock provides an incentive for companies to use ESOPs instead of company matching with employer stock in a 401(k) plan. Also, with an arbitrary cap on employer stock in 401(k) plans, workers would still be able to invest retirement savings in employer stock through IRA accounts.

ADDENDUM

EBRI SURVEY RESULT SUMMARY[5]

(Survey Sample Drawn from 3,300 Members of the International Society of Certified Employee Benefit Specialists. Number of respondents: 375.)[6]

RESPONSES TO FACTUAL QUESTIONS

48 percent of all firms represented in the survey offer company stock as an investment option.

Restrictions on sale of employee stock.

13 percent of firms that provide employer stock as a matching contribution do not restrict the sale of employer stock. 27 percent restrict sales as long as an employee

[4] This calculation is based on a BLS estimate of the fraction of participants with the option of investing in employer stock and an EBRI/ICI estimate of the fraction of participants with the option of investing in employer stock who report holding assets above the proposed cap.

[5] Vanderhi, Jack L., EBRI Special Report, Company Stock in 401(k) Plans: Results of a Survey of ISCEBS Members, January 31, 2002, Employee Benefit Research Institute.

[6] Note since this data was gathered from a sample survey it is subject to sampling error.

is a participant in the plan; 60 percent lift restrictions after age or service requirements have been met.

Average percent of company stock in employees' 401(k) accounts in those plans in which company stock is an investment option:

In 39 percent of the companies surveyed, employees hold an average of less than 10 percent of their 401(k) assets in the form of company stock.

In 42 percent of the companies surveyed, employees hold an average of between 10 and 5 0 percent of their 401(k) assets in the form of company stock.

In 18 percent of the companies surveyed, employees hold an average of more than 50 percent of their 401(k) assets in the form of company stock.

Only 14 percent of firms represented in the survey restrict the amount or percentage of employer stock that employees can hold in their 401(k) accounts.

Blackouts

74 percent of respondents reported that their plans have undergone a blackout.

30 percent of the respondents whose plans have undergone a blackout reported that the blackout period lasted two weeks or less, 39 percent reported that the period lasted between two weeks and one month, 31 percent reported that the period lasted more than one month.

RESPONSES TO OPINION QUESTIONS

63 percent of respondents think that the government should limit a plan sponsor's ability to require that matching contributions be invested in company stock.

32 percent of respondents think that the government should limit an employee's ability to invest in company stock.

93 percent of respondents think that plan sponsors should advise their employees to diversify if company stock is offered as an investment option.

61 percent of respondents think that problems resulting from employees investing their own contributions in company stock would be mitigated if employers could provide independent investment advice.

The respondents are sympathetic with the concept of blackouts. 79 percent think blackouts are fair to employees if they are required for a plan conversion and there is no company stock in the plan. If company stock is part of the plan that percentage falls to 72 percent.

43 percent of respondents think there would be a decrease in matching contributions if matching contributions could consist of no more than 50 percent employer stock.

RESPONSE TO QUESTIONS OF SENATOR ENZI FROM THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Question 1. Allegations have been made that OSHA is ignoring the deaths of immigrant workers and failing to investigate these deaths in a wholesale manner. Do you believe that is true?

Answer 1. No, I don't believe this is true. As I said in my testimony, the Secretary and I have established a priority for strong, effective and fair enforcement. Except for reports of imminent danger, fatality investigations are the Agency's highest priority. OSHA's practice is to investigate all fatalities except those not clearly covered by the OSH Act, such as fatalities involving self-employed individuals or those resulting from work conditions regulated by another Federal agency, such as FAA.

It would be very difficult for OSHA to discriminate on a wholesale basis against immigrant workers when the Agency does not know whether or not an injured worker is an immigrant. As I have said in my testimony, OSHA does not at this time, and has not in the past, collected data on either the ethnicity or the citizenship status of the employer or the employee. Compliance officers do not ask for the ethnicity of a fatally injured employee before going to an investigation. In fact, neither BLS nor OSHA collects data on immigrant workers.

Question 2. Are you confident that OSHA investigates all work-related deaths, at least in conjunction with local law enforcement authorities?

Answer 2. Yes. I am confident that we investigate virtually all workplace deaths that we are informed of and that are within our jurisdiction. We do not investigate homicides, suicides, motor vehicle accidents or fatalities of self-employed individuals.

However, we do receive referrals from local fire, police departments or other federal and state agencies that may be investigating the workplace pursuant to other statutes. In the past, OSHA regional and field offices have entered into agreements with local law enforcement authorities and emergency response services for referral of any workplace injuries or fatalities to OSHA. As I mentioned in my testimony,

I have directed the field offices to renew these agreements with the respective local organizations to enhance OSHAs receipt of information about these fatalities.

OSHA recognizes that a few employers who hire undocumented workers may be afraid to report workplace deaths due to possible legal repercussions from their hiring practices. Therefore we use other sources to attempt to identify all workplace fatalities including those that employers fail to report. For example, our area offices use local radio, TV and newspaper media reports of workplace accidents to learn of fatalities.

Mr. Maier claims that from 1994 to 2000 OSHA did not investigate 800 immigrant worker deaths. OSHA is unable to verify his findings, because we do not have ethnicity or citizenship status in our inspections database. Without this information it is impossible to determine which of the fatalities involved immigrant workers and which did not.

BLS data from 1994 to 2000 shows 173 foreign-born workplace deaths from suicides (self-inflicted wounds); 1,486 from homicides; and 683 from highway accidents. This totals 2,342 foreign-born fatalities that, as stated above, OSHA would not routinely investigate. Perhaps Mr. Maier's 800 immigrant worker fatalities are in these categories.

Question 3. Why does OSHA allow local law enforcement authorities to take precedence in certain situations like homicides or automobile accidents, even if they are occupationally related?

Answer 3. Law enforcement authorities generally have the expertise for investigating homicides, suicides and automobile accidents that most C6HA compliance officers do not have. If the subject of the investigation is within the jurisdiction of local law enforcement, OSHA gives priority to them to avoid interfering with a criminal or civil investigation and to preserve evidence.

Even so, OSHA cooperates with state and local law enforcement agencies in criminal and civil prosecutions to the fullest extent appropriate under the law. Both the Agency and the Department of Labor believe sharing information is mutually beneficial in these cases.

Question 4. The starting point for addressing concerns about immigrant worker safety is complete and reliable data. I have often been frustrated in the past by the inability to get reliable and complete data on occupational safety and health. Do you and your agency now have good data to allow you to identify immigrant workers who have language or cultural barriers that might create special problems for their safety and health at work? OSHA collects a significant amount of information during an inspection. For example our compliance officers collect and record on the Accident Investigation Summary Form (OSHA 170) information about where and when the accident occurred, demographics about the establishment, information about how the accident happened, what the employee was doing, etc. In the past, we have not, as you know, collected information on ethnicity or citizenship status.

Answer 4. However, we are now in the process of changing the Accident Investigation Summary Form to include several questions about ethnicity and language capabilities, including country of origin, and whether or not language barriers caused or contributed to the accident. The new form is due to be finished very soon.

Question 5. I understand you intend to change the way your compliance officers collect information when they undertake inspections to attempt to identify situations where language or cultural issues may have played a part in an injury. Can you gather such data, formally or informally, for all situations where OSHA personnel have contact with workers and employers? Including compliance assistance activities?

Answer 5. Yes. The agency is seeking ways to gather information on the impact language and cultural barriers have on occupational safety and health, and how these issues play a part in occupational injuries and illnesses. Currently, during the course of a fatality or catastrophe investigation OSHA compliance officers try to determine the cause of the incident in order to prevent its reoccurrence and determine if any OSHA standards were violated during the event. OSHA's directive on Fatality Investigation Procedures (CPL 2.113) requires compliance officers to document their findings. We intend to expand this guidance to ensure that the compliance officers consider whether language and cultural barriers contributed to the accident.

In addition, both OSHA and NIOSH are committed to looking at ways to prevent language and cultural barriers from contributing to workplace accidents. When the proposed changes to the OSHA Form 170 are implemented as described earlier, we can analyze the collected data to identify specific problems and trends associated with cultural and language barriers. This should tell us which industry sectors have the biggest problem. The data may be particularly useful in identifying which safety or health standard violations are most often due to miscommunication or other cultural barriers. This, along with what we continue to learn from NIOSH's Fatality

Assessment and Control Evaluation (FACE) Program, will allow us to address workplace safety and health issues confronting immigrant workers.

In addition to OSHA's current compliance assistance efforts, the Agency is building new alliances among established groups such as trade and professional associations, small businesses, labor groups, universities, mid-to-large employers, and other government agencies. The recently agreed upon alliance between the Hispanic Contractors of America (HCA) and OSHA is focused on two basic concepts: 1) identifying and .developing resources to promote safety and health awareness, and 2) seeking opportunities for joint presentations at trade, community and faith based organization events. These activities will achieve OSHA's goal of decreasing immigrant worker injuries and fatalities.

Question 6. I'm concerned about the relative balance in you agency's overall strategic planning between enforcement and compliance assistance. Frankly, I had hoped OSHA would plow more resources into compliance assistance than your Fiscal Year 2003 budget proposes. What are you planning to do to shift the agency's priorities and resources more quickly?

Answer 6. In the Fiscal Year 2003 budget request, we are enhancing our focus on non-regulatory approaches. OSHA uses a variety of tools and approaches to provide compliance assistance to employers and employees. For example, small businesses often cannot afford private sector fee-for-service safety and health consultants, so the agency provides free, top quality consultative services to thousands of small business owners who request assistance. The FY 2003 budget request includes an additional $1,500,000 to increase the number of on-site consultation visits and services and assist small businesses in implementing safety and health management systems.

In addition, the agency can reach a broader audience through the OSHA Website. The website offers a variety of compliance assistance materials to employers including electronic compliance tools (e-tools) which use text, illustrations and animations to instruct users about occupational hazards, standards and recommended practices. The budget request includes funding to expand e-tools for several new topics. Developing and maintaining these tools is a cost-effective way to help employers understand OSHA regulations and how they apply to particular worksites and working conditions.

The FY 2003 request also provides funding to enable the agency to take advantage of the rapidly developing field of technology-enabled training to meet the training demands of OSHA and State compliance personnel, as well as State Consultants. In addition., the Agency will focus on training front-line staff in the core competencies for providing effective compliance assistance to employers. In sum, we are putting more emphasis than ever on prevention and compliance assistance to achieve our primary mission of protecting workers.

Finally, the Agency is proposing a new training and education grant program that more effectively reaches workers and employers that are most in need of compliance assistance. The new grant program will fund the development and pilot testing of safety and health training materials to be made available on the Internet.

Question 7. I am also concerned that OSHA's proposed Fiscal Year 2003 budget reduces funds for training grants from $11 million to $4 million. You've acknowledged the critical role that training plays in preventing workplace injuries and deaths. ? I would have expected the training grant budget to be increased, rather than reduced. How do you account for the dramatic decrease in funds for training grants?

Answer 7. We are proposing a new training grant program that will allow us to better leverage available resources and focus more on the development of training materials, as opposed to the delivery of direct training. Ultimately, it is the employers' responsibility to train their employees in workplace safety and health issues. Our job and responsibility is to help them do it.

Training grants are just one tool among many at our disposal for delivering compliance assistance, which has increased 73% since 1996. Onsite consultative services, compliance assistance specialists, e-tools, and the voluntary protection program are some of the many forms of outreach and assistance that we offer to employers and their employees and are funding at higher levels in this budget.

Question 8. The Susan Harwood Training Grant program has been popular in some quarters over the years and has provided safety training for many workers. Why change it now?

Answer 8. The OSHA Training Program was designed in the late 1970s. The Agency believes it is time to reexamine the most effective way to address the training needs of a changing workforce and use new technologies available to deliver training.

Question 9. Will OSHA's new training grant program, proposed in the agency's FY 2003 budget, provide more effective training for special worker populations, like immigrant workers?

Answer 9. OSHA's new training grants program is open to all non-profit organizations, including faith-based and community-based organizations. Faith-based and community-based organizations are specifically noted in the new program as possible untapped resources that have experience in reaching young, immigrant, and non-English speaking workers. Employers will be provided with the material they need to train their employees through a variety of media and technologies.

The new grant program will not be solely developed for web-based learning. Some of the training materials will be developed in formats suitable for publication on the Web so that the material can be downloaded and used by anyone who is interested. Other materials would include: course materials, toolbox and brown bag lunch talks, fact sheets and handouts. The material also will be tailored to meet the needs of the training audience, such as materials developed for easy comprehension or in other languages. These products will be available at no charge for use by employers and others to conduct training programs.

Question 10. What can OSHA do in the future to ensure that it can effectively communicate safety information with workers and employers with language and cultural barriers?

Answer 10. To begin with, I have directed the Agency to revise its Spanish translation of the pamphlet, "Employee Workplace Rights" to include a reference that OSHA is not the Immigration and Naturalization Service (INS), or in any way affiliated with the INS. Dispelling the fear of deportation, or other retaliation, is important for reassuring workers who may be reluctant to come forward with a complaint or to cooperate with an OSHA inspector investing possible safety and health violations. We are continuing to translate other outreach materials into foreign languages, too.

OSHA is developing several partnerships and alliances with various Hispanic, faith-based, and community-based organizations that can help us get safety and health and compliance information out to hard-to-reach workers and their employers. This October we will be cosponsoring a Best Practices Summit at the National Safety Congress and participating with EPA, the National Safety Council, the Pan American Health Organization and the National Alliance for Hispanic Health in the Hispanic Forum. Participants will share methodologies and strategies on how to effectively communicate about occupational health and safety. By working with groups that have already earned the trust and respect of Hispanics, such as the Catholic Church, OSHA can more effectively disseminate workplace safety and health information.

Another relatively easy way to ensure that OSHA can effectively communicate safety information with workers and employers is by actively hiring multilingual employees. Having bilingual staff with cultural knowledge of other countries is especially helpful in overcoming communication and cultural barriers.

February 27, 2002.

Hon. Edward Kennedy,
Chairman,
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR KENNEDY: I have been in contact with members of your staff and understand that you are holding a hearing on the Employment Non-Discrimination Act (ENDA) today. I want to thank you for holding this hearing and I wish I could attend, but unfortunately, I am still unable to talk publicly about the anti-gay harassment and abuse at New Balance Shoe. I hope that sharing my experience with you—even if only in writing—will be of some benefit.

From June 1986 to January 1996, I worked for New Balance Athletic Shoe company, on the production line at the company's factory in Norridgewock, Maine. During my time at New Balance, I received several written performance evaluations. In all of my evaluations, I was rated as either "meets standards" or "exceeds standards" in all performance areas—as well as "meets standards" for my overall evaluation. During my time at New Balance, I also received awards for successfully completing work team training and team building training programs.

Just three months prior to my termination, in fact, I received a written performance evaluation. This evaluation was prepared and signed by my supervisor, Ronn Plourde, and it was also signed by New Balance's Human Resources manager, Elizabeth Hook. Under the category listed as "Willingness and Ability to Work in a Team," my supervisor indicated that my performance was "Very Good," which is de-

fined as "consistently meets standards, above average performance." Under the category entitled "Follows company policies and procedures and proper safety regulations," I also received an evaluation of "Very Good." Under the category "Ability to Accept Constructive Criticism and Response to Supervision," I was rated as "Satisfactory," which is defined as "generally meets standards, does what is expected." The section of the evaluation listing "Strengths" stated that I was "always willing to help where needed." My overall evaluation rating was "Very Good."

This was only three months before I was fired with no notice. And one month before my termination,, in December 1995, I was complimented by Ms. Hook for being a "highly skilled shoe-maker."

So why did I have trouble at New Balance? Because my co-workers thought I was gay.

Throughout my employment with New Balance, I was subjected—practically daily—to malicious and extreme harassment and abuse by several of my fellow team members as well as my supervisor. They would make obscene and insulting remarks to me, sometimes in the presence of Mr. Plourde. They would also make humiliating and degrading gestures to me, ridiculing me because they thought I was gay; which included making feminine. motions, and imitating a feminine voice and feminine language. They yelled obscenities at me to the point that I was in fear for my safety almost daily.

Members of my work-team would constantly degrade and insult me. One co-worker would yell out loud so that everyone in the area could hear (including my supervisor) things such as, "You eat sh*t out of men's a "holes!", and "you fag—you faggot!" On one occasion this person put a sign on my desk stating, "Blow Jobs. $.25."

Another co-worker would also loudly call me things like, "you dumb f**k!," "you stupid f**k!," and "faggot!" One day when I was standing at a urinal in the bathroom at New Balance, yet another co-worker came up behind me, grabbed my shoulders and shook me so violently that I almost fell down. He said to me in a very hostile tone of voice, "I'll kill you!"

Co-workers would snap rubber bands on me, which at times caused welts. . Some threw hot cement on me. Several co-workers would put packets of mustard and ketchup on the floor and when I walked by they would stomp on the packets causing the ketchup and mustard to spray me. Several co-workers told me they did not want me to work with them or anywhere near them—and, on several occasions—co-workers would say, "he'll give us AIDS," referring to me.

My supervisor, himself, made degrading and humiliating gestures toward me up until the day I was fired. Mr. Plourde would use his hands and body motion to indicate that I was gay—he would also imitate a feminine voice and language. Before Mr. Plourde became my supervisor, he would say things such as, "you shouldn't get too close to me because of your kind."

I thought I was protected from this kind of harassment by my company's "no harassment" policy. New Balance's employee handbook specifically prohibits harassment based on sex and sexual orientation. The written policy defines forbidden harassment, in part, as follows:

[U]nwelcome conduct, whether verbal, physical or visual, that is based upon a person's protected status, such as sex . . . [or] sexual orientation . . . Sexual harassment may include sexual propositions, sexual innuendo, suggestive comments, sexually oriented 'kidding' or 'teasing,' 'practical jokes,' jokes about gender-specific traits, or obscene language or gestures, displays of foul or obscene printed or visual material, and physical contact, such as patting, pinching or brushing against another's body.

The policy provides a grievance procedure as follows: "If you feel that you have experienced or witnessed harassment, you are to notify immediately either your supervisor or the Human Resources Department . . . If an investigation confirms that harassment has occurred, New

Balance will take corrective action, including such discipline up to and including immediate termination of employment, as is appropriate."

Even though I complained to Mr. Plourde and Ms. Hook about the harassment and abuse I suffered—and even though much of this harassment and abuse was observed directly by Mr. Plourde—neither one of them (nor anyone else) took any action to stop the harassment or abuse. None of my harassers were ever disciplined, and the harassment continued even after my complaints.

I also have a hearing impairment that makes it difficult for me to hear and communicate, and requires that I wear a hearing aid. If I don't use my hearing aid, I can barely hear at all. Mr. Plourde, Ms. Hook, and other members of management were well aware of my hearing disability, and that I needed to use a hearing aid. I told Plourde, Hook and other members of management many times that, because of my hearing disability, I was not always able to hear the requests made by co-

workers for certain shoe-work they wanted me to do, and, as a result, some of the team members would feel that I was not cooperative or that I did not wish to comply with their requests. I complained that many times my co-workers would call me "stupid" and "retarded" and use profanity simply because I could not hear very well.

The steaming machines in my work area caused it to become very hot a lot of the time. This heat would, in turn, cause me to perspire, and the moisture from the perspiration would damage my hearing aid. I told Mr. Plourde that the heat from the steaming machines was causing damage to my hearing aid, and asked for an overhead fan to help with and control my perspiration. Mr. Plourde denied my request, despite the fact that other workers in the area on my work team had fans, and some workers even had industrial-sized fans. I also spoke to the Plant Manager, as well as to the head of personnel, about my request for a fan, but my request was denied.

New Balance claims that I was terminated "for continued poor job performance and insubordination"—specifically, for failure to "communicate with a fellow team member after being instructed to do so by management." In particular, New Balance claims that I was terminated because I refused to work with a single, pregnant woman—even though this coworker, Melanie Vitalone, had her baby three months before I was terminated. At this same time—three months before I was terminated—I also received a glowing review from my supervisor and from New Balance's human resources representative, including a rating of "Very Good" for "Willingness and Ability to Work in a Team."

A memorandum that was prepared by my supervisor, Mr. Plourde, at the time of my termination describes what happened that day as follows:

[Melanie Vitalone] called me over to her work station around 10:00 a.m. to tell me that Robert Higgins refuses to talk to her when she asks him a question concerning work.

I went by Roberts [sic] work station and asked him about it. He said he wasn't going to talk to her, she swears at him. I said you guys have to start communicating, and this has got to stop.

I brought [Melanie] down to my office and asked her if she swore at him. She said no. I also told her that this has got to stop. She said she's trying.

I along with the Plant Manager and the H.R. Representative to discuss what had taken place [sic]. We reviewed Roberts record as he had received a warning in November and also in May for failing to work effectively as a team. He had been counseled numerously in the past, and today he refused to speak to her. Based on all of this information, the decision was made to terminate Robert immediately.

The two warnings that Mr. Plourde is referring to—in May and November 1995 claimed that I was argumentative, disruptive and uncooperative. I refused to sign either warning because Mr. Plourde refused to acknowledge in writing that both of these incidents were prompted by the harassment and abuse piled on me by my co-workers—co-workers who were not given written warnings.

Just as I did not agree with Mr. Plourde's characterization of the facts of my conduct on May 10 or November 28, 1995, I offer my own—first-person—account of what occurred on January 4, 1996 to be sure that all the facts are on the table. On the morning that I was terminated, Ms. Vitalone left her station to talk to her boyfriend. When she returned, there were boxes of shoes piled up at her station and the production on the line was disrupted and held up as a result. When Ms. Vitalone returned to her station and saw the mix-up or pile up at her station, she immediately ran up to me and started swearing at me, yelling at me and blaming me for the problem when it was Ms. Vitalone's own fault. She was calling me "fag boy" and "you stupid f**k" and was using other profane and obscene language. I asked her to stop swearing at me and try to listen, but she kept yelling and using vulgar and abusive language. She then turned abruptly and walked off.

Prior to my termination, Ms. Vitolone would regularly swear at me, berate me, and yell at me. She would use vulgar, profane, and obscene language toward me, and she would wrongly blame me when things would go wrong. I complained many times to Mr. Plourde and Ms. Hook about Ms. Vitolone's conduct, but neither Plourde nor Hook did anything to correct the problem. Ms. Vitalone was never disciplined.

Some people might want to know why I would stay in a job where I was subject to such harassment and abuse. There are two reasons.. First, I loved my job. I loved being a part of the creation of something useful from flat pieces of material. Second, and more importantly, I had to pay my way in this world. I had to pay my bills and my rent and I believed (and still believe), in my heart, that I had just as much right to work at New Balance as anyone else—including my coworkers who harassed and abused me—and was not about to let anyone force me out of my job.

I was sure there had to be some federal law that prohibited the harassment and abuse I endured in the New Balance plant—so I filed suit against New Balance Shoe in federal district court in Maine. The district court, however, dismissed my claim because sexual orientation discrimination is not prohibited by federal law (or Maine state law). I appealed that decision to the First Circuit Court of Appeals... and lost again. I would like to quote for the record part of the First Circuit's decision:

"The record make manifest that the appellant [Robert Higgins] toiled in a wretchedly hostile environment . . . We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment—and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation."

What happened to me could happen to any other gay or lesbian person in Maine—and it would be perfectly legal. There is no federal law or state law that prohibits this kind of harassment in the workplace. That's not right.

Before I close I want to thank you and the members of this committee for holding today's hearing and for your commitment to move this important piece of legislation. While it won't help me personally, it will provide hope for many, many people and put employers on notice that anti-gay harassment and abuse does not belong in the workplace. I would like to close with a comment from the federal judge in my district court case:

"In determining along with numerous other jurisdictions that Title VII does not provide a remedy for discrimination based on sexual orientation, the Court does not in any way condone this serious and pervasive activity in the American workplace. The intolerable working conditions set forth in the cases denying relief under Title VII for rampant discrimination based on sexual orientation call for immediate remedial response by Congress."

Again, thank you for holding this important hearing and please let me know if I can be of further assistance.

Sincerely,

ROBERT E. HIGGINS,
Waterville, Maine.

NATIONAL SAFETY COUNCIL,
WASHINGTON, DC,
March 13, 2002.

Hon. MIKE ENZI,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR ENZI: The National Safety Council was pleased to have had the opportunity to testify before the Subcommittee on Employment, Safety and Training on February 27, 2002. We appreciate your generous invitation and hope the testimony regarding immigrant workplace safety matters was useful and informative.

As you requested, this letter is in response to your recent questions that you could not ask during the hearing.

1. OSHA officials tell me they are concerned about their ability to reach employers with limited English proficiency as well as their employees. Can NSCs programs help OSHA address these issues with employers?

Yes.

One of the early lessons-learned in NSC's Hispanic outreach strategy was to focus the design and delivery of our services and products for Hispanic community-based organizations; these organizations have credibility and experience in addressing the needs and aspirations of hard-to-reach employers and immigrants to overcome the language and trust barriers. In the initial planning of our first Hispanic Forum on Safe and Healthy Environment in 2000, we established Hispanic community-based organizations as our target audience, and, then, recruited partners who could communicate and provide these organizations with scholarships and support to attend our event in Orlando, Florida.

In planning for our Second Forum to be held in October 2002, we have been developing products and learning sessions, which build the capacity of community-based organizations to better address the safety and health needs of hard-to-reach employers and immigrants with limited English proficiency. After attending our sessions, these community-based organizations will have a better understand of how to apply

for financial assistance from Federal/State agencies and foundations, and will be better equipped to request technical support services and products from public and private sector organizations.

One of our most recent lessons-learned is that the U.S.-Mexico Chamber of Commerce (USMCOC) will be a valuable partner in reaching small- and medium-sized Hispanic-owned businesses; many times these owners have limited English proficiency and often employ immigrants with equally limited English proficiency and/or low levels of literacy. By working hand-in-glove with the USMCOC, we are developing a strategy for converting useful NSC products and services into culturally appropriate language for use by employers and employees With limited proficiency in English, both in the U. S. and Mexico. As soon as we are successful in locating appropriate sources of financial assistance through our partnerships with the USMCOC and other national Hispanic leadership organizations (like the National Alliance for Hispanic Health), we will be able to establish the infrastructure to help these hard-to-reach employers.

2. You state in your testimony that small and medium-sized employers often don't have the capacity to adequately assess immigrant workers' skills and experience levels. I am particularly concerned with ensuring that small businesses are included in the development and delivery of immigrant worker safety initiatives. Could you please comment on this and what suggestions you have for ensuring that this happens?

Having worked extensively with the Hispanic community, the NSC has determined that the technical expertise needed to assess immigrant workers' skills and experiences is complex, especially when there are language and trust barriers. It is also administratively and technically challenging to design and deliver workplace training in identifying and protecting against risks and hazards, especially for workers with limited English proficiency. Small- and medium-sized employers are not likely to have the financial resources and technical know-how (systems, products, and expertise) needed to address this complex set of workplace challenges.

NSC has long been a leader in occupational safety and health training that covers a variety of topics for all employer and employee levels. Training options include nationally recognized classroom programs, convenient packaged training, and, most recently, online programs. Safety and health training programs for business, industry and government assist employers and employees in conveying best practices for specific industries and job tasks and complying with OSHA and other regulations. Many of these training programs are delivered to small- and medium sized employers, employee groups and community based organizations through local NSC chapters. As NSC expands the availability of its products and services in Spanish and employ more native-language specialists in its state Chapters, we will be better able to help these hard-to-reach small and medium-sized employers and their employees.

Although private and public sector organizations purchase NSC training programs, services and publications, the NSC is a not-for-profit organization, which relies on financial assistance from Federal and state governments to fulfill its mission, particularly for the under-served employers and populations.

3. Can you please comment on the importance of building coalitions between the public and private sector and community-based organizations in order to promote the safety and health of immigrant workers?

Having worked extensively with the Hispanic community, (as explained above) the NSC believes that the technical issues and challenges are very complex, especially when there are language and trust barriers. Not 'only did we recognize the importance of developing, an extensive professional technical network with private and public sector groups, we also realized that We needed to establish trust and credibility within the community and those organization who deliver these products and services to immigrants and hard-to-reach employers.

An excellent example of a highly successful public-private partnership was the Council's Hispanic Forum on a Safe and Healthy Environment, which is mentioned above. This event was held two years ago and was co-sponsored by the U.S. Environmental Protection Agency, the Pan American Health Organization, and the National Alliance for Hispanic Health. Scholarships were provided for members of Hispanic organizations to attend the Forum to learn about the problems facing Hispanic workers and their families. Attendees were able to form new partnerships and develop a model plan of action to address challenges. We will conduct a second Hispanic Forum this October, and expect even greater interest and participation.

As another example, Mr. Al Zapanta, President and CEO of the U.S.-Mexico Chamber of Commerce, servers as our partnership's advocate and spokesperson for the Hispanic Forum with the national Hispanic leadership. By keeping many of the leaders of the Hispanic community informed and involved in our activities, we make

sure that our partnership establishes and maintains credibility and trust within the Hispanic community, employer community and employee groups.

4. What can we at the subcommittee, in the Senate or the Congress, or the staff of OSHA do to help you make your efforts at NSC to promote the safety and health of immigrant workers more successful?

The Congress, the Committee and OSHA can help us find ways to address this complex challenges by initiating a means to minimize overlap and duplication of effort among many involved Federal agencies and others. In addition, there is a need to encourage the establishment of coalitions and partnerships, involving government, non-govern mental, and private-sector organizations, in a coordinated approach. NSC believes that a reliance on public-private partnerships offers the best, if not only, hope of achieving the development of a meaningful national network of education and training programs, as well as materials and delivery methods for workplace safety and health. NSC's experience validates that public-private partnerships are proven to successfully promote safety and health in the workplace, thus contributing to the reduction in the number of lives and disabling injuries among workers.

The NSC believes that the Congress can also help by recognizing that this is not only a U. S. challenge, but it is also a major Hemispheric concern. We need to address the significant problems associated with the health and safety of Hispanic immigrant workers in the U. S. as well as similar challenges throughout the Americas. Systems, processes, materials, tools, and training programs are needed to help employers throughout the Americas to assess the job skills of workers and educate workers, since these workers could be part of the pool of future U.S. immigrants.

By making the safety and health needs of immigrants visible to the American public, the Committee is enhancing the credibility of our partnerships and demonstrating that this is a cemplex challenge that requires nation-wide (and hemisphere-wide) strategies. The technical and administrative challenges are extensive, and the resource needs are significant, especially for the hard-to-reach employers and their employees.

I hope these answers appropriately respond to your questions and that they will provide you and the Committee with additional insights into immigrant workplace issues.

Again, thank you for your generous invitation for the National Safety Council to participate in this hearing. We were pleased to do so and we look forward to assisting in any way possible in the future.

Sincerely,

BOBBY JACKSON,
Vice President, National Programs.

COORS BREWING CO.,
GOLDEN, COLORADO 80401-1295,
February 25, 2002.

Ms. Elizabeth Birch,
Executive Director,
Human Rights Campaign,
919 18th Street, NW,
Washington, DC 20006.

DEAR MS. BIRCH: I am pleased to reaffirm Coors Brewing Company's longstanding commitment to our policy of non-discrimination in our workplace. As you may be aware, more than two decades ago Coors was among the first Fortune 500 companies to formally adopt an employment policy that prohibits discrimination based on sexual orientation. In addition, since 1995, we have also offered equal benefits to our employees' domestic partners. At Coors, respect for others is part of our core values and the cornerstone for building trusting relationships through honesty, openness and fairness. We see it as fundamental to the way we do business.

It is our longstanding commitment to non-discrimination that allows Coors employees to thrive and encourages us all to work together for the success of the company. We recognize and respect the diversity in our workforce, and among our consumers, and strive for people in the entire Coors organization to be recognized and valued for their differences because diversity is the key to achieving and sustaining our company's vision.

Coors supports the efforts by the Human Rights Campaign to ensure that all employees are afforded equal employment opportunity, regardless of sexual orientation.

The Employment Non-Discrimination Act provides a vehicle for this goal to be achieved. We wish you continued success in reaching this goal.

Sincerely,

W. LEO KIELY, III,
President and Chief Executive Officer.

MICROSOFT CORP.,
WASHINGTON, DC 20036,
February 14, 2002.

Hon. EDWARD KENNEDY,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR KENNEDY: Microsoft's vision is to empower people through great software—any time, any place and on any device. As the worldwide leader in software for personal and business computing, Microsoft strives to produce innovative products and services that meet our customers' evolving needs.

In order to accomplish that goal we strive to create a workplace at Microsoft where everyone can develop a challenging career with opportunities for growth, competitive rewards and a balance between work and home life. In a fast-paced, competitive environment, this is a shared responsibility between Microsoft and its employees.

In order to compete effectively, the company has adopted policies that it believes foster such an environment. Our employees know that they will be treated fairly, without being subject to prejudice or discrimination. An essential element of those policies includes the company's anti-discrimination policy that expressly states that it will not discriminate on the basis of sexual orientation.

Unfortunately, not all Americans experience this basic protection in their employment. It remains legal in 38 states to fire someone because of their sexual orientation. This is not only bad for business, it is bad for America. The Employment Non-Discrimination Act would simply and fairly extend to all Americans the fundamental right to be judged on one's own merits. And it does so without any endue burden on corporate America.

Microsoft strongly supports passage of the Employment Non-Discrimination act. The principles it fosters are consistent with our corporate principles in treating all employees with fairness and respect. We encourage the Congress to move quickly to enact this important legislation.

Sincerely,

JACK KRUMHOLTZ,
Director of Federal Government Affairs, Associate General Counsel.

Cc: Hon. JUDD GREGG,
SR-393,
U.S. Senate,
Washington, DC 20510.

PREPARED STATEMENT OF STEVEN L. MILLER

On behalf of 24,000 U.S. employees of Shell, I thank the committee for the opportunity to share our company's perspective on the issue of diversity and discrimination in the workplace and to voice our strong support for the Employment Non-Discrimination Act.

Shell's commitment to diversity has been strong and very active. Shell's plan for how we will conduct our business is outlined in our Blueprint for Success which not only defines how we will deliver on our performance commitments, but also how we will ensure every employee can contribute to his or her full potential. Our goal is to become a model of diversity for corporate America—a lofty aspiration, but one that we take seriously and work every day to achieve.

In order to reach that goal, Shell has adopted policies that it believes create an environment where all of our employees feel that they have a chance to exercise their creativity, knowledge and experience without fear of ostracism or reprisal. People spend a good portion of their lives in the workplace; why deprive them of achieving the satisfaction of being able to give of themselves in the fullest measure and our company of the benefit of their productivity?

As an essential element of those policies, our non-discrimination policy expressly states that the company will not discriminate on the basis of sexual orientation.

This has been the policy of Shell Oil Co. since April 1996. This policy is not only in place because it is the right thing to do. It is the right business decision as well.

Our non-discrimination policy has worked well. In the years since we included sexual orientation, its implementation has been accepted broadly and we believe it has affected our bottom line for the better. Having this policy significantly improves employees' morale, loyalty and productivity. Simply put, our business would be greatly diminished if our gay and lesbian employees lived every day in fear of discrimination. The same is true for all businesses.

Our gay and lesbian employees have worked closely with our leadership to help advance employee awareness and understanding of issues that are important to Shell and its employees. Most importantly, they have helped Shell model desired policies and practices to the external environment.

Since its formation, our gay and lesbian employee network, called SEA Shell, participated in volunteer activities in the local community such as the AIDS walk, the Pride Parade and the Greater Houston Gay and Lesbian Chamber of Commerce's Empower events.

All of these activities are driven by the realization that we must take action to effect change. Our way of life—our freedom, open-mindedness, and understanding of what it means to be tolerant are being challenged like never before, especially in the aftermath of the events of September 11.

Society today is demanding greater accountability from businesses, governments and individuals. Shell's commitment is to America—and to what it represents. And, the Employment Non-Discrimination Act goes to the core of what this nation is all about. Giving all our citizens the fundamental right to be judged on one's own merits.

In fact, the fairness and simplicity of this bill is one of its most compelling features. Affirmative action is not mandated by this bill. It contains no reporting requirements. It does not compel employers to grant domestic partner benefits, although Shell has done so for many years. A federal law would create a level playing field for corporate America with the right policy against discrimination. Currently our business has to comply with 12 differing state laws against sexual orientation discrimination, while our employees in other states are afforded no legal protection under state law. One uniform federal policy would ease our administrative burden.

This bill embodies the principle of non-discrimination that already enjoys the wide support of the American people. Nearly two-thirds of America's Fortune 500 companies already include sexual orientation in their non-discrimination policies. A recent poll found that more than 80 percent of Americans believe that gays and lesbian should be given equal opportunity in the workplace.

Unfortunately, in many places, just the opposite occurs. It remains legal in 38 states to fire an individual based solely on his or her real or perceived sexual orientation. And while many large employers have recognized the value of diversity others have not.

It is Shell's belief that ENDA is good for American business, large and small. The principles it fosters are consistent with our corporate principles of treating all employees with fairness and respect. We encourage the Congress to move expeditiously to pass this common-sense legislation.

STATEMENT OF NEW BALANCE ATHLETIC SHOE, INC.

EQUAL EMPLOYMENT OPPORTUNITY POLICY

New Balance provides equal opportunities for all current and prospective associates and takes affirmative action to ensure that employment, training, compensation, transfer, promotion, and other terms, conditions and privileges of employment are provided without regard to race, color, religion, national origin, sex, sexual orientation, age, handicap and/or status as a disabled or Vietnam Era veteran. Associates and applicants are protected from coercion, intimidation, interference or discrimination for filing a complaint or assisting in an investigation regarding unlawful discrimination. Equal Employment Opportunity means that all personnel decisions are to be made in a nondiscriminatory manner. An Affirmative Action Program has been developed and implemented to assure that equal opportunity is a reality at New Balance. Affirmative Action is a results oriented program which seeks to ensure that each individual can participate equally in all employment opportunities at New Balance.

ANTI-HARASSMENT POLICY

New Balance is committed to maintaining a working environment that is free from discriminatory harassment. The Company's commitment begins with the rec-

ognition and acknowledgment that such harassment is, of course unlawful. To reinforce this commitment, the Company has developed a policy against harassment and a reporting procedure for associates who have been subjected to or witnessed harassment. This policy applies to all work-related settings and activities, whether inside or outside the workplace, and includes business trips and business-related social events. Company property (e.g., telephones, copy machines, facsimile machines, computers, and computer applications such as e-mail and Internet access) may not be used to engage in conduct which violates this policy. The Company's policy against harassment covers associates and other individuals (e.g., directors, officers, contractors, vendors, customers, etc.) who have a relationship with the Company which enables the Company to exercise some control over the individual's conduct in places and activities that relate to the Company's work.

PROHIBITION OF SEXUAL HARASSMENT

The Company's policy against sexual harassment prohibits sexual advances, requests for sexual favors, and other physical or verbal conduct of a sexual nature, when: (1) submission to such conduct is made as an express or implicit condition of employment; (2) submission to or rejection of such conduct is used as a basis for employment decisions affecting the individual who submits to or rejects such conduct; or (3) such conduct has the purpose or effect of unreasonably interfering with an associate's work performance or creating an intimidating, hostile, humiliating, or offensive working environment.

While it is not possible to list all of the circumstances which would constitute sexual harassment, the following are some examples: (1) unwelcome sexual advances—whether they involve physical touch or not; (2) requests for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits, or continued employment; or (3) coerced sexual acts.

Depending on the circumstances, the following conduct may also constitute sexual harassment: (1) use of sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; (2) sexually oriented comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess; (3) displaying sexually suggestive objects, pictures, cartoons; (4) unwelcome leering, whistling, deliberate brushing against the body in a suggestive manner, sexual gestures, suggestive or insulting comments; (5) inquiries into one's sexual experiences; or (6) discussion of one's sexual activities.

It is also unlawful and expressly against Company policy to retaliate against an associate for filing a complaint of sexual harassment or for cooperating with an investigation of a complaint of sexual harassment.

PROHIBITION OF OTHER TYPES OF DISCRIMINATORY HARASSMENT

It is also against Company policy to engage in verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her race, color, gender, religion, sexual orientation, age, national origin, disability, or other protected category (or that of the individual's relatives, friends, or associates) that: (1) has the purpose or effect of creating an intimidating, hostile, humiliating, or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

Depending on the circumstances, the following conduct may constitute discriminatory harassment; (1) epithets, slurs, negative stereotyping, jokes, or threatening, intimidating, or hostile acts that relate to race, color, gender, religion, sexual orientation, age, national origin, or disability; and (2) written or graphic material that denigrates or shows hostility toward an individual or group because of race, color, gender, religion, sexual orientation, age, national origin, or disability and that is circulated in the workplace, or placed anywhere in the Company's premises such as on an associate's desk or work space or on Company equipment or bulletin boards. Other conduct may also constitute discriminatory harassment if it falls within the definition of discriminatory harassment set forth above.

It is also against Company policy to retaliate against an associate for filing a complaint of discriminatory harassment or for cooperating in an investigation of a complaint of discriminatory harassment.

REPORTING OF HARASSMENT

If you believe that you have experienced or witnessed sexual harassment or other discriminatory harassment by any associate of the Company, you should report the incident immediately to your supervisor or to your facility Human Resources Man-

ager. You may also contact Anne Davis, Vice President of Administration at (617) 746-2340. Possible harassment by others with whom the Company has a business relationship, including customers and vendors, should also be reported as soon as possible so appropriate action can be taken.

The Company will promptly and thoroughly investigate all reports of harassment as discreetly and confidentially as practicable. The investigation would generally include a private interview with the person making a report of harassment. It would also generally be necessary to discuss allegations of harassment with the accused individual or with other associates. The Company's goal is to conduct a thorough investigation, to determine whether harassment occurred, and to determine what action to take against an offending individual. To the extent feasible, only individuals who the Company determines have a need to know will be informed of the allegations and they will be requested to treat the matter confidentially.

If the Company determines that a violation of this policy has occurred, it will take appropriate disciplinary action against the offending party, which can include counseling, warnings, transfers, suspensions, and termination. Associates who report violations of this policy and associates who cooperate with investigations into alleged violations of this policy will not be subject to retaliation. Upon the completion of the investigation, the Company will inform the associate who made the complaint of the results of the investigation.

OTHER INFORMATION

The Company strongly encourages associates to bring any concerns about possible sexual or other discriminatory harassment to the Company's attention. Associates may also direct inquiries or reports concerning discriminatory harassment to the agencies responsible for governmental enforcement of employment discrimination laws.

Massachusetts associates may contact:

Massachusetts Commission Against Discrimination
One Ashburton Place
Boston, MA 02108
(617) 727-3990

Maine associates may contact:

Maine Human Rights Commission
State House, Station 51
Augusta, ME 04333
(207) 624-6050

Both Massachusetts and Maine associates may contact:

Equal Employment Opportunity Commission
One Congress Street
Room 1001
Boston, MA 02114
(617) 565-3200

WALDEN ASSET MANAGEMENT,
BOSTON, MA 02108,
February 28, 2002.

Hon. Edward Kennedy,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR KENNEDY: Walden Asset Management, a division of United States Trust Company of Boston, is a global investment manager with $1.2 billion in assets under management. Our clients believe that companies with a commitment to customers, employees, communities and the environment will prosper long-term. Among their top social objectives is the assurance that their companies are doing all that they can to provide equal employment opportunities to current and prospective employees. We write today in strong support of your efforts to pass the Employment Non-Discrimination Act. As you noted yesterday, the United States is long overdue in providing this basic protection to its workforce.

For many years, Walden, on behalf of our clients, has worked with companies to encourage them to extend their leadership in corporate responsibility by amending their non-discrimination policies to explicitly include sexual orientation. We have been involved in sponsoring shareholder resolutions with a number of companies on this issue. In fact, Walden has been successful in its dialogue efforts this past year with Affiliated Computer Services, American International Group, and Teleflex. We also have a resolution pending before Alltel this year and a client has cofiled a similar resolution with ExxonMobil.

Walden has also participated in company dialogues coordinated by the Equality Project, a coalition of institutional shareholders concerned about workplace equality. Allies and leaders within companies, at other social investment firms, in the labor movement, and in the not-for-profit sector have successfully encouraged more than 1,500 U.S. companies, including more than half of Fortune 500 companies across all industries, to have non-discrimination policies that explicitly include sexual orientation. These data have been well documented by the Human Rights Campaign's WorkNet project.

Unfortunately, there are too many companies that refuse to extend such protections to all employees. Walden and other members of the Equality Project have been stonewalled in our efforts to encourage ExxonMobil, Emerson Electric, Alltel, and other companies to adopt inclusive policies.

PREPARED STATEMENT OF KIM WISCKOL

On behalf of Hewlett-Packard Company's (HP) 44,000 U.S. employees, I would like to thank the Committee for this opportunity to share our company's views on the Employment Non-Discrimination Act. In short, HP strongly believes that this legislation is good for American business, while addressing very harmful discrimination. We hope Congress will pass it soon.

First, it's important to highlight what the Employment Non-Discrimination Act does not do. It does not provide any special rights. It does not promote affirmative action. It does not require quotas or reporting procedures. It does not force employers to grant domestic partner benefits (although I would like to note that HP does provide these benefits).

What the Employment Non-Discrimination Act does say is that employees cannot be fired or discriminated against because of their sexual orientation. That's it—plain and simple. The legislation provides the type of fairness that our country has been seeking since its inception—the type of fairness that says that in the workplace and in commerce, we should all be judged by our merits.

Unfortunately, there are still 38 states in our nation where it is legal to fire someone because of their sexual orientation. For a company like HP, which has employees across the country, this means dealing with differing state laws, and operating in places where our employees are offered no legal protection under state statutes. The Employment Non-Discrimination Act would provide a standard for the nation—a standard simply stating that discrimination based on sexual orientation is not unacceptable in America.

This is the right thing to do.

At HP, we have also realized that a lack of the Employment Non-Discrimination Act is bad for business. As you know, eighty-six percent of Fortune 50 companies include sexual orientation in their non-discrimination policies. They do this for business reasons.

We at HIP understand that attracting and retaining a talented and diverse workforce is critical to the success of our business. No competitive company that wants to succeed can afford to practice a policy of exclusion. As our Chairman and CEO, Carly Fiorina, has said: "Invention requires creativity; creativity requires true diversity. If we are to succeed, we must become a role model of inclusion."

Harmful discrimination in the workplace decreases productivity and morale. Having employees who are working in fear of persecution is not a smart way to run a company.

As you may know, HP has a long-standing non-discrimination policy, which states that we do not discriminate against any employee or potential employee because of race, creed, color, religion, gender, national origin, sexual orientation, age, disability, or military veteran status. And we provide these protections in many places where state laws do not.

Our country has a long history of fighting against discrimination in the workplace and elsewhere—whether the victims were women, the disabled, religious and ethnic minorities, and so forth. That discrimination was stopped because it was wrong.

Today, people are being fired for no other reason than their sexual orientation. This too is wrong.

Please join the vast majority of America's leading businesses in realizing that discrimination is not good for business or productivity. It's not good for America.

On behalf of HP, I encourage you to move quickly to enact the Employment Non-Discrimination Act.

[Whereupon, at 11:38 a.m., the committee adjourned.]

○