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Sexual Orientation Discrimination in Employment: Legal Analysis of Title VII of S. 16, the Employment Nondiscrimination Act of 2003

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Sexual Orientation Discrimination in Employment: Legal Analysis of Title VII of S. 16, the Employment Nondiscrimination Act of 2003

Summary

On January 7, 2003, Senator Daschle introduced for himself and several colleagues S. 16, the Equal Rights and Equal Dignity for Americans Act of 2003. This omnibus legislation proposes to increase funding and to strengthen federal civil rights enforcement in several areas – including hate crimes, racial profiling, paycheck fairness, genetic discrimination, and medical privacy. Title VII of the bill incorporates a version of the Employment Nondiscrimination Act (ENDA) that was reported by the Senate Health, Education, Labor and Pensions Committee as S. 1284 in the 107th Congress. Based on Title VII of the 1964 Civil Rights Act, and related federal laws, ENDA forbids discrimination based on sexual orientation by public and private employers in hiring, discharge, and employment conditions and terms; forbids retaliatory conduct; and would be enforced by the Equal Employment Opportunity Commission (EEOC). Specific exemptions from coverage are included for religious organizations, religious schools, the armed services, and employers with fewer than 15 employees. Earlier versions of the legislation, dating back to 1975, proposed simply amending the provisions of Title VII to add "sexual orientation" to categories of discrimination already prohibited. Like its predecessor from the last Congress, S. 16 instead proposes a stand-alone legislative safeguard against "sexual orientation" discrimination in employment. The proposed framework nevertheless incorporates by reference most of the Title VII causes of action, enforcement procedures, and remedies, making it similar in scope to the earlier law. But because "sexual orientation" discrimination in employment involves a host of considerations not before Congress when it enacted Title VII, the measures also differ in several significant respects. Preferential treatment or quotas on the basis of sexual orientation and "disparate impact" proof of discrimination would be specifically precluded, and provision of employee benefits to domestic partners is apparently not required.

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The 1964 Civil Rights Act generally makes it unlawful for employers with fifteen or more employees, employment agencies, and labor organizations to discriminate against employees or applicants for employment because of race, color, religion, sex, or national origin. All forms of employment and pre-employment bias are forbidden, including discrimination in hiring, discharge, promotion, layoff and recall, compensation and fringe benefits, classification, training, apprenticeship, referral, union membership and other "terms, conditions, or privileges of employment."

Earlier versions of ENDA, dating back to 1975, proposed simply amending the provisions of Title VII of the 1964 Act to add "sexual orientation" to categories of discrimination already prohibited.[2] S.16, in contrast, proposes a stand-alone legislative safeguard against "sexual orientation" discrimination in employment. Subject to specific exceptions and limitations, however, it incorporates by reference most of the Title VII causes of action, enforcement procedures, and remedies, making

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[1] Senate Rept. 107-341 on S. 1284, the "Employment Non-discrimination Act of 2001," 107th Cong., 2d Session (2002).

[2] See CRS Report RL31048, *Sexual Orientation Discrimination in Employment: Legislation in the 107th Congress*.

it similar in scope to the earlier law. But because "sexual orientation" discrimination in employment involves a host of considerations not before Congress when it enacted Title VII, the measures also differ in several significant respects.

Definition of Sexual Orientation. "Sexual orientation" is defined by the bill to mean "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or *perceived*."(Emphasis added). In addition, § 704 (e) makes clear, an individual is protected not only from discrimination based upon her own sexual orientation, but also that of persons "with whom the individual associates or has associated." Thus, the bill would not be limited to protecting only gays and lesbians from sexual orientation discrimination. Heterosexuals would also be protected from discrimination by a homosexual employer or by a heterosexual employer who discovers that the employee has a homosexual friend or family member, and then intentionally fires or otherwise discriminates against the employee on that basis.

Note, however, that the scope of legal protection afforded persons based on their "perceived" orientation may be difficult to gauge. Whose "perception" is the controlling factor, that of the victim of sexual orientation discrimination or of the alleged perpetrator? Is the perception to be tested subjectively or objectively? For example, can an employee who considers himself or herself to be homosexual or bisexual claim discrimination by an employer who may have no perception – nor any objective reason for perceiving – one way or another? Also, perceived orientation may include discrimination against transsexuals or transvestites, two groups which the courts have held to be unprotected by the "sex" discrimination prohibitions of Title VII.[3] There is no comparable language in Title VII prohibiting discrimination on the basis of "perceived" characteristics applicable to discrimination prohibited by the 1964 Act. Thus, courts would apparently be left the task of developing appropriate standards of proof in such "perceived" orientation cases.

Prohibited Employment Practices. The bill's delineation of prohibited employment practices substantially tracks the catalogue of employer malfeasance condemned by Title VII of the 1964 Act. Thus, employers with fifteen or more employees are forbidden from taking specific actions with respect to the hiring, discharge, or other discrimination in employment "compensation, terms, condition, or privileges" because of an individual's sexual orientation, or "limit[ing], segregat[ing] or classify[ing]" them in ways that "deprive or tend to deprive" them

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[3] The U.S. Supreme Court has defined a transsexual as "one who has a rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change." Farmer v. Brennan, 525 U.S. 825 (1994)(quoting American Medical Association, Encyclopedia of Medicine 1006 (1989)). In a leading case, Ulane v. Eastern Airlines, 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985), the Seventh Circuit found three reasons to deny Title VII coverage to transsexuals. First, the court read the word "sex" in the statute to mean a man or woman, not an individual suffering from a sexual-identity disorder. Second, the court found the sparse legislative history of the sex discrimination amendment to the Civil Rights Act failed to reveal any congressional intent to protect transsexuals. Third, the court noted the fact that many bills had been offered subsequent to 1975 to add the term "sexual orientation" to Title VII, but none had passed.

of job opportunities or "adversely affect" their employment status. A provision without direct parallel in Title VII statutory text, however, would also make the employer liable for such actions if they are "based on the sexual orientation of a person with whom the individual associates or has associated." A comparable range of employment agency and labor organization practices, again largely borrowed from Title VII, are prohibited by the bill. Section 705 of S. 16 incorporates language specifically prohibiting employer retaliation against employees attempting to exercise their rights under the 1964 Act.[4]

The Supreme Court has developed alternative methods for establishing employer liability under Title VII. The "disparate treatment" model requires proof by direct or circumstantial evidence that the employer intentionally discriminated by treating similarly situated employees differently because of race or gender. Proof of intent is unnecessary, however, in "disparate impact" cases where, based on statistics, a company rule or policy can be shown to disproportionately affect a protected class and to lack business necessity. In the 1991 Civil Rights Act, Congress codified the disparate impact concept in a manner beneficial to Title VII plaintiffs by imposing a greater burden on employers for justifying the disparate impact of any challenged employment practice. The bill, however, would narrow the evidentiary options available in sexual orientation cases by providing that "[o]nly disparate treatment claims may be brought under this title," meaning that employers would be liable only where plaintiffs are able to prove intent to discriminate. Reinforcing this limitation is § 707 of the bill, which bars the EEOC from "collect[ing] statistics on sexual orientation from covered entities, or compel[ling] the collection of such statistics by covered entities."

Exceptions to Coverage. S. 16 carries forward various exceptions from earlier versions of ENDA legislation. First, the armed forces, which include the army, navy, air force, marines, and coast guard, would be exempt, and this would extend to allocation of veterans benefits. The courts have similarly held that uniformed military personnel are not covered by Title VII. The bill incorporates into its definition of "employer" an exclusion taken from the 1964 Act for "bona fide private membership" clubs that qualify for federal tax exemptions. Section 711(a) of the bill preserves the right of employers to enforce workplace rules and policies, provided that they "are designed for, and uniformly applied to, all individuals regardless of sexual orientation." And the bill seems to specifically condone an employer's refusal to extend domestic partnership benefits.[5]

Section 709 of S. 16 provides that "[t]his title shall not apply to a religious organization," which is defined by § 703(a)(8) to mean any "religious corporation, association, or society" or any kind of "educational institution" whose curriculum is "directed toward the propagation of a religion" or which is "controlled, managed,

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[4] During committee consideration in the 107th Congress, an associated "coercion" provision in the anti-retaliation section of S. 1284, which had no direct parallel in the statutory language of Title VII, was eliminated by the Collins Amendment. See Senate Report, supra n. 1, at p. 17.

[5] § 706 of S. 16 states: "This title does not apply to the provision of employee benefits to an individual for the benefit of the domestic partner of such individual."

owned, or supported" wholly or substantially by a "religion" or religious organization. In its present form, therefore, the bill would permit organizations – including schools and learning institutions – operated and controlled by religious organizations to discriminate against gays, lesbians, or bisexuals in hiring and employment practices.

This provision of the bill appears modeled after a parallel exemption for religious organizations from the religious discrimination ban in Title VII of the 1964 Civil Rights Act. Section 702 of the Act provides: "This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[6] Current law thus allows religious institutions to discriminate, but only on the basis of religion; they remain covered by the statutory ban on racial, ethnic, and gender-based discrimination. When enacted in 1964, this exemption was limited to the "religious activities" of such institutions. In 1972, Congress eliminated the term "religious" and thereby broadened the exemption to cover all activities of the institution.[7] The controlling factors for determining what constitutes a "religious" organization under this exemption are whether the organization was created, and continues, to serve a "religious purpose."[8]

Insofar as educational institutions are concerned, the religious exception in S. 16 appears to track the Title VII statute, which specifically permits schools, colleges, universities, or other educational institutions:

> [T]o hire and employ employees of a particular religion if [such institution] is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such [institution] is directed toward the propagation of a particular religion.[9]

The EEOC has interpreted this provision as providing two alternative exemptions. One is for a school "owned, supported, controlled, or managed" by a particular religion. The other is for a school whose curriculum is "directed toward the propagation of a particular religion."[10]

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[6] 42 U.S.C. § 2000e-1.

[7] See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).

[8] EEOC Decision 83-6, 31 FEP 1858 (1983).

[9] 42 U.S.C § 2000e-2(e)(2). Compare to §703 (a)(8) of the bill, which adopts the same two-part management/control or "propagation" standard in defining schools, colleges, or other institutions of education or "learning" that may be deemed "religious organizations" under the bill.

[10] EEOC Decision No. 75-186 (1975).

What schools or colleges are covered sometimes is disputed. In *Pime v. Loyola University of Chicago*,[11] for example, a former Jesuit university sought to retain its religious identity even after it had evolved into a secular institution. Thus, it reserved three tenured positions for Jesuits and claimed that it was exempt under the Title VII statute as a university supported, controlled, or managed in whole or in part by a religious society. The President of the university was a Jesuit, as were more than one third of the trustees and several university officers and administrators. However, the Society of Jesus did not instruct the President or trustees with regard to university matters and did not control the decisions of other Jesuits who served in official university positions. Hence, despite a "Jesuit presence" on campus, the university was held not exempt under the Act

By the bill's terms, Christian and religious schools that are independent financially or in their management structure from churches or other formal religious entities may nonetheless qualify for the § 709 exemption – allowing them to take sexual orientation into account when making employment decisions – provided that their curriculum includes a religious component or, as the bill states, is "directed toward the propagation of a religion." The extent to which, in practice, schools may be required to engage in religious instruction or to integrate religious teachings into their formal curriculum is not addressed by the bill, nor is it conclusively settled by existing Title VII precedent. *EEOC v. Kamehameha Schools*[12], however, indicates that a religious school can lose its Title VII exemption when it lacks close ties to organized religion or its purpose or character is not primarily religious.

EEOC sued the Kamehameha Schools, which had been created by the will of a member of the Hawaiian Royal family, providing that teachers "shall forever be members of the protestant faith." The schools conceded that, in order to effectuate the testator's intent, they were required to discriminate on a religious basis prohibited by Title VII but were exempt as "religious educational institutions" under the 1964 Act. In rejecting this argument, the Ninth Circuit held that Kamehameha' purpose and character were primarily secular and not religious. Further, what religious characteristics it had – namely, comparative religious studies, scheduled prayers and services, Bible quotations in a school publication, and employment of nominally protestant teachers – were common to private schools and did not satisfy the requirements of the religious education exemption. Instead, the court of appeals found that the schools had embraced a broad mandate to help native Hawaiians "participate in contemporary society for a rewarding and productive life" through a solid secular education, including Hawaiian culture and history, and moral guidance to aid students "[d]efine a system of values." Finally, noting a dearth of case law on the "curriculum exemption," the Ninth Circuit found that the curriculum of the schools did little to propagate Protestantism. Courses about religion and a general effort to teach good values did not constitute a curriculum propagating religion. Moreover, the schools' publications demonstrated that religion embodied more a general tradition than actual mission and served primarily as a means of advancing moral values within the context of a general education. As such, the court concluded,

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[11] 585 F. Supp. 435 (N.D. Ill. 1984), aff'd, 803 F.2d 351 (7th Cir. 1986).

[12] 90 F.3d 458 (9th Cir. 1993).

the educational experience at Kamehameha would not be any different if some of the teachers were not Protestants.

The result in *Kamehameha Schools* was influenced to some degree by the absence of church ownership or control. Indeed, the court of appeals observed that it had found "no case holding the Title VII exemption to be applicable where the institution was not wholly or partially owned by a church."[13] Subsequently, in *Killinger v. Samford University*,[14] the Eleventh Circuit held that a Baptist college was an exempt religious institution which could require professors to subscribe to the school's religious doctrine. The court noted that a Baptist convention comprised the largest single source of revenue for the college and that the school's charter listed as its chief purpose the "promotion of Christian Religion." Thus, under Title VII precedent, independent Christian and other religious schools not owned, financed or controlled by church bodies may find it difficult to qualify for "religious organization" exemption in § 709 of S. 16. Of course, as stand-alone legislation, it is possible that courts would find that the policy concerns underlying the bill are sufficiently different from Title VII to warrant a less restrictive reading of the former's curriculum propagating religion standard. Absent clarification in the bill itself, or its legislative history, any resolution of the issue would have to await further judicial elaboration.

First Amendment Right of Association. A rule of "construction" in the bill would preclude application of the sexual orientation prohibition in any manner that infringes First Amendment associational rights of any "nonprofit, voluntary membership organization." Thus, § 711(b) of S. 16 provides:

> Association.– Nothing in this title shall be construed to prohibit any association, or infringe upon any rights of association, guaranteed by the first amendment to the Constitution, of any nonprofit, voluntary membership organization.

Whether, or to what extent, this provision would insulate the hiring and employment practices of such nonprofit organizations from the bill's proscriptions may be a matter of some doubt. Observe that § 711(b) neither mentions employment, nor by its own force, does it delineate the scope of any possible exception from the bill's coverage for the designated organizations. Rather, the provision would take its meaning from First Amendment principles as established by the courts. Most relevant here may be the U.S. Supreme Court ruling in *Boy Scouts of America v. Dale*,[15] which considered the constitutional ramifications of applying a state ban on sexual orientation discrimination to the membership policies of the Boy Scouts.

The Supreme Court in that case held that a New Jersey law prohibiting sexual orientation discrimination in public accommodations could not be applied so as to compel the Boy Scouts to reinstate an avowed homosexual scout leader. In effect, the New Jersey law was found to burden the Boy Scouts' First Amendment right to

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[13] Id. at 461, n. 7.

[14] 113 F.3d 196 (11th Cir. 1997).

[15] 530 U.S. 640 (2000).

oppose homosexual conduct, an intrusion which could not be justified by the state's interest in curbing discrimination. The five to four majority applied a three-prong test to determine that the Boy Scout policy was protected by the First Amendment. First, examination of the Scout Oath, Law, and various position statements convinced the Court that the Scouts disapproved of homosexuality as a lifestyle choice, and forcing it to accept homosexuals as leaders would violate their "freedom of expressive association." Second, inclusion of homosexual leaders would signal acceptance by the group and significantly hamper its ability to advocate its public or private viewpoints. Finally, while the state had an interest in eliminating discrimination, it could not be exercised at the cost of another group's constitutional rights. In other words, the state could not compel the Boy Scouts to express a position completely at odds with its organizational viewpoint.

The Boy Scouts case, of course, had to do with voluntary members and leaders of the organization, not paid staff and employment. Nor do any other decisions appear to have equated discrimination in employment with an employer's right to associate for constitutional purposes. Even assuming that the Boy Scouts rationale is applicable to the employment setting, however, it is unlikely that an organization's right to "expressive association" would justify wholesale exclusion of homosexuals from all consideration for employment. Instead, whether there is a right to exclude protected by the bill would appear to depend on three basic factors. First, is the organization in question engaged in expressive association on the subject of homosexuality? Relying on policy statements by BSA's Executive Council, the majority in the Boy Scouts' case determined that "[t]he Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes."[16] Presumably, unless the basis for a similar judgment exists with respect to other voluntary membership organizations covered by § 711 (b), the employment practices of the organization would not be exempt from the requirements of S. 16. Second, the majority opinion argued that if BSA "teaches . . . by example," then "[the leader's] presence would . . . force the organization to send a message, both to the youth members and the world, that [i]t accepts homosexual conduct as a legitimate form of behavior."[17] The Court's dictum may have considerable force as applied to the "message" sent by individuals – whether volunteers or paid employees – in leadership or executive positions. It may be less germane, however, where lower level clerical or custodial positions, for example, are concerned. The congressional interest in ending discrimination prohibited by S. 16 might be found to outweigh the burden imposed on the nonprofit organization, as applied in such situations.

In sum, the "right of association" protected by § 711(b) may not apply to Boy Scout hiring practices, but even if it does, it is uncertain whether all job positions would be covered or what other nonprofit organizations would be able to invoke its protection.

Remedies and Enforcement. Administrative enforcement of S. 16 with respect to private employment would be delegated to the Equal Employment

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[16] Id. at 657.

[17] Id. at 659.

Opportunity Commission, which would have the same authority to receive and investigate complaints, to negotiate voluntary settlements, and to seek judicial remedies as it currently exercises under Title VII. Similarly, in devising remedies for sexual orientation discrimination under the bill, "a court of the United States shall have the same jurisdiction and powers as the court has to enforce . . .Title VII."[18] Federal courts generally possess broad remedial discretion under Title VII of the 1964 Act. They may not only enjoin the unlawful employment practice but may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other relief as the court deems appropriate."[19] Back pay liability is limited to a period dating back no more than two years prior to filing the complaint. The Supreme Court early on adopted a "make-whole" theory of Title VII relief, including use of affirmative action remedies, minority preferences and the like, where necessary to redress discrimination of a particularly "egregious" or "longstanding" nature. But S. 16 specifically prohibits use of quotas or preferential treatment by employers voluntarily or by judicial order or consent decree in sexual orientation cases.[20]

Until 1991, only equitable relief – including limited back pay awards for wage, salary, and fringe benefits lost as the result of discrimination – was available to Title VII plaintiffs. Section 102 of the Civil Rights Act of 1991 added a new 42 U.S.C. § 1981a which, subject to "caps," provides for a right to jury trial and compensatory[21] and punitive damage awards against private defendants for intentional violations of Title VII, and related federal civil rights laws. The 1991 Act also provides for awards of compensatory, but not punitive, damages against federal, state, and local governmental agencies. The following ceiling or "caps" are established by the law for compensatory and punitive damages combined: 1) $50,000 for defendants who have 15 to 100 employees; 2) $100,000 for employers with 101 to 200 employees; 3) $200,000 for employers with 201 to 500 employees; and 4) $300,000 for employers with more than 500 employees. These monetary damages are "in addition to" relief awarded under § 706(g) of Title VII,[22] mainly back pay and prejudgment interest. The U.S. Supreme Court has also excluded from the statutory limits on damages so-called "front pay," awarded to redress discrimination victims for continuing injury in promotion or discharge cases where reinstatement is not a feasible remedy.[23] S. 16 appears intended to make these remedies available to

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[18] § 712(a)(6) of S. 16.

[19] 42 U.S.C. 2000e-5(g).

[20] § 708 of S. 16.

[21] Section 1981a(b)(3) describes compensatory damages as including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

[22] 42 U.S.C. § 2000e-5(g).

[23] Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

claimants under the bill "to the same extent as the remedies are available for a violation of Title VII."[24]

Section 713(b)(1)(a) of the bill would waive the states' Eleventh Amendment immunity from suit for sexual orientation discrimination against employees or applicants within any state "program or activity" that receives federal financial assistance. The Eleventh Amendment provides states with immunity from claims brought under federal law in both federal and state courts. Congress may waive the states' sovereign immunity by "appropriate" legislation enacted pursuant to § 5 of the Fourteenth Amendment. But the scope of congressional power to create a private right of action against the states for monetary damages has been substantially narrowed by a recent series of U.S. Supreme Court decisions.

The era of a reinvigorated Eleventh Amendment immunity can be traced to *Seminole Tribe v. Florida*,[25] which invalidated a portion of the Indian Gaming Regulatory Act authorizing tribal suits against the states. Neither the Commerce Clause nor § 5 proved to be an effective vehicle to override state sovereign immunity. Three years later, in *Alden v. Maine*[26] the Supreme Court ruled that the states could not be sued, even in their own courts, for violation of the Fair Labor Standards Act. *City of Boerne v. Flores*[27] announced the Court's new framework for determining the validity of congressional action under § 5. In holding unconstitutional the Religious Freedom Restoration Act, Justice Kennedy wrote that Congress' § 5 power was remedial only; it was not a basis for legislation defining the substantive content of the equal protection guarantee. Moreover, the remedy had to be "congruent and proportional" to the scope and frequency of any violations identified by Congress. These constitutional limitations were subsequently applied by the Court to hold the states immune from private lawsuits under the Age Discrimination in Employment Act,[28] the Violence Against Women Act,[29] and the Americans with Disabilities Act.[30]

Taken together, these decisions restrict the ability of private individuals to take the states to court for federal civil rights violations. They may not, however, apply to states' voluntary acceptance of federal benefits that are expressly conditioned on waiver of Eleventh Amendment immunity. "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds

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[24] Section 713(c) of S. 16.

[25] 517 U.S. 44 (1996).

[26] 527 U.S. 706 (1999).

[27] 521 U.S. 507 (1997).

[28] Kimel v. Board of Regents, 528 U.S. 62 (2000).

[29] United States v. Morrison, 529 U.S. 598 (2000).

[30] Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955 (2001).

entails an agreement to the actions."[31] Thus, when a statute enacted under the Spending Clause conditions grants to the states upon an unambiguous waiver of Eleventh Amendment immunity, as S. 16 proposes, "the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it."[32]

Attorney's Fees. The attorney's fees provision in S. 16 is substantially identical to Title VII which states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.[33]

Under Title VII, a "prevailing" plaintiff is ordinarily entitled to attorney's fees unless special circumstances make such an award unjust.[34] Complainants may be considered "prevailing parties" if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."[35] Although either a plaintiff or a defendant may be the prevailing party, fee awards to defendant employers are not the general rule, given the public interest in having Title VII plaintiffs act as "private attorneys general" and the likelihood that defendant employers would have less need of financial assistance.[36]

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[31] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 686 (1999).

[32] Litman v. George Mason University, 186 F.3d 544, 555 (4th Cir. 1999).

[33] 42 U.S.C. § 2000e-5(k).

[34] Albermarle Paper Co. v. Moody, 442 U.S. 405 (1975); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).

[35] Hensley v. Eckherhart, 461 U.S. 424 (1983).

[36] Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).