2017 Year in Review
LGBT Law

BATTLES OVER EMPLOYMENT DISCRIMINATION, EXECUTIVE AUTHORITY, RELIGIOUS LIBERTY, AND MORE

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2017 Year in Review

- WORKPLACE DISCRIMINATION
- TRANS IN THE MILITARY
- GOVERNOR V. AG
- RELIGIOUS LIBERTY
- BATHROOM BILLS
- CASES RESOLVING EFFECTS OF OBERGEFELL
- QUESTIONS

Workplace Discrimination – Title VII

- Title VII commands that employers may not discriminate "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).
- In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court interpreted Title VII to include a prohibition on employment discrimination based on nonconformity with gender-based stereotypes.
- In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court held that same-sex sexual harassment is cognizable.

Evans v. Georgia Regional Hospital, 850 F. 3d 1248 (2017)

- 2-1 vote that the plaintiff failed to state a Title VII claim based on her status as a lesbian.
- The panel majority held that it was bound by a precedent from the former Fifth Circuit, *Blum v. Gulf Oil Corp*., 597 F.2d 936, 938 (1979). According to the majority, it could not stray from the prior precedent until it was overruled by "a clearly contrary opinion of the Supreme Court or of this Court sitting en banc." 850 F.3d at 1257.
- The dissent argued that, to the contrary, *Blum* had been abrogated by *Price Waterhouse*. According to the dissent, sexual orientation discrimination is necessarily discrimination based on an impermissible sex-based stereotype.

Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (2017 en banc)

- Sexual orientation discrimination was actionable under Title VII.
- First, the court found that sex discrimination occurs when a woman married to another woman is treated differently than a man married to a woman. *Id.* at 345.
- Second, the court found that it is impossible to draw a line between claim based on gender nonconformity, which would be actionable, and those based on sexual orientation. *Id.* at 346. The court found that discrimination that may occur "based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Id.*
- The dissenters argued that the majority's interpretation over-strained the phrase "because of sex": "discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic." *Id.* at 363.

Transgender Servicemembers

- Some Background:

- "Don't Ask, Don't Tell" (DADT), 1993

  - Continued existing ban on service by openly gay/lesbian/bisexual persons, but (theoretically) prohibited military personnel from discriminating against closeted service members or applicants

Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996, en banc)

- Lt. Thomasson had an excellent service record, but wrote a letter to 4 admirals he served disclosing that he was gay. Under DADT, this created a rebuttable presumption that he intended to engage in prohibited homosexual acts. He presented evidence of his exemplary service record to the Board of Inquiry, but no evidence to rebut this presumption. Board voted unanimously to honorably discharge Thomasson, and he brought suit challenging this. District Court granted summary judgment in favor of the government.
- Fifth Amendment - Equal Protection: No suspect class, no fundamental right implicated. Thus, Court engaged in rational basis review. Court held that Congress's finding that those who have a propensity to engage in homosexual behavior impair military readiness was legitimate, and that the ban on service by such people was rationally related to it.
- the 4th Circuit also rejected Thomasson's First Amendment argument

Favorable cases for LGB service members

- *Log Cabin Republicans v. United States*, 2010 WL 3526272 (C.D. Cal. 2010)
  - Recognized that a fundamental right was involved (i.e. LGB persons' right to intimate conduct, post-*Lawrence*), and held that the government had failed to show that encroachment on that right was necessary to significantly further a compelling interest of the government. Court observed that the facts actually showed the opposite
- *Witt v. Department of the Air Force*, 739 F. Supp.2d 1308 (W.D. Wash. 2010)

DADT Repeal

- Congress passed and President Obama signed a bill repealing DADT in December of 2010. Since that time, gay, lesbian and bisexual people have been able to serve openly in the military.
- Transgender individuals, however, continued to be categorically barred from military service until the Defense Department on June 30, 2016, after a lengthy review and report by a Working Group established to examine that prohibition, finalized a policy allowing them to serve openly (retention effective immediately, accession effective by June 30, 2017)
  - (Administrative separation on medical or psychological grounds vs. Discharge)

Transgender service members in limbo

- On June 30, 2017, Defense Secretary Mattis announced a delay in the accession of transgender applicants into the military until January 1, 2018, pending further review.

- July 26, 2017 - Trump announces in a series of tweets that the military will no longer "accept or allow transgender individuals to serve in any capacity." A presidential memorandum directing implementation of this policy was issued on August 25, 2017, which memo stated in part that the previous/Obama administration "failed to identify a sufficient basis" to conclude that allowing open service by transgender people would not hinder military effectiveness, disrupt unit cohesion, or burden military resources. Essentially, this memorandum ordered the reinstatement of the previous ban on service by open transgender persons.

Jane Doe v. Donald J. Trump, _____ (D.C. Oct. 30, 2017)

- 8 plaintiffs: 6 active duty, 1 U.S. Naval Academy midshipman, and 1 ROTC member at the University of New Haven. All openly transgender, all had supportive commanders and peers, some had served in war zones, and all had taken at least some steps medically to transition. In coming out, all of them had relied on the 2016 policy change lifting the ban on open service, and all of their careers are now uncertain and in jeopardy as a result of the Trump administration's reversal of that change and reinstatement of the ban. 2 plaintiffs had yet to accede and would not be able to under the Presidential Memorandum, and the other 6 who are already serving fear they will be discharged.
  - Note on government's lack-of-standing assertion and the Interim Guidance put in place by Sec. of Defense following the Presidential Memorandum

Doe v. Trump, continued

- Court held that the directives of the Presidential Memorandum violate the guarantee of equal protection granted by the Due Process Clause of the Fifth Amendment.
  - Court found that transgender persons constituted "at least" a quasi-suspect class, requiring a heightened, intermediate scrutiny of the Presidential Memorandum.
  - Court also found that the Presidential Memorandum was a form of gender discrimination, also requiring intermediate scrutiny.
  - Government must show that the challenged classification "serves **important government objectives**, and that the discriminatory means employed are **substantially related** to the achievement of those objectives"
    - The justification must be GENUINE, not hypothesized or invented after the initiation of litigation;
    - The justification must not rely on overbroad generalizations about the talents, capacities or preferences of [males and females];
    - The justification cannot be a bare desire to harm a politically unpopular group.

Doe v. Trump, continued

- Court found the Presidential Memorandum's directives "extremely overbroad" and hypothetical
  - e.g., "**some** transgender individuals **could** suffer from medical conditions that impede their duties"; "there is room for the military to think" that trans people might not be deployable at times" - cannot justify ban on **all** trans people
- Importantly, the Court also found that the reasons offered by the President were contradicted by the studies and conclusions of the military itself.
- Lastly, the Court found that the unusual circumstances of the announcement (via Twitter, with no prior notice to the military) indicated that the policy was driven by animus rather than genuine concerns regarding military effectiveness.
- For the above reasons, the Court found it likely that Plaintiffs would succeed on the merits re: the accession and retention portions of the Presidential Memorandum, and granted a preliminary injunction.

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- Executive Order JBE 2016-11
- (April 13, 2016)

- Prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, political affiliation, disability or age:
    - in the provision of services or benefits by state agencies or other state entities;
    - in employment by the state, including hiring, promotion, tenure, recruitment or compensation; and
    - in the awarding of contracts with the state (also requires contractors to include a provision that the contractor shall not so discriminate).

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- A group of state legislators asked Landry to issue a formal opinion as to the validity and enforceability of the E.O., as they were concerned about the expansion of protected groups of persons to include "gender identity", when such expansions had repeatedly failed to pass the legislature. Landry issued an opinion stating that the E.O. had no binding or legal effect.

- Landry thereafter refused to approve a host of pending state contracts, including requests from state agencies for the appointment of private legal counsel, if those contracts included "gender identity" in their anti-discrimination provisions.

- JBE filed a separate mandamus action seeking an order for the A.G. to approve a number of those contracts. This was denied on the ground that the A.G. had discretion in the contract approval process, and JBE did not appeal as to those mandamus requests. However, the issue of approval of private legal counsel contracts was not addressed in that separate action, so to resolve it, Landry filed the current lawsuit……..

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- *La. Dept. of Justice v. John Bel Edwards*, 2017 CA 0173 (1 Cir. 2017)
- Attorney General Jeff Landry brought suit arguing, among other things, that the E.O. was an unconstitutional *ultra vires* act; specifically, that it conflicts with existing state law and violates separation of powers established by the Louisiana Constitution.
- Governor Edwards responded by arguing that the E.O. does not create new law and does not conflict with current law, but rather is a lawfully-issued policy directive relating

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- Judge Todd Hernandez (19th JDC) sided with Landry, writing that "[the executive order] is in violation of the Louisiana Constitution's separation of powers doctrine and an unlawful usurp [sic] of the constitutional authority vested only in the legislative branch of government."
- Judge Hernandez found the E.O. went further than La. R.S. 49:215 (granting governor the authority to issue E.O.s) provides, i.e. a mechanism the governor can use to "faithfully execute the laws of the State of Louisiana."
- Judge Hernandez rejected Landry's other two claims: that the E.O. violated the Commerce Clause of the U.S. Constitution, and First Amendment rights and privacy rights of the Louisiana and/or U.S. Constitution

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- In response to a request from JBE that the Court resolve the dispute between he and Landry with respect to their respective roles and relative powers, Judge Hernandez ruled that the law permits the A.G.'s involvement in the appointment of private legal counsel for state entities, but that does not extend to review of retention of private counsel to assert claims on behalf of the state, and the AG may not supersede the actions of private counsel once appointed.

- Judge Hernandez ruled further that the Louisiana Constitution makes the Governor superior to the Attorney General within the Executive Branch, but declined to issue an opinion as to which officer would prevail in any given dispute that could possibly arise between them.

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- On appeal, the First Circuit upheld the District Court's ruling on the validity of the E.O., holding that the separation of powers set forth in Sections 1 and 2 of Article II of the Louisiana Constitution were violated by the E.O.
- The First Circuit found that the E.O. went "beyond a mere policy statement or a directive to fulfill law, because there is no current state or federal law specifically outlining anti-discrimination laws concerning and/or defining sexual orientation or gender identity."
- In doing so, the First Circuit held, the E.O. constituted an unconstitutional interference by the Governor with authority vested solely in the Legislative Branch, which has not yet revised Louisiana law to include orientation or gender among the list of protected classes of persons.
- Lastly, the First Circuit held that the District Court should not have issued an opinion at all with respect to the A.G.'s and Governor's relative powers and roles re: approving state contracts and the hiring of private legal counsel, and vacated that portion of Judge Hernandez's decision.

Protections for LGBT state workers: John Bel Edwards versus Jeff Landry

- Currently on appeal to the Louisiana Supreme Court
- In the meantime, no state contracts are being held up. Following the District Court's ruling, the Edwards administration decided not to enforce the provisions of the E.O. on any contracts during the appellate process.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Oral Argument Held by SCOTUS on December 5.
- Does Colorado law the prohibits discrimination on the basis of sexual orientation require a baker to bake a wedding cake for a same-sex couple?
- Petitioners' argument:
  - Compelling a Baker to Create Artistic Expression that Celebrates Same-Sex Marriage Violates the Free Speech Clause
  - Compelling a Baker to Design Custom Wedding Cakes that Celebrate Same-Sex Marriage Violates the Free Exercise Clause
  - Respondents Cannot Satisfy Strict Scrutiny

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

- Respondents' Argument
  - This case involves a straightforward application of an anti-discrimination law to commercial sales
  - The Free Speech Clause does not authorize a business to engage in discrimination prohibited by a regulation of conduct that incidentally affects expression.
  - The Free Exercise Clause does not permit a business to engage in discrimination prohibited by a neutral and generally applicable law.

Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017)

- Mississippi HB 1523 provides that "[t]he state government shall not take any discriminatory action" against persons who act in accordance with certain beliefs in an enumerated set of circumstances.
- Section 2 of HB 1523 identifies three "religious beliefs or moral convictions":
  - (a) Marriage is or should be recognized as the union of one man and one woman;
  - (b) [s]exual relations are properly reserved to such a marriage; and
  - (c) [m]ale (man) or female (woman) refer[s] to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

Barber v. Bryant

- Case dismissed on standing grounds; SCOTUS cert. petition filed
- "Plaintiffs claim they have suffered a stigmatic injury from the statute's endorsement of the Section 2 beliefs."
- "A plaintiff has standing to challenge a religious display where his stigmatic injury results from a "personal[] confront[ation]" with the display. . . . the plaintiffs make no clear showing of a personal confrontation with Section 2: The beliefs listed in that section exist only in the statute itself."
- No evidence of an injury-in-fact
- HN 1523's "limited scope does not provide the same certainty that any member of an affected group will suffer an injury."

Bathroom Bills

- North Carolina HB2 – passed in 2016
- "It bans transgender people from using the bathroom of the gender they identify with. Everyone has to go to the bathroom of the gender on their birth certificate. And it bans cities and counties from loosening that restriction."
- "But that's not all. It also nullified local ordinances around the state that would have protected gay or transgender people from being fired simply for their sexual preference or identify. It also clears the way for businesses to refuse to serve gay or transgender patrons."
  - (From The News-Observer, www.newsobserver.com)

HB 1523 Repeal (or "Fake Repeal?")

- HB2 repealed
- "No local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations."
- Leaves regulation of multi-stall bathrooms with the state legislators
- Condemned by civil rights groups

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

- LGBT Parentage re: Birth Certificates:

- *Pavan v. Smith, 582 U.S. ____(2017)*
    - Clarified the Obergefell decision re: parentage presumption

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

- Ark. Code : § 20-18-401
- (e) For the purposes of birth registration, the mother is deemed to be the woman who gives birth to the child, unless otherwise provided by state law or determined by a court of competent jurisdiction prior to the filing of the birth certificate. The information about the father shall be entered as provided in subsection (f) of this section.
- (f) (1) If the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child…

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

- La. RS 40:34.5
- Original birth certificate; required contents; name of father
- A. If the child is born to a mother who either is married or was married within three hundred days prior to the birth of the child, the full name of the father shall be recorded in the same manner provided for the recordation of the surname of the child in R.S. 40:34.2(2)(a) and (c).

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

Presumption of Parentage

- The Arkansas law (and LA law) allow for the presumption of paternity even when the child is conceived through artificial insemination with the sperm of another man.
  - i.e. Even when it is known that the husband is not the biological father, he is given the presumption of paternity nonetheless.
  - Plaintiffs brought suit against Arkansas Department of Health for not allowing the legal spouse/wife of the biological mother the same presumption

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

Presumption of Parentage

- In cases where a married same-sex female couple used artificial insemination with an anonymous sperm donor, the non-biological mother had to undergo a step-parent adoption to legally bind herself to the child.
  - Opposite-sex couples in the same circumstances were granted the presumption of paternity and no adoption was necessary.
- The trial court agreed with the Plaintiffs and stated that the law violated the *Obergefell* decision.
- The Arkansas Supreme Court reversed and the USSC took the case for review.

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

Rights and Privileges of Marriage

- The USSC clarified and reiterated their previous decision in *Obergefell*
  - Because that differential treatment infringes *Obergefell's* commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage," id., at ___ (slip op., at 17), we reverse the state court's judgment.

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

Louisiana

- In practice, LA DCFS has indicated that the decision in *Pavan v. Smith* is the law of the land and step-parent adoptions are no longer necessary.
- It is imperative that the couples wishing to avail themselves of the benefits clarified in *Pavan* meet the specific criteria described.
- They must:
  - 1. Be legally married or have been legally married at the time of birth
  - 2. The birth must have taken place AFTER the *Obergefell* decision (June 26, 2015).
  - 3. They must have used an anonymous sperm donor.
  - ***Note that *Pavan* will in practice only effect female same-sex couples.

After *Obergefell*: The New Legal Landscape for Same-Sex Couples

Finally, remember, just because marriage is now available to same-sex couples does not mean all of them will choose to marry - it's still incumbent upon lawyers to present the best information to each client about the advantages and disadvantages marriage may present based on his or her individual circumstances.

THANK YOU!

- Questions?