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109TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 109–313

CLARIFICATION OF FEDERAL EMPLOYMENT PROTECTIONS ACT

NOVEMBER 18, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TOM DAVIS of Virginia, from the Committee on Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3128]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform, to whom was referred the bill (H.R. 3128) to affirm that Federal employees are protected from discrimination on the basis of sexual orientation and to repudiate any assertion to the contrary, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 3128 clarifies Congressional intent with regard to statutory protections available to Federal employees facing discrimination on the basis of sexual orientation. The legislation states that Congressional intent as well as current policy and practice prohibit Federal employment discrimination on the basis of sexual orientation. The legislation amends current law to specifically prohibit discrimination based on sexual orientation.

LEGISLATIVE HISTORY

On June 6, 2005, Rep. Henry Waxman (D–CA) introduced H.R. 3128, the "Clarification of Federal Employment Protection Act." On September 15, 2005, the committee approved H.R. 3128 by voice vote and ordered it reported favorably to the full House of Representatives for consideration.

SECTION-BY-SECTION

Section 1

Names this legislation the "Clarification of Federal Employment Protections Act."

Section 2

This section states that, in order to dispel any public confusion, Congress hereby repudiates any assertion that Federal employees are not protected from discrimination on the basis of sexual orientation. This section also states that it is the sense of Congress that, in the absence of the amendment made by subsection (c), discrimination against Federal employees and applicants for Federal employment on the basis of sexual orientation is prohibited by section 2302(b)(10) of title 5, United States Code. Finally, this section would amend section 2302(b)(1) of title 5, United States Code, by adding at the end the following: "(F) on the basis of sexual orientation."

EXPLANATION OF AMENDMENTS

There were no amendments offered.

COMMITTEE CONSIDERATION

On September 15, 2005, the Committee met in open session and ordered favorably reported the bill, H.R. 3128, by voice vote.

ROLLCALL VOTES

No rollcall votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 3128. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3128. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the

Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3128 from the Director of Congressional Budget Office:

H.R. 3128—Clarification of Federal Employment Protections Act

CBO estimates that enacting H.R. 3128 would have no significant impact on the federal budget. Enacting the bill would not affect direct spending or revenues. H.R. 3128 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

H.R. 3128 would amend federal law to codify that discrimination against Federal employees based on sexual orientation is a prohibited personnel practice. Because the legislation would put into statute current policy and practice, CBO estimates that implementing H.R. 3128 would have no significant impact on the budget.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 2302 OF TITLE 5, UNITED STATES CODE

§ 2302. Prohibited personnel practices

(a) * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) * * *

* * * * * * *

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); **[**or**]**

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation; *or*

(F) on the basis of sexual orientation.

* * * * * * *

MINORITY VIEWS

I introduced H.R. 3128, the "Clarification of Federal Employment Protection Act," to reaffirm that Federal employees are protected from discrimination on the basis of sexual orientation and to repudiate any assertion to the contrary. At a time when our federal employees are working tirelessly on behalf of the Nation, we should be doing our utmost to ensure that all are protected against all forms of discrimination. Unfortunately, some in the Bush Administration appear to have abandoned a long-standing, bipartisan interpretation of the law that protects Federal employees from discrimination based on sexual orientation.

Until recently, the Bush Administration followed a long-standing policy prohibiting job discrimination against gay Federal employees. However, Special Counsel Scott Bloch, head of the Office of Special Counsel (OSC), which is responsible for investigating and prosecuting retaliation claims in the Federal workplace, including retaliation resulting from discrimination, has deviated from this long-held policy.

The statutory provision at issue is 5 U.S.C. 2302(b)(10), which makes it unlawful to "discriminate for or against any [Federal] employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others." Enacted as part of the Civil Service Reform Act of 1978, this provision has been interpreted by both Republican and Democratic administrations to prohibit discrimination against Federal workers on the basis of their sexual orientation, including both discrimination based solely on "orientation" or "status" and sexual conduct.

In 1980, the Director of the Office of Personnel Management (OPM) advised Federal agencies that under 5 U.S.C. § 2302(b)(10) "applicants and employees are to be protected against inquiries into, or actions based upon, non job-related conduct, such as religious, community, or social affiliations, or sexual orientation."[1] This position has been repeatedly reaffirmed by OPM. In fact, OPM guidance issued in a 1999 publication that remains available today states that OPM "has interpreted this statute [10 U.S.C. § 2302(b)(10)] to prohibit discrimination based on sexual orientation."[2] The Justice Department has issued similar guidance. An opinion written more than 20 years ago by Theodore Olson, then Assistant Attorney General heading the Office of Legal Counsel, states that "it is improper to deny employment or to terminate anyone on the basis either of sexual preference or of conduct that does

[1] OPM, Memorandum on "Policy Statement On Discrimination On The Basis of Conduct Which Does Not Adversely Affect The Performance Of Employees Or Applicants For Employment" (May 12, 1980).

[2] OPM, Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights *http://www.opm.gov/er/address2/Guide04.asp*

not adversely affect job performance."[3] Prior to the current Special Counsel's tenure, OSC also interpreted this provision to prohibit discrimination based on sexual orientation.

Unfortunately, the current Special Counsel continues to refuse to investigate certain claims of sexual orientation discrimination. Within weeks of taking office in January 2004, and apparently without consulting OPM, he ordered the removal of all references to OSC's jurisdiction to enforce sexual orientation discrimination protections from OSC's website.

Mr. Bloch explained his reasoning in testimony on May 24, 2005, before the Senate Committee on Homeland Security and Governmental Affairs. He contends that 5 U.S.C. § 2302(b)(10) prohibits discrimination based on "conduct" and does not mention discrimination based on "orientation" or status. He apparently concludes that OSC would exceed its jurisdiction if it were to investigate and prosecute cases alleging discrimination based solely on sexual orientation where no conduct is in question.

The distinction the Special Counsel seems to be making between discrimination based on sexual "conduct" and sexual "orientation" is incomprehensible. His suggestion that such a distinction exists is the reason for this clarifying legislation. When a Federal agency discriminates against an employee or applicant because he or she is gay, the discrimination is rooted in disapproval of their sexual conduct or other manifestation of the employee's "lifestyle," not some abstract disapproval of the person's "orientation." There is no meaningful, real-world distinction between discrimination based on "conduct" and discrimination based on "orientation" because conduct and orientation are inextricably intertwined in this context.

H.R. 3128 would make clear the protection afforded by the Civil Service Reform Act of 1978 by explicitly making discrimination on the basis of sexual orientation a prohibited personnel practice under the act.

I commend my colleagues—Representatives Shays, Danny Davis, Foley, Frank, Kolbe, Hoyer, Engel, Baldwin, Van Hollen, and Norton—for their leadership on this issue and look forward to working with them to obtain rapid approval of this bill in the House.

HENRY A. WAXMAN.
ELEANOR HOLMES NORTON.

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[3] OLC, Termination of an assistant United States Attorney on Grounds Related to his Acknowledged Homosexuality, 3 (Mar. 11, 1983) (7 op. OLC 46).