COMMENTS

USING COLLECTIVE BARGAINING TO COMBAT LGBT DISCRIMINATION IN THE PRIVATE-SECTOR WORKPLACE

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INTRODUCTION

In this comment, I argue that one of the most effective and efficient means of recognizing and enforcing the rights of lesbian, gay, bisexual, and transgender private-sector workers[1] is through collective bargaining.[2] This

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1. For present purposes, the term "sexual orientation" describes individuals who identify as "lesbian," "gay," and "bisexual" while the term "gender identity" describes individuals who identify as "transgender" or express other non-conforming gender identities. In turn, "transgender" describes those individuals whose gender identity differ from the identity assigned at birth. As an example, an individual who was born female is generally

comment provides the legal framework of labor law in which to view the issue, and discusses the advantages and limitations of the collective-bargaining process and its enforcement mechanism – arbitration. Thus, the focus of the comment will be on "real world" tactical and strategic considerations rather than theory in isolation.

The pervasive scope of gender identity and sexual orientation discrimination in the workplace is indisputable.[3] Only eighteen states and the District of Columbia provide protection for both classifications.[4] The likelihood of protection against such discrimination at the federal level is uncertain at best.[5] Even where such relief may be available, practical and philosophical limitations of government intervention weigh against viewing such action as the "be-all end-all" solution. Similarly, the prospects of a federal statutory solution are grim.[6]

Collective bargaining offers a platform uniquely suited for the creation of workplace rights that exist independently of any state or federal law. Collective bargaining is distinctly unlike the legislative process. Whether state or federal,

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expected to perform the gender behavior of a "girl" or "woman." If that individual's subjective identity is as a "boy" or a "man," that individual would likely identify as "transgender." The term "LGBT" is used to describe these groups of individuals as a class.

2. Reference to private-sector workers means those workers covered by the National Labor Relations Act. Public employees of both state and federal government are governed by separate bodies of law that vary from state to state and sometimes even federal agency to federal agency. This is not to imply that such workers do not have claims through collective bargaining. Rather, it is done for specificity and conciseness. *See Employee Rights*, NAT'L LAB. REL. BD, http://www.nlrb.gov/rights-we-protect/employee-rights (last visited Mar. 16, 2015).

3. *See* JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL.AND NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51, 56 (2011), http://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

4. *Non-Discrimination Laws: State by State Information – Map*, AM. C. L. UNION, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited, Nov. 9, 2013).

5. This is not to say that there have not been developments at the administrative level; indeed, it would be more than fair to say that there seems to be a shift favoring coverage. *See* Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012); DEPT. OF JUSTICE, TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf; Jonathan Capehart, *Obama to Sign Executive Order Protecting LGBT Federal Contractors*, WASH. POST (June 16, 2014), http://www.washingtonpost.com/blogs/post-partisan/wp/2014/06/16/obama-to-sign-executive-order-protecting-lgbt-federal-contractors/; Zachary A. Goldfarb, *Obama Announces Executive Order Protecting Federal Employees from Gender-Identity Discrimination*, WASH. POST (June 30, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/30/obama-announces-executive-order-protecting-federal-employees-from-gender-identity-discrimination/. However, while praise-worthy, these recent changes are outside the scope of present analysis as they concern governmental intervention into the workplace rather than the private ordering of labor relations through collective bargaining.

6. *See, e.g.*, Employee Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (1st Sess. 2013).

the legislative process is also encumbered by political pressure through lobbying and less-restrictive campaign finance regulation.[7] In contrast, collective-bargaining agreements are subject only to the employer and the workers' representative. The collective-bargaining agreement is "an effort to erect a system of industrial self-governmenGHt" which, along with the "common law of the shop," functions as "an agreed-upon rule of law" that governs the workplace.[8] This "rule of law" approach to viewing collective-bargaining agreements is a central theme in American labor law.

Collective-bargaining agreements serve two chief functions: 1) the creation of workplace rights, and 2) the provision of a means of enforcing them. As is the case with any rule, substantive rights are meaningless if they are either not enforced or enforceable. Collective bargaining operates with this specific notion in mind. The grievance-and-arbitration process of collective-bargaining agreement dispute resolution is one of the hallmark features of a unionized workplace and is a central issue in labor law.[9] Though much maligned in other contexts, the availability of arbitration both provides a venue for redressing grievances and is a remedy itself. Legal doctrines unique to labor arbitration insulate the process from virtually all judicial and political interference.

Part I discusses the pervasive scope of gender identity and sexual orientation discrimination in the modern workplace, and briefly examines available state and federal statutory protections against such discrimination. In addition, this section addresses the limitations of using anti-discrimination legislation generally including the primary limitations of any statutory intervention into the workplace: the political vulnerability of any governmental agency[10] charged with administering the statutes and the effectiveness of the private cause of action.

Part II summarizes the history of collective bargaining, along with a brief explanation of the American system of labor policy. In addition, Part II explains what collective-bargaining agreements are and reviews the concepts of mandatory and permissive bargaining subjects. This section also discusses the crucial importance of the relationship between collective-bargaining agreements and grievance and arbitration procedure. Collective-bargaining agreements represent the most efficient and effective, and sometimes exclusive, means of enforcing the rights guaranteed under the collective-bargaining agreement. Moreover, enforcement of collective-bargaining agreements often

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7. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

8. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960).

9. INDUS. RELATIONS RESEARCH ASS'N., EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 1-2 (Adrienne E. Eaton & Jeffrey H. Keefe eds. 1999).

10. For example, the Wisconsin Department of Workforce Development is one such state agency charged with administering anti-discrimination and other employment laws. WIS. STAT. § 111.39 (2013-14).

sparks larger social change, be it in the context of wages, hours, or anti-discrimination.

Part III summarizes the advantages and disadvantages of using the collective-bargaining agreement as a means of protection. As is the case with government intervention, collective bargaining is not a comprehensive solution. Rules unique to labor law limit employees' individual freedom of action. The nationwide decline of unionization further limits the effectiveness of collective-bargaining agreements as a means of raising industry standards. Part III explains the advantages and disadvantages not only from the perspective of the worker, but also from the perspective of unions and the public at large.

Part IV balances the advantages and disadvantages and concludes that providing protection against gender identity and sexual orientation discrimination in collective-bargaining agreements is not only desirable, but also necessary. Part IV notes that other protections guaranteed by the National Labor Relations Act (the "NLRA") may provide protection in the non-union workplace as well through the Act's coverage of "protected concerted activity" under Section 7 of the NLRA.[11] Ultimately, and unfortunately, the decision of whether to use collective bargaining comes down to a simple choice: provide protection through collective bargaining and accept its limitations, or provide no protection at all.

I. THE SCOPE OF GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION

A 2011 report by the National Center for Transgender Equality collected the results from 6,450 surveys to analyze the scope of gender identity and sexual orientation discrimination in a variety of settings, including employment.[12] Respondents came from a diverse set of racial, socioeconomic, and geographic backgrounds.[13]

The results were disconcerting but not surprising. Overall, 90% of respondents reported direct harassment or mistreatment at work and 71% felt compelled to take action that negatively impacted their well-being.[14] 47% of respondents reported adverse employment action on the basis of gender identity or sexual orientation.[15] 26% of respondents reported a direct relationship between their gender identity or sexual orientation and employment termination.[16] 44% percent of respondents reported failure to hire because of

11. 29 U.S.C. § 157 (2012) ("Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .").

12. JAIME M. GRANT ET AL., *supra* note 3, at 2, 50. *See also Lesbian, Gay, Bisexual & Transgender Workplace Issues*, CATALYST (May 15, 2014), http://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues (providing more recent statistics).

13. *See* Jaime M. Grant et al., *supra* note 3, at 2.

14. *See id*. at 3.

15. *Id*. at 53.

16. *Id*.

gender identity or sexual orientation.[17] 23% of respondents reported failure to promote due to gender identity or sexual orientation.[18] 78% of respondents reported personally experiencing mistreatment or discrimination in the workplace due to their gender identity or sexual orientation.[19] Racial minority respondents reported higher rates of discrimination: sometimes double or triple that of non-racial minority respondents.[20]

A 2007 report by the Williams Institute compiling survey results from the mid-1980s to the mid-2000s showed similarly pervasive discrimination.[21] Aggregating studies conducted between 1996 and 2006, the Williams Institute report found that 15% - 57% of transgender respondents experienced workplace discrimination.[22] The Williams Institute aggregated studies conducted between 1992 and 1999 and found that between 16% and 68% of lesbian, gay, or bisexual respondents reported workplace discrimination.[23] While not all of these instances of mistreatment would be necessarily actionable under existing legal standards,[24] the reports of both the National Center for Transgender Equality and the Williams Institute make it clear that discrimination is pervasive and virtually unchecked.

A. State Statutory Protection

Eighteen states and the District of Columbia protect against both gender identity and sexual orientation discrimination in the private sector.[25] An additional three states bar sexual orientation discrimination.[26] Despite persuasive evidence that discrimination on the basis of sexual orientation and gender identity is pervasive in the modern private-sector workplace, two arguments, themselves contradictory of one another, are frequently raised against the necessity of further legislation against sexual orientation discrimination. The first is known as the "drought" theory while the second is

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17. *Id*. at 54.

18. Jaime M. Grant et al., *supra* note 3, at 54.

19. *Id*. at 56.

20. *Id*. at 51.

21. M.V. LEE BADGETT ET AL., *BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTIFICATION DISCRIMINATION*, THE WILLIAMS INST. (2007), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf. The Williams Institute is a branch of the University of California of Los Angeles School of Law dedicated to "conducting rigorous, independent research on sexual orientation and gender identity law and public policy." *Mission*, THE WILLIAMS INST., http://williamsinstitute.law.ucla.edu/mission/ (last visited Mar. 22, 2015).

22. M.V. LEE BADGETT ET AL., *supra* note 21, at 7.

23. *Id*. at 2.

24. *See, e.g*., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (finding that mistreatment in violation of Title VII is only actionable where it is sufficiently "severe or pervasive" so as to alter the terms of employment and create a hostile and abusive work environment).

25. *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/state_maps (last visited Mar. 22, 2015).

26. *Id*.

known as the "flood" theory.[27] Professor Rubenstein describes "flooders" as those who argue that "there are so *many* allegations of sexual orientation discrimination that [legislation such as the Employee Non-Discrimination Act ("ENDA") or analogous state laws] will lead to a litigation explosion" that will overwhelm the Equal Employment Opportunity Commission ("EEOC") and federal courts.[28] Alternatively, the "droughters" argue that "there are so *few* cases of sexual orientation discrimination that federal law is unnecessary."[29]

Professor Rubenstein substantially discredits both arguments. According to his findings, the "population-adjusted complaint rate" is roughly equivalent to, if not slightly higher than, the claim rate for female workers with regard to sex discrimination laws.[30] Moreover, even relatively frequent filings will not overwhelm federal agencies and federal courts because of the relatively small number of gay workers in the workforce as a whole.[31] Thus, state-level solutions make a difference and such laws are necessary given the complaint rate in those states whose laws bar sexual orientation discrimination.[32]

However, state law solutions, by their nature, are not comprehensive.[33] Moreover, a state legislative solution is vulnerable to attacks unique to states, such as state constitutional amendments and ballot initiatives.[34] Those attacks and others make state law solutions much more vulnerable to repeal than a federal law. Moreover, in a manner similar to federal statutory solutions, the effectiveness of state laws often depend on the resources of the state agency

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27. William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 65-66 (2001). Professor Rubenstein's survey addresses only sexual orientation discrimination rather than all forms of LGBT discrimination.

28. *Id*.

29. *Id*. at 66.

30. *Id*. at 68.

31. *Id*.

32. In fact, unions have a stronger case that LGBT discrimination is a mandatory subject of bargaining in those states where protective legislation exists. This is because the parties to collective-bargaining agreements may not bargain away the substantive rights conferred through legislation. That is, the parties may bargain for greater protection than that guaranteed by legislation but they may not undermine it. However, that particular aspect of collective bargaining is not within the scope of this comment.

33. Municipal ordinances and other local laws are even more piecemeal than state statutory solutions and are always subject to repeal by state legislatures. *See* Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 757-758 (2012) (discussing the limitations of local and state law solutions). For that reason, among others, they are not discussed here. Ironically, federal labor policy may undermine the effectiveness of state action. For example, state law provisions against discrimination on the basis of gender identity and sexual orientation for unionized workplaces may be preempted by existing federal labor law. *See, e.g*., Wilhelm v. Sunrise Ne., 923 F. Supp. 330 (D. Conn. 1995) (determining that the application of state law banning sexual orientation discrimination was preempted by Section 301 of the Labor Management Relations Act, a federal law; applying that federal law, the claim against the union and the employer was time-barred by the federal statute of limitations).

34. Pizer, *supra* note 33, at 758.

charged with administering them.[35] In this regard, state agencies possess the same vulnerabilities of federal agencies like the EEOC. Nonetheless, Professor Rubenstein's article demonstrates that neither federal nor state EEOC offices would likely be overwhelmed by sexual orientation discrimination claims.[36]

B. Federal Statutory Protection

There are two options for federal relief. The first is through acceptance of a broad reading of sex stereotype theory under Title VII.[37] Alternatively, proposed legislation such as ENDA may codify a variety of claims including broad sex stereotype discrimination claims.[38] It does not appear that the ENDA will be passed within the foreseeable future.[39] However, Title VII may offer some relief for covered LGBT workers. Under Title VII, covered entities may not discriminate "because of . . . sex."[40] The statute does not define "sex," but the Supreme Court and most circuits have interpreted the term relatively expansively.[41]

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35. *See id*. at 757.

36. Rubenstein, *supra* note 27, at 68.

37. *See*, *e.g*., E.E.O.C. v. Boh Bros. Constr. Co., 731 F.3d 444 (5th Cir. 2013) (interpreting the ban on discrimination "because of sex" in Title VII to include sex stereotyping).

38. Employee Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (1st Sess. 2013). Another route exists under the National Labor Relations Act, which guarantees workers the right to engage in concerted activities for mutual aid or protection. 29 U.S.C. § 157 (2012). The NLRA is discussed *infra* Parts II and III.

39. While the current composition of Congress may seem to be the sole reason, riders to ENDA, specifically a "national right-to-work" provision added in the previous session of Congress, have essentially ruled out the possibility of support from a majority of Democrats. *See* Ramsey Cox, Senate Advances Gay Rights Bill, THE HILL (Nov. 4, 2013), http://thehill.com/blogs/floor-action/senate/189209-senate-advances-gay-rights-bill. Notably, some form of the ENDA has been introduced in nearly every session of Congress since 1994 with a brief gap between 2001 and 2007. Ed O'Keefe, ENDA, Explained, WASH. POST (Nov. 4, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda/.

40. 42 U.S.C. § 2000e-2 (2012).

41. See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009); Boh Bros. Constr., 731 F.3d at 456-57; Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, Chief J., Trott and Berzon, Js., concurring); Glenn v. Brumby, 663 F.3d 1312, 1318-19 (11th Cir. 2011) (looking to Title VII law in 42 U.S.C. Section 1983 case). The Circuits are split on whether sexual orientation and gender identity discrimination is sex discrimination under Title VII. See, e.g. Kiley v. Am. Soc. for Prevention of Cruelty to Animals, 296 F.App'x 107 (2d Cir. 2008) (determining that sexual orientation discrimination failed to state a claim of sex discrimination under Title VII); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058 (7th Cir. 2000) (same); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982) (determining that discrimination because of transgender identity is not sex discrimination under Title VII); Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) (same).

The seminal case interpreting discrimination "because of sex" is *Price Waterhouse v. Hopkins*.[42] In *Price Waterhouse*, the Supreme Court legitimized the "sex stereotype theory" of what constitutes discrimination "because of sex" under Title VII. Under sex stereotype theory, discrimination based on non-conformity with stereotypical gender role behavior is actionable under Title VII.[43] *Price Waterhouse* itself did not address the issues of sexual orientation and gender identity discrimination. However, in *Onacle v. Sundowner Offshore*, the Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant" are of the same sex.[44] Thus, it could be, and has been, inferred that discrimination because of gender identity and sexual orientation is nothing more than discrimination because of sex.[45]

In 2013, the Fifth Circuit recognized a broader reading of sex stereotype discrimination claims.[46] Sitting *en banc*, the Fifth Circuit held that a heterosexual male employee who endured abuse in the form of various sexual slurs, acts, and other "sex-based epithets" by his male supervisor suffered discrimination "because of sex" within the meaning of Title VII.[47] In the Fifth Circuit's opinion, the fact that the supervisor and the employee were of the same gender was not a bar to finding abusive acts by the supervisor to be unlawful.[48] Moreover, the fact that the employee was not gay and was not perceived to be one was also not a bar.[49] Instead, the Fifth Circuit held that attacks on the employee's masculinity constituted discrimination because of sex under Title VII.[50] Under the expansive language of *Boh Brothers*, LGBT workers in the Fifth Circuit likely now have a claim of sex discrimination under Title VII.[51]

Another related avenue exists under claims of "association" discrimination where it is unlawful to discrimination against employees because of their association with or advocacy for members of a class protected by Title VII. The Sixth Circuit recognized such claims in *Barrett v. Whirlpool Corp.*,[52] where it held that Title VII barred discrimination based on association with and advocacy for protected employees. Thus, if LGBT status is within the meaning of "sex" under Title VII, those employees who associate with or advocate for

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42. 490 U.S. 228 (1989), *superseded in part by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2, *as recognized in* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525-26 (2013).

43. *Price Waterhouse*, 490 U.S. at 250-51.

44. 523 U.S. 75, 79 (1998).

45. *See* note 41, *supra*.

46. Boh Bros. Constr. Co., 731 F.3d 444.

47. *Id*. at 457.

48. *Id*. at 455.

49. *Id*. at 456 n.8.

50. *Id*. at 457.

51. Although the Fifth Circuit based its opinion entirely on Supreme Court and Fifth Circuit precedent, other Circuits have also accepted a similarly broad interpretation of Title VII sex discrimination and the Fifth Circuit noted as such. *Id*. at 456 n.7.

52. 556 F.3d 502, 511-12 (2009).

LGBT employees are protected against discrimination on the basis of that association or advocacy.

Between sex stereotype and association/advocacy discrimination, Title VII provides relief for many LGBT employees. However, Title VII is insufficiently stable to guarantee that those protections will continue to exist. As mentioned, not all circuits recognize a broad interpretation of sex stereotype and association and advocacy discrimination. Further, the Supreme Court could reverse circuit court opinions such as *Boh Brothers* in a single case. For this reason, a federal legislative solution is not simply desirable, but necessary. However, even express legislative solutions are not without limitations.

C. Legislative Intervention and Enforcement Problems of Enforcement Agencies

The effectiveness of any legislative solution is wholly dependent upon two major factors: the resources of the enforcing agency, and the effectiveness of a private cause of action.[53] Both of these factors are dependent upon political winds at the time of passage, but funding is uniquely vulnerable to political attack.[54]

Administrative agencies are typically created to administer a new body of legislation enacted by Congress after some perceived crisis.[55] The National Labor Relations Board (the "NLRB")[56] is a good example. In response to the industrial warfare that ravaged the nation from the 1880s to the Great Depression, Congress passed the National Labor Relations Act (the "NLRA") and created the NLRB to administer it.[57] Over time, the enthusiasm behind the NLRB waned, with both sides calling for its disbandment at some point or another.[58] The problem is not so much that interest groups "captured"[59] the NLRB as it is that the NLRB does not have the resources, politically or otherwise, to perform its function as effectively as it could. The latest saga of

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53. *See* Pizer, *supra* note 33, at 757-58.

54. *See id*.

55. *See, e.g.*, National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (declaring that the effect of industrial strife on interstate commerce necessitated passage of the National Labor Relations Act).

56. This comment distinguishes between the NLRB as an agency broadly and the Board as the five-member panel charged with adjudicating labor disputes. Both the NLRB and the Board are discussed more fully in Part II, *infra*.

57. National Labor Relations Act, ch. 372, 49 Stat. at 451..

58. *Compare* Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 53, 73 (2007) (quoting AFL-CIO President Richard Trumka as he called for the abolition of the NLRA in 1987) *with* Lynn Woolsey, *Why the Labor Board Matters*, THE HILL (June 25, 2013, 10:57PM EDT), http://thehill.com/opinion/op-ed/307775-why-the-labor-board-matters (quoting Senator Lindsey Graham as saying, "the NLRB as inoperable could be considered progress.").

59. "Capture" in administrative agency law refers to the notion that regulatory bodies will inevitably fall under the influence of those whom the agency is charged with regulating, thereby reducing the agency's ability to neutrally govern.

NLRB appointments[60] exemplifies the problems the NLRB faces. Moreover, the NLRB may only enforce the rights guaranteed under the NLRA; there is no private cause of action for violations of the NLRA. Thus, the enforcement of the NLRA is only as effective as the NLRB itself.[61] In contrast, Title VII only requires that claimants file a charge with the EEOC before private suits may be brought.[62] This requirement leads us to the second factor: the availability and effectiveness of the private cause of action.

The effectiveness of a private cause of action is affected by administrative exhaustion requirements, type and scope of remedies, and the availability of attorney fee shifting. Although not the focal point of this comment, the conditions placed upon these factors are the most important ones to examine when determining the potential effectiveness of any legislative solution.

First, more complicated administrative exhaustion requirements means cases will sit longer and memories will be become staler. A legislative solution, be it by legislators or advocacy groups, should look to the EEOC Notice-of-Right-to-Sue rules which allows employees to bring suit on their own if the EEOC has not processed the charge within 180 days or if it does not consider the act to be a violation. This provision is vital, as there may come a time when plaintiffs, rather than the EEOC, will be on the cutting edge of anti-discrimination jurisprudence. Second, the remedies and the rules on fee-shifting should be no less than those available under Title VII sex discrimination suits. There is no rational reason to limit the scope of recovery for some protected classes but not for the others. All three concerns would be addressed concisely and effectively with an amendment to Title VII stating that sex includes gender identity and sexual orientation.

II. COLLECTIVE BARGAINING

The NLRA occupies the field of labor relations and preempts any state provision that conflicts with it.[63] Under the NLRA, covered private-sector workers have the right to select an exclusive bargaining representative, usually a labor union, and bargain collectively.[64] Employers are obligated to bargain in good faith with the workers' representative over "wages, hours, and other terms

60. N.L.R.B. v. Canning, 134 S.Ct. 2550 (2014). The significance of *Canning* is not so much the constitutional problem of determining when the Senate is in recess, but rather the circumstances that allegedly necessitated the appointments in the first instance, i.e. political gridlock over the highly politicized Board Member confirmation process. For other political controversy regarding the Board, see New Process Steel v. N.L.R.B., 560 U.S. 674 (2010).

61. In turn, the NLRB is only as effective as Congress, and particularly the Senate given its role in confirmation proceedings, allows it to be. The NLRA, the NLRB, and the Board are discussed more fully in Part II, *infra*.

62. 42 U.S.C. § 2000e-5(b) (2012).

63. National Labor Relations Act, 29 U.S.C. § 151 (2012); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (finding that state laws seeking to regulate activity covered by the NLRA are preempted).

64. 29 U.S.C. § 157 (2012).

and conditions of employment," the so-called mandatory bargaining subjects.[65] However, the phrase "wages, hours, and other terms and conditions of employment" has been deemed by the Supreme Court to not be an "immutably" fixed list of what constitutes mandatory bargaining subjects.[66] Thus, other topics that do not expressly fall within "wages, hours, and other terms and conditions of employment" may also be mandatory bargaining subjects.[67] Good faith bargaining imposes two primary obligations: 1) the duty to provide information, and 2) the duty to bargain to impasse.

The duty to provide information is an important part of both the bargaining process and of policing the terms of the collective-bargaining agreement.[68] It requires that the employer "provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[69] A "broad discovery-type standard" is used for determining relevance.[70] That duty, however, is "coextensive with the statutory duty to bargain concerning mandatory subjects."[71] Thus, the duty to provide information applies only if the bargaining subject is mandatory. Ordinarily, the employer is not required to provide information related to its hiring practices.[72] However, the elimination of "actual or suspected sex discrimination is a mandatory subject of bargaining" even in the context of hiring practices.[73]

The second major component of the duty to bargain in good faith is that mandatory bargaining subjects must be bargained to impasse before either side may abandon negotiations.[74] Bargaining impasse only occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement."[75] Failure to bargain to impasse constitutes a violation of the NLRA known as an unfair labor practice.[76] While neither side is required to come to an agreement,[77] the burden to bargain to impasse is a heavy one that is not easily overcome. Should bargaining reach impasse, the employer may unilaterally

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65. *Id*. § 158(d); N.L.R.B. v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958).

66. Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

67. *Wooster Div*. *of Borg-Warner*, 356 U.S. at 349; *see* NLRB v. Katz, 369 U.S. 736, 742-43 (1962).

68. *See* NLRB v. Acme Indus. Co., 385 U.S. 432, 432-33 (1967).

69. Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 303 (1979).

70. Caldwell Mfg. Co., 346 N.L.R.B. 1159, 1160 (2006).

71. Serv. Emps. Local 535, 287 N.L.R.B. 1223, 1223 n.1 (1988), *aff'd sub nom*. N. Bay Dev. Disabilities Servs., Inc. v. N.L.R.B., 905 F.2d 476 (D.C. Cir. 1990).

72. *See*, *e*.*g*., Star Tribune, 295 N.L.R.B. 543, 545 (1989).

73. *Id*. at 548.

74. The terms "mandatory" and "permissive" do not connote that the parties must bargain over mandatory subjects in order to execute a valid-collective bargaining agreement. Rather, as explained further, "mandatory" only means that the subject must be bargained in good faith to impasse.

75. Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967).

76. *See* N.L.R.B. v. Katz, 369 U.S. 736, 747 (1962).

77. National Labor Relations Act 29 U.S.C. § 158(d) (2012).

implement its last best offer. However, the duty to bargain to impasse over mandatory subjects is not a one-way street against employers. The NLRA imposes obligations upon unions that mirror those placed upon employers.[78] Unions, upon penalty of an unfair labor practice finding, must bargain over mandatory subjects in good faith to impasse.[79] Findings of unfair labor practices against unions have a variety of consequences, including direct lawsuits against the union under other federal labor laws.[80]

In addition, unions have a special duty placed upon them to represent all members fairly and without any irrelevant or invidious treatment.[81] This is known as the duty of fair representation. The duty of fair representation has its origins in combating the concerted racial discrimination of unions and employers.[82] A union's actions that are "arbitrary, discriminatory, or in bad faith" violate the duty of fair representation.[83] Actions are arbitrary if the union's behavior is "far outside a 'wide range of reasonableness.'"[84] A union may not act upon "considerations . . . which are irrelevant, invidious, or unfair."[85] Breach of the duty of fair representation can give rise to a direct civil suit against the union and sometimes against the employer as well.[86] However, the employee must still follow the grievance and arbitration procedure unless the union's conduct "seriously undermines the integrity of the arbitral process."[87]

While determining what constitutes wages and hours has been relatively straightforward, interpreting what falls within "other terms and conditions of employment" has not been so simple. The Supreme Court has suggested that other terms and conditions of employment that are "plainly germane to the 'working environment'" are mandatory subjects.[88] Bargaining subjects that are not mandatory are known as permissive bargaining subjects.[89]

This binomial classification carries significant implications, as mandatory bargaining subjects are subject to the bargaining duty while permissive bargaining subjects are not.[90] Insisting on bargaining to impasse over a

78. *See* 29 U.S.C. § 157 (2012).

79. *See* 29 U.S.C. § 158(b)(3) (2012). It is rare for a union to refuse to bargain to impasse over a mandatory subject. What is more common is a union's insistence to bargain to impasse over a permissive subject which is, as is the case with employers, an unfair labor practice.

80. *See* 29 U.S.C. § 185 (2012).

81. Vaca v. Sipes, 386 U.S. 171, 177-78 (1967).

82. *Id*. at 177; Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203 (1944).

83. Air Line Pilots Association v. O'Neill, 499 U.S. 65, 67 (1991).

84. *Id*.

85. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enf*. *denied sub nom*.326 F.2d 172 (2d Cir. 1963).

86. *See* 29 U.S.C. § 185 (2012).

87. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976).

88. Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 498 (1979).

89. There is a third category of bargaining subjects called illegal bargaining subjects, but they are not implicated here.

90. N.L.R.B. v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958).

permissive subject is itself an unfair labor practice.[91] This is the case for unions as well as employers.[92] Mistaking a permissive subject for a mandatory subject can have catastrophic consequences. For example, if union members strike over a permissive subject of bargaining, they may be lawfully permanently replaced.[93] Conversely, employer lockouts over permissive subjects are also unfair labor practices.[94] Thus, locked-out employees are entitled to back pay for the period when they were denied work.[95] In the present context, it is vital that the subject of LGBT discrimination be mandatory not only to ensure that it must be bargained over once brought forth, but also to ensure unions and employers have the ability to enforce their demands through other action if necessary.

Although the Supreme Court occasionally weighs in on the matter, determining what is a mandatory bargaining subject is usually left to the NLRB, the administrative agency responsible for administering the NLRA.[96] The NLRB is split into two parts. First, the enforcement branch consists of 26 regional offices and is headed by the General Counsel.[97] Second, the adjudicating branch consists of the Administrative Law Judges and the five-member Board (the "Board") who sit in an appellate capacity over the Administrative Law Judges.[98] While the Board has rulemaking authority,[99] its primary and historic function has been to sit as the "Supreme Court" of labor relations in its adjudicative capacity.[100] The Board is afforded "considerable deference."[101] The NLRB follows its own lines of precedent and is a non-acquiescence administrative agency, meaning the NLRB does not follow circuit court decisions and is subordinate only to itself, the Supreme Court, and Congressional legislative action.[102] Thus, one must look to Supreme Court and Board case law to determine whether a subject is mandatory or permissive.

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91. Ohio Valley Hosp., 324 N.L.R.B. 23, 24 (1997).

92. Detroit Newspaper Agency, 327 N.L.R.B. 799 (1999), *rev'd sub nom*. Detroit Typographical Union No. 18 v. N.L.R.B., 216 F.3d 109, 116-17 (D.C. Cir. 2000).

93. *See generally* N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

94. Movers & Warehousemen's Ass'n of Wash. D.C., 224 N.L.R.B. 356 (1976), *enforced*, 550 F.2d 962, 966 (4th Cir. 1977).

95. *Movers & Warehousemen*, 224 N.L.R.B. at 359.

96. *See* Star Tribune, 295 N.L.R.B. 543, 548-49 (1989); s*ee also* McGregor & Werner, Inc., 136 N.L.R.B. 1306, 1316-17 (1962).

97. 29 U.S.C. § 153(d) (2012); NAT'L LABOR RELATIONS BD.: REGIONAL OFFICES, http://www.nlrb.gov/who-we-are/regional-offices (last visited Mar. 16, 2015).

98. 29 U.S.C. § 153(a) (2012). This comment distinguishes the NLRB as an administrative agency from the five-member Board as the adjudicatory body and the General Counsel as the enforcement body.

99. *Id*. § 156.

100. IRVING BERNSTEIN, THE TURBULENT YEARS A HISTORY OF THE AMERICAN WORKER 1933-1941, 323 (2010).

101. Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 495 (1979).

102. *See* Arvin Auto., 285 N.L.R.B. 753, 757 (1987).

A. Gender Identity and Sexual Orientation Discrimination Is a Mandatory Bargaining Subject

The substance and inclusion of "No Discrimination" clauses within the collective-bargaining agreement are mandatory bargaining subjects.[103] While discrimination, in itself, is not a violation of the Act,[104] unions have a legal right as the exclusive bargaining representative to insist on the elimination of discriminatory practices.[105] While the Board did not expressly provide that No Discrimination clauses are mandatory bargaining subjects until *Star Tribune* in 1989, the Supreme Court strongly suggested as much in an earlier case.[106] In *Emporium Capwell*, Justice Thurgood Marshall wrote for the majority:

> Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority . . . The elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions.[107]

The *Star Tribune* Board expressly relied on the broad language of *Emporium Capwell* in declaring that No Discrimination clauses are mandatory bargaining subjects.[108] That the Supreme Court chose to weigh in on the subject is important when considering the nature of the Board as a primarily adjudicative entity. While the Board does largely adhere to its precedent, its interpretation of the NLRA, absent direction from the Supreme Court otherwise, is vulnerable to being overturned depending on the political dispositions of the Board members themselves.[109]

However, *Star Tribune* may not be a surefire guarantee that bargaining over protection for gender identity and sexual orientation is mandatory. *Star Tribune* noted that the employer's policy "may have been discriminatorily implemented *on the basis of sex*."[110] Whether discrimination on the basis of gender identity or sexual orientation is within the "on the basis of sex" language of *Star Tribune* is as debatable as whether such discrimination falls within the ban on discrimination "because of sex" in Title VII.[111] Thus, under a narrow reading, *Star Tribune* stands only for the proposition that combating discrimination on the basis of biological sex is a mandatory bargaining subject. In contrast, a broader reading, similar to that applied in sex stereotype Title VII

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103. *See generally* Star Tribune, 295 N.L.R.B. 543 (1989).

104. *See id*. at 548-49.

105. *See* Westinghouse Elec. Corp., 239 N.L.R.B. 106, 111 (1978).

106. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975).

107. *Id*. at 66, 69.

108. *Star Tribune*, 295 N.L.R.B. at 548.

109. *See, e.g*., New York Univ., 332 N.L.R.B. 1205 (2000) (allowing certain graduate students to unionize), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004).

110. *Star Tribune*, 295 N.L.R.B. at n.17 (emphasis added).

111. 42 U.S.C. § 2000e-2 (2012).

cases, includes gender identity and sexual orientation within the "basis of sex" discrimination covered by *Star Tribune*.

Fortunately, it is possible to avoid the merits of this dispute, as there is precedent supporting a broader interpretation of "discrimination." Previous Board cases upon which *Star Tribune* relied, as well as the Supreme Court's broad language in *Emporium Capwell*, provide a substantial basis for finding gender identity and sexual orientation discrimination to be mandatory bargaining subjects. In those cases, both the Court and Board discussed race and sex discrimination specifically as well as workplace discrimination on the basis of "other unlawful, invidious, or irrelevant reasons."[112] Thus, regardless of whether gender identity and sexual orientation discrimination fall within the language of *Star Tribune*, there is a much broader basis, upon which *Star Tribune* is based, for finding such discrimination to be a mandatory bargaining subject.

Although the most supportive line of cases begins shortly after *Emporium Capwell*,[113] an earlier Board decision also provides some history on the mandatory or permissive bargaining subject status of No Discrimination clauses. In *McGregor & Werner, Inc*., the Board affirmed the Administrative Law Judge's decision that the employer's refusal to bargain over the substance of the No Discrimination clause violated the NLRA.[114] There, the employer refused to bargain over the terms of its proposed No Discrimination request and conditioned further bargaining on the acceptance of its terms.[115] This tactic can be a form of unlawful bad faith bargaining, and the Administrative Law Judge based the decision on a finding of such bad faith bargaining.[116] However, *McGregor & Werner* expressly declined holding on whether the inclusion of a No Discrimination clause was a mandatory bargaining subject.[117] Thus, *McGregor & Werner* neither establishes nor eliminates No Discrimination clauses as mandatory bargaining subjects.

The first case supporting the proposition that terms relating to the elimination of gender identity and sexual orientation discrimination as mandatory subjects is *Handy Andy, Inc*.[118] In *Handy Andy*, the Board held that employees within a union's "bargaining unit" had the right to be free from "unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[119] The Board looked to the union's duty of fair representation in holding that promulgating or perpetuating such

112. Handy Andy, Inc., 228 N.L.R.B. 447, 456 (1977).

113. Taken together, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975), *Handy Andy, Inc*., 228 N.L.R.B. 447, Westinghouse Electric Corp., 239 N.L.R.B. 106 (1978), and *Star Tribune*, 295 N.L.R.B. 543 will be referred to as the "*Westinghouse Electric*" line of cases.

114. McGregor & Werner, Inc.,136 N.L.R.B. 1306 (1962).

115. *Id*. at 1313.

116. *Id*.

117. *Id*. at n.7.

118. Handy Andy, Inc., 228 N.L.R.B. 447 (1977).

119. *Id*. at 455.

discrimination was an unfair labor practice.[120] While *Handy Andy* only stood for that proposition for employees *vis-à-vis* their union, its reasoning was expressly relied upon in *Westinghouse Electric* where the Board took another important step forward.

In *Westinghouse Electric*, the Board provided a necessary precursor to finding No Discrimination clauses to be mandatory bargaining subjects.[121] In *Westinghouse Electric*, the Board found that refusing the union's information request relating to possible race or sex discrimination was an unfair labor practice.[122] Like *McGregor & Werner* and *Handy Andy*, the NLRB stopped short of declaring No Discrimination clauses themselves to be mandatory bargaining subjects. However, the Board extended the language of *Handy Andy* against employers by reaffirming what it saw as its "obligation to consider issues concerning discrimination on the basis of race, sex, national origin, *or other unlawful, invidious, or irrelevant reasons*."[123] The "other unlawful, invidious, or irrelevant reasons" language of *Westinghouse Electric*, expressly derived from language interpreting unions' duty of fair representation, is important as it stands for the proposition that *all* unlawful, invidious, or irrelevant discrimination is at play when bargaining over No Discrimination clauses.

Finally, the language of *Emporium Capwell* suggests that national labor policy favors combating discrimination beyond that based on race or sex. Justice Marshall wrote for the majority in saying that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority."[124] While *Emporium Capwell* itself dealt with race discrimination, the sweeping language of the opinion does not limit itself to that specific category. Rather, both *Westinghouse Electric* and *Star Tribune* rely upon that specific passage in justifying their broad holdings.[125]

Of course, it would still need to be shown that discrimination on the basis of gender identity or sexual orientation was within the invidious or irrelevant range of distinctions if such classifications do not fall expressly within *Star Tribune*. For this task, it is instructive to look at duty of fair representation cases against unions, as both the *Handy Andy* and *Westinghouse Electric* decisions based their reasoning on the duty of fair representation. Based on the *Westinghouse Electric* line of cases, it seems that the mandatory nature of the substance of No Discrimination clauses is coextensive with the scope of the duty of fair representation. Thus, if gender identity and sexual orientation discrimination by the union would breach its duty of fair representation, it logically follows that it is a mandatory bargaining subject.

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120. *Id*. at 456.

121. Westinghouse Electric, 239 N.L.R.B. 106 (1978).

122. *Id*. at 107, 140.

123. *Id*. at 107 (emphasis added).

124. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 66 (1975).

125. *Westinghouse Electric*, 239 N.L.R.B. at 107; *Star Tribune*, 295 N.L.R.B. 543, 548-49 (1989).

Recent precedent suggests that such discrimination breaches the duty of fair representation. In *Gilbert v*. *Country Music Association*, the Sixth Circuit held that the gay employee's claim of discrimination on the basis of sexual orientation warranted remand for further investigation as to whether the local union's inaction on that basis breached its duty of fair representation.[126] The court did hold that Title VII did not proscribe such discrimination.[127] The court agreed that the union's conduct in that case likely amounted to at least arbitrary or bad faith misconduct and remanded that matter back for further proceedings.[128] Accordingly, the plaintiff faced a peculiar situation where the discrimination he faced was not barred by Title VII, but possibly *was* barred by his union's duty of fair representation. Thus, given that the *Star Tribune* and *Westinghouse Electric* language is based upon the duty of fair representation, it is highly likely that bargaining proposals to ban sexual orientation and gender identity discrimination are mandatory bargaining subjects, especially in the Sixth Circuit given the court's reasoning in *Gilbert*.[129]

In summary, the express holding in *Star Tribune* that No Discrimination clauses are mandatory bargaining subjects rests upon the foundational principle that employees are protected against all unlawful, invidious, or irrelevant discrimination. That standard can be applied against both unions and employers under *Westinghouse Electric*. Accordingly, a narrow reading of *Star Tribune*, i.e., that only the categories of race and sex discrimination within No Discrimination clauses are mandatory, is without support in Board precedent.[130] While determining whether the subject is mandatory for more cooperative employers and unions is not an issue, it may become one where either party is particularly resistant to providing protection for LGBT workers. As leveled against the employer, one can claim it is within the scope of the mandatory

126. 432 F. App'x 516, 521 (6th Cir. 2011).

127. *Id*. at 520.

128. *Id*. at 521.

129. An employee may have two options when pursuing action against his or her union. First, if the union breaches its duty of fair representation without breaching a term of the collective-bargaining agreement, the employee may file an unfair labor practice charge against the union with the NLRB under Section 8(b)(1)(a) of the NLRA. *Miranda Fuel Co*., 140 N.L.R.B. 181 (1962). Second, if the union's breach of the duty of fair representation also violates the terms of the collective-bargaining agreement, the employee may bring suit in federal district court under Section 301 of the Labor Management Relations Act. *Vaca v*. *Sipes*, 386 U.S. 171 (1967).

130. A more complex question is whether reading gender identity and sexual orientation discrimination to be within the mandatory bargaining subject of No Discrimination clauses unconstitutionally infringes on employers' Free Exercise rights. While this particular aspect could itself take up volumes of scholarly examination, it is likely that holding LGBT discrimination to be a mandatory subject would not infringe on Free Exercise. The NLRA does not require parties to come to an agreement but instead only requires good faith bargaining to impasse on mandatory subjects and prohibits the Board from imposing substantive terms. H.K. Porter Co. v. NLRB, 397 U.S. 99, 105-06 (1970). Thus, an employer with an unwavering religious objection to gender identity and sexual orientation variances could easily bargain to impasse over the issue without incurring any unfair labor practice sanction.

bargaining subject of No Discrimination clauses. As leveled against the union, one can plausibly claim that allowing such discrimination is a breach of the duty of fair representation.

B. Administration of Collective-Bargaining Agreements and Arbitration

The product of collective bargaining is the collective-bargaining agreement. In the words of the Supreme Court:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law-the common law of a particular industry or a particular plant. . . A collective bargaining agreement is an effort to erect a system of industrial self-government.[131]

Like statutes, the substantive rights of a collective-bargaining agreement are largely without meaning if there is no method of enforcement. In unionized workplaces, the maxim of "work now, grieve later" refers to grievance and arbitration process and instructs workers to continue working, rather than stopping and face insubordination discipline, and file a grievance later.[132] While the grievance and arbitration process varies, a few core elements are retained across nearly all workplaces.

Step One of a grievance is usually an informal complaint to a union steward, ordinarily a more senior or well-educated fellow worker who acts as the liaison between line workers and their immediate supervisors. Step Two of the grievance is usually a written complaint that is reviewed by either the employer or a committee comprised of union members and management representatives. Step Three of the grievance procedure is to refer the grievance to a neutral arbitrator for binding resolution. Arbitration is both a venue and a remedy. It is a venue for obvious reasons as it serves as a forum for the adversarial processing of complaints. It is also a remedy in two respects. First, while individual collective-bargaining agreements vary, arbitrators usually have the power to reduce or rescind discipline, reinstate employees, and award back pay.[133] Second, arbitration serves as a remedy in and of itself in that, without a contract, employees would be subject to dismissal for virtually any reason.[134]

In traditional contract law language, the "consideration" for arbitration is the highly valuable "No Strike" clause. The No Strike clause is the "quid pro

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131. United Steelworkers of America. v. Warrior Gulf & Nav. Co., 363 U.S. 574, 578-80 (1960).

132. *See, e.g.*, Krist Oil Co., 328 N.L.R.B. 825, 830 (1999) (acknowledging the "accepted industrial norm" of work now, grieve later).

133. *See* ELKOURI & ELKOURI: HOW ARBITRATION WORKS 1233-34 (Alan Miles Ruben ed., 2003).

134. *Id*. at 925.

quo" for the employer's promise to arbitrate disputes.[135] No Strike clauses vary from agreement to agreement, but generally provide that the union will not engage in a strike for the duration of the collective-bargaining agreement.[136] For obvious reasons, such clauses are just as valuable to employers as arbitration agreements are for unions. The two clauses, the No Strike clause and the Arbitration clause, are not only quid pro quo, but are also "coterminous."[137] Accordingly, the inclusion of the No Strike clause is almost guaranteed to be accompanied by its companion "agreement to arbitrate" clause.

Federal law recognizes the close relationship between collective-bargaining agreements and arbitration,[138] and the Supreme Court has given arbitrators substantial power and deference in the context of labor relations. Through a series of three cases all decided on the same day, now known as the *Steelworkers* Trilogy, the Supreme Court laid out the framework for labor arbitration that has governed this country ever since. The *Steelworkers* Trilogy stands for three propositions: 1) all questions of contract interpretation are for the arbitrator only, 2) the role of federal courts in the arbitration process is "strictly confined"[139] to determining whether the parties agreed to arbitrate the matter at issue, and 3) arbitrators are under no obligation to the courts to provide their reasoning for their award and courts should enforce the award despite ambiguity or the court's disagreement on the merits. The sweeping language of the *Steelworkers* Trilogy virtually removed federal courts from the process of arbitration except to their threshold determination of arbitrability and enforcement of awards where necessary.

The first case is *United Steelworkers of America v. American Manufacturing Co*.[140] In *American Manufacturing*, the question before the Court was the scope of judicial review of arbitration decisions. The Court began by noting that Congress expressly provided that the national labor policy favored private determination of the appropriate method of resolving differences through collective bargaining.[141] The Court then declared the function of the court to be "very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator."[142] The Court expressly stated the point:

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135. Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 407 (1976).

136. The right to strike labor practice is codified in federal law, 29 U.S.C. § 163 (2012), and the Supreme Court has held that a union does not waive the right to strike over an unfair labor practice unless the waiver is by explicit contractual provision. *See* Maestro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 279 (1956).

137. Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 382 (1974).

138. *See, e.g.*, Teamsters, Local Union No.135 v. Jefferson Trucking Co., 628 F.2d 1023 (7th Cir. 1980) (affirming District Court decision to enforce arbitration award for suit brought under section 301 of the Labor Management Relations Act).

139. United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

140. 363 U.S. 564 (1960).

141. *Id*. at 566; 29 U.S.C. § 173(d) (2012).

142. *Am. Mfg*., 363 U.S. at 567-68.

> The courts, therefore have no business in weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.[143]

Thus, under *American Manufacturing*, judicial review of the merits of claim is all but entirely removed.

The second case is *United Steelworkers of America v. Warrior & Gulf Navigation Co*., which set a broad standard for determining whether a party to a collective-bargaining agreement agreed to arbitrate the particular grievance.[144] The *Warrior & Gulf* Court expressly held that parties could bring suit under section 301 of the Labor Management Relations Act to enforce arbitration awards.[145] The Court then distinguished commercial arbitration as a substitute for litigation from labor arbitration as "the substitute for industrial strife."[146] This returns to an earlier point: the availability of arbitration is itself both a venue and a remedy even though the terms of the remedy is dictated by the collective-bargaining agreement. The judicial role in determining whether section 301 should compel parties to arbitrate would be "strictly confined to the question whether the reluctant party did agree to arbitrate the grievance . . . "[147] In looking to whether the arbitrator was acting within its authority, courts only look to whether the reluctant party "did agree to give the arbitrator power to make the award he made."[148] The Court went on to state, "[d]oubts should be resolved in favor of coverage."[149] The Court concluded:

> The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.[150]

This is known as arbitrability and has been the subject of much litigation ever since.[151] Like its holding in *American Manufacturing*, the Court drew a relatively bright line in limiting the role of the judiciary to determination of the underlying arbitrability of the dispute.

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143. *Id*. at 568.
144. *Warrior & Gulf*, 363 U.S. 574.
145. *Id*. at 577; 29 U.S.C. § 185(a) (2012).
146. *Warrior & Gulf*, 363 U.S.at 578.
147. *Id*. at 582.
148. *Id*.
149. *Id*. at 583.
150. *Id*. at 585.
151. AT&T Tech. v. Communication Workers of America, 475 U.S. 643, 649 (1986) (stating that the proper forum for determining the arbitrability of a grievance is the federal judiciary); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009) (determining that the collective-bargaining agreement clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act claims).

The third case is *United Steelworkers of America v. Enterprise Wheel & Car Corp*. where the Court addressed the scope of judicial review of arbitration awards.[152] As the Court noted in *American Manufacturing*, contract interpretation is strictly a matter for the arbitrator.[153] The role of the courts under *Warrior & Gulf* is limited to determining the underlying arbitrability.[154] Despite the forceful language in *Warrior & Gulf*, federal courts actually have two roles: determining the underlying arbitrability of the dispute, and performing a limited examination of the arbitration award for enforcement purposes. Under *Enterprise Wheel*, courts must enforce arbitrator's award if "it draws its essence from the collective bargaining agreement."[155] A "mere ambiguity" will not justify refusing to enforce the award, and arbitrators are under no obligation to the courts (though they might be to the contracting parties) to "give their reasons for an award."[156] A court's disagreement with the arbitrator's reasoning does not justify refusing to enforce the award so long as the award draws its essence from the collective-bargaining agreement.[157]

III. PRACTICAL CONSIDERATIONS OF USING COLLECTIVE BARGAINING

Three distinct perspectives must be considered when examining the use of a collective-bargaining agreement: that of the worker, that of the employer, and that of the union. Between the three, the employer and the union, perhaps ironically, share similar concerns and interests while the worker faces similar hurdles against both the union and the employer.

A. Employees[158]

In the context of a union workplace, banning discrimination on the basis of gender identity and sexual orientation through a collective-bargaining agreement is self-executing because disputes arising out of collective-bargaining agreements almost always provide for a grievance and binding arbitration procedure. In arbitration, the employee would be supported by the

152. 363 U.S. 593 (1960).

153. United Steelworkers of America v. Am. Mfg., Co.,363 U.S. 564, 568 (1960).

154. *Warrior & Gulf*, 363 U.S. at 582.

155. *Enterprise Wheel & Car Corp*., 363 U.S. at 597.

156. *Id*. at 598.

157. *Id*. at 598.

158. Before all other considerations, employees should be reassured that their efforts to expand LGBT workplace protection are protected by law. In addition to the previously mentioned proscription of association/advocacy discrimination, *see supra* note 52, employees have the right to engage in collective activity for mutual aid or protection under Section 7 of the NLRA, known as "Section 7 rights." *See supra* note 11 and accompanying text. Section 7 rights are the fundamental component of the National Labor Relations Act and allow employees to speak frankly with their employer regarding working conditions. For reasons previously stated, LGBT discrimination is not only a mandatory subject of bargaining but also clearly concerns the safety and well-being of employees within the workplace. There is a strong argument that protected concerted activity seeking LGBT anti-discrimination work rules is indistinguishable from similar efforts to obtain any other form of safety rules.

union. In contrast, legislative bans on discrimination require the worker to navigate the judiciary or an administrative agency privately and face the employer alone. Arbitration of statutory claims has not always been widely accepted by the Supreme Court.[159] Nonetheless, more recent developments in labor law shifted the balance in favor of allowing arbitration of statutory claims so long as the intent to do so is sufficiently clear and all the remedies, such as fee-shifting, are available to the claimant.[160]

The grievance-and-arbitration process is not without its pitfalls for individual employees. First, depending on the clarity of the collective-bargaining agreement, arbitration of LGBT-related claims may displace the right to bring a Title VII claim in those jurisdictions where a sex stereotype theory covering such discrimination would be available. The primary negative effect on the worker of that displacement is that the worker loses control of the grievance-and-arbitration process. This is because the union, as the statutory representative, has the right to decide whether and how far to pursue a grievance. However, the union is still subject to its duty of fair representation, and failure to prosecute meritorious grievances on the basis of sexual orientation or gender identity discrimination may constitute a breach of that duty.[161]

Were an arbitrator to decide against the employee, vacating the arbitration award would be particularly difficult under the *Steelworkers* Trilogy and its progeny. On the other hand, were the employee to prevail, the likelihood of the employer being able to vacate the award is equally unlikely.[162] In this regard, the importance of the *Steelworkers* Trilogy cannot be understated: once the arbitrator decides the matter, court review on the merits is essentially non-existent. This absence is a double-edged sword for LGBT employees as the arbitration award, win or loss, is almost certain to be enforced.[163]

Another possible blind spot for collectively-bargained-for protection against sexual orientation and gender identity discrimination occurs when fellow employees the discriminatory acts, as opposed to the employer. In this case, the union would have to rely on so-called "union discipline" to maintain order. Union discipline is the process by which unions enforce their own local and international union constitutions and bylaws *vis* their own members and can be thought of as "the criminal law of union government."[164] Union discipline ranges from informal admonitions by union stewards to formal

159. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (stating that Title VII claims were not amenable to arbitration).

160. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

161. *See, e.g.*, Gilbert v. Country Music Ass'n, 432 F. App'x 516 (6th Cir. 2011).

162. This article does not speculate on any potential personal biases arbitrators may hold. However, actual bias on the part of the arbitrator is grounds for vacating the award. *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968) (White, J., concurring).

163. Despite that danger, it is better to have the express language in the collective-bargaining agreement than not for reasons stated below.

164. Clyde W. Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 YALE L. J. 175, 178 (1960).

charges carrying penalties of fines, suspension of membership, and expulsion. Unions are also allowed to discipline members for collective-bargaining-related offenses, such as misconduct on the job.[165] In present context, the AFL-CIO, to which most unions either belong or are affiliated, has codified sexual orientation and gender identity protection into its constitution and could be the basis for such discipline.[166]

When the employer carries out discriminatory acts, the union may bring the matter to arbitration if there is a tangible adverse employment action, such as failure to correct harassment or reassignment of the claimant. In this regard, the employee may resort to the arbitration process for reinstatement and back pay, should the conditions warrant such. Moreover, the LGBT worker's Title VII claim may also exist against the employer, either in federal court or in arbitration, if the jurisdiction follows an expansive reading of a sex-stereotype claim.

In the worst case scenario, the employee may face opposition from both his or her own union and his or her own employer. In such a case, legal avenues are available to the worker to seek redress against both parties. While the employee faces a heavy burden of showing a breach of the duty of fair representation against the union and must bring a formal federal suit against both, the employee is not left without a remedy.

B. Employers and Unions

The chief concerns for both employers and unions relate to possible sources of legal liability in the face of a failure to act. This concern is understandable but can be easily overstated. Most employers subject to the NLRA are already subject to Title VII. Further, the majority of the federal circuits, though not without division, recognize an expansive interpretation of the "because of . . . sex" language in Title VII.[167] Thus, many employers are already subject to potential liability for failure to remedy LGBT discrimination. As for unions, it is likely that a union perpetrating or consenting to discrimination on the basis of sexual orientation or gender identity is not only subject to suit under Title VII but also under their duty of fair representation. However, both employers and unions may find there is a silver lining to writing such bans into formal documents governing the workplace.

Employers have a clear interest in limiting their potential sources of liability and retaining as much control over the day-to-day operations of the workplace as possible. Nonetheless, arbitration of LGBT discrimination claims may work in employers' favor. First, the public relations bonus of banning such discrimination is increasingly evident. Second, as demonstrated in *14*

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165. *Id*. at 188-89. As discussed below, both union and non-union employees may always engage in protected concerted activity.

166. Art. II, § 4 of *AFL-CIO Constitution*, AFL-CIO, http://www.aflcio.org/About/Exec-Council/AFL-CIO-Constitution/II.-Objects-and-Principles (last visited Mar. 29, 2015).

167. *See* note 41, *supra*.

Penn Plaza,[168] employers may seek to arbitrate statutory claims, such as potential sex stereotype discrimination claims under Title VII, rather than proceed to federal court. Thus, while recognizing a ban on sexual orientation and gender identity discrimination creates a potential source of liability, confining those claims to arbitration can narrow the financial cost of adjudicating those claims.[169] Even the most recalcitrant employers have something to gain from writing such bans into collective-bargaining agreements.

In ways similar to employers, unions would likely gain public relations credit for formally banning such discrimination.[170] However, the ever-dwindling union density limits the effectiveness of such bans. As is the case with employers, unions may hesitate to agree to such language as it opens a possible avenue for a duty of fair representation breach suit. There is no simple way around that potential source of liability other than the fact that proving a breach of the duty of fair representation is no simple matter.[171] Nonetheless, providing fair representation to all members of the bargaining unit has long been an obligation and a privilege of the exclusive bargaining representative. There is no reason that the duty of fair representation, which began with combating race discrimination well before any statutory requirements,[172] should not also lead the way in this new front for employee rights.

It is worth noting that unionized workplaces may be able to argue LGBT protection already exists through "just cause" and "for cause" provisions, nearly universal in collective-bargaining agreements. In such a case, were a bargaining unit employee to face an adverse employment action on the basis of gender identity or sexual orientation, the union could certainly argue that such bias on the part of the employer does not constitute just cause. The union could argue that just cause means work-performance issues only and that such invidious discrimination, such as race and religious discrimination, may not play a part in the employer's decision-making process.[173]

However, one should carefully consider not leaving LGBT protection to existing just cause language. This is not out of doubt of the integrity of the

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168. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

169. In this regard, another factor to consider is the possibility of both a court and arbitral action. That is, if the employee's right is based upon both statutory law and contractual terms, the employee may be able to proceed both in court and in arbitration against the employer. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 401 (1988).

170. *See* Andy Martino, *MLB's New Collective Bargaining Agreement to Add 'Sexual Orientation' to Discrimination Clause*, N.Y. DAILY NEWS (Nov. 23, 2011, 7:55 AM), http://www.nydailynews.com/sports/baseball/mlb-new-collective-bargaining-agreement-add-sexual-orientation-discrimination-clause-article-1.981161.

171. *See* Airline Pilots Association v. O'Neill, 499 U.S. 65, 78 (1991) (holding that "[a]ny substantive examination of a union's performance, therefore, must be highly deferential. . .").

172. *See generally* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

173. The union could also argue that the employee's subjective gender identity and sexual orientation is simply off-duty conduct and should not be the basis for discipline in the first instance. *See* ELKOURI & ELKOURI, *supra* note 133, at 938..

arbitrators, but is rather due to the laws' and arbitrators' confidence in written words in collective-bargaining agreements. Where gender identity and sexual orientation anti-discrimination language is expressly included in the contract under the No Discrimination clause, the union will have a much stronger case that any discipline or other adverse action is a breach of the collective-bargaining agreement on its face. Just cause is often left for the arbitrator to interpret based on the work record, seniority, conduct alleged, and employer response.[174] However, No Discrimination clauses arguably only provide specific examples of what does not constitute just cause rather than as limitations on the scope of just cause. The characteristics protected under No Discrimination clauses mean just that: they are protected against discrimination. This form of express protection is more likely to have the desired effect than leaving it to the uncertainties of interpretation.

IV. CONCLUSION

The grievance-and-arbitration and arbitration process is not perfect, but it does offer a less complicated route than a federal suit. Moreover, it allows employees to act through representatives of their own choosing in a collective venue. Unlike federal court, the parties to arbitration are the union and the employer rather than the employee alone against the employer. In arbitration, the union covers expenses of presenting the case and the employee receives any compensatory pay in full. In contrast, not only will employees have to find their own attorney for federal court, the recovery may be limited to the terms of the contingency fee arrangement if the employee cannot secure pro bono representation.

Collectively-bargaining for protection also furthers the interests of anti-discrimination principles generally. Educating employees and employers about the importance of curbing LGBT discrimination is important both for workplace harmony and safety and for society as a whole. There can be little doubt that LGBT discrimination is as destructive as it is pervasive.[175] Further, collective bargaining uniquely involves the internalization and enforcement of self-selected values. Unlike unilateral government action upon the parties, which is certainly necessary at times, collective bargaining requires and brings about acceptance of values from within the workplace from employees' peers and colleagues.

It is true that developments in the law relating to sex stereotype and association and advocacy discrimination may provide overlapping sources of legal remedies. It is equally true, and laudable, that the federal government is showing its willingness to expand existing coverage. Nonetheless, unlike Title VII, collective-bargaining agreements are virtually unreviewable by courts.[176]

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174. *See id*. at 964.

175. *See* note 12, *supra*, and accompanying text.

176. Airline Pilots, 499 U.S. at 78 (". . . [T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far

The only entities that may repeal the provisions of the collective-bargaining agreement are the union and the employer. Unlike Title VII and analogous state laws, the grievance-and-arbitration process is handled internally and, generally, no administrative agency is involved. Thus, attacks on the funding of entities such as the EEOC would not affect the administration of collectively-bargained-for bans on sexual orientation and gender identity discrimination.

Labor management relations are on the frontline of anti-discrimination principles, voluntarily or otherwise, and there is no reason for that role to change now in the context of LGBT discrimination. From the Pullman Porters to the Memphis Sanitation Worker Strike in 1968 to present day, labor unions have featured prominently in advancing civil rights. Equally important is the willingness on the part of employers to provide more protection than is required by law. The private ordering of the workplace through collective bargaining is the exclusive form of joint labor management relations. It is desirable not only for employees, unions, and employers, but also for society as a whole as necessary to preserve industrial peace.

outside a 'wide range of reasonableness,' [internal citations omitted], that it is wholly 'irrational' or 'arbitrary.'").