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OPEN COURT

A Newsletter of the PBA GLBT Rights Committee Fall 2017

Seventh Circuit Expands Civil Rights Protection for LGBT Employees

By Laurie Baulig

In a landmark ruling widely praised by national gay rights organizations, the full Seventh Circuit Court of Appeals held, 8-3, that sexual orientation discrimination in the workplace is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. The decision, *Hively v. Ivy Tech,* 853 F.3d 339 (7th Cir. 2017), is a reversal of earlier decisions of the Seventh Circuit, which had expressly denied the protections of the Civil Rights Act to the GLBT community in employment discrimination cases. The court justified taking a "fresh look" at GLBT employment discrimination remedies based on two decades of developments at the Supreme Court expanding LGBT rights, including the right of same-sex persons to marry.

Kimberly Hively, the openly lesbian plaintiff in the case, had served as a part-time adjunct professor at Ivy Tech Community College since 2000. Between 2009 and 2014, she applied unsuccessfully for full-time positions, and, in July 2014, her part-time contract was not renewed. Hively initiated proceedings with the U.S. Equal Employment Opportunity Commission and eventually filed suit in federal district court.

The district court granted Ivy Tech's motion to dismiss, accepting the college's argument that sexual orientation is not a protected class under Title VII, which prohibits discrimination based on a person's "race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a). Hively argued that sexual orientation discrimination is a form of sex discrimination, not a separate protected class. The district court's decision was affirmed, 2-1, by a panel of the Seventh Circuit. Represented by the Lambda Legal Defense and Education Fund, Hively sought *en banc* review and the full Seventh Circuit granted that request.

The Seventh Circuit framed the issue in the case as one of pure statutory interpretation:

> "The question before us is not whether this court can, or should 'amend' Title VII to add a new protected category ... We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."

In reviewing the legislative history of Title VII, the court gave little weight to the college's argument that Congress had considered, but failed, to add the words "sexual orientation" to the list of protected classes in the statute. The court noted that the Supreme Court had, in fact, expanded the notion of sex discrimination to include other forms of conduct, including sexual harassment.

In particular, the court was guided by the Supreme Court's decision in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), which held that Title VII covered claims of male-on-male and other same-sex sexual harassment. In an opinion written by Justice Scalia, the Supreme Court in *Oncale* recognized that the statutory language "because of sex" could be construed to cover discriminatory conduct beyond that which Congress might have intended when the law was passed in

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1964. *Onacle* was considered a victory for LGBT rights in the workplace, even though the record in the case did not reveal whether the plaintiff-victim in the case, or his male harassers, were gay or straight. The facts in the case, however, strongly suggested that Mr. Oncale was bullied and subjected to humiliating conduct because of his sexual orientation.

The court also noted that the Supreme Court had expanded Title VII's coverage to include claims of sex stereotyping in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In this case, Ann Hopkins was denied a partnership because she failed to dress, walk and otherwise behave in a stereotypically feminine manner. One of the partners even advised her to take a course in charm school. The Supreme Court held that Price Waterhouse discriminated against Ms. Hopkins "because of sex," because she failed to conform to how the male partners believed a woman should appear and behave in the workplace.

Similarly, Hively argued that had she been a man married to a woman, the college would not have denied her requests for promotion and cancelled her contract. The court relied on the Hopkins analysis to find support for this argument: "Viewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and

other forms of sexuality as exceptional): she is not heterosexual." The court went on to conclude: "Any discomfort, disapproval or job decision 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. That means that it falls within Title VII's prohibition against sex discrimination."

Hively also offered an "associational theory" for concluding that the college discriminated against her because of her lesbian relationship. This theory rests on the idea that a person who associates with someone in a protected class also has protections under Title VII. The court relied on the interracial marriage cases to find support for Hively's associational sex discrimination claim. *See Loving v. Virginia*, 388 U.S. 1 (1967).

Finally, the court found support for its decision to overturn its own precedents by citing non-employment Supreme Court decisions that expanded LGBT protections. Among those cases were *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a provision of the Colorado Constitution that would have forbidden localities in the state from enacting laws protecting LGBT persons; *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down criminal state sodomy laws; *United States v. Windsor*, 133 S.Ct 2675 (2013), which held that the term "spouse" in the Defense of Marriage Act includes a same-sex partner; and finally, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which recognized a Constitutional right to same-sex marriage. These decisions, according to the court, form a "backdrop" against the broader area of sexual orientation discrimination in society and reflect the Supreme Court's view that such discrimination – in many contexts – is unconstitutional.

In conclusion, the court frames its responsibility in *Hively* "to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago." The court adds, "it is actually impossible to discriminate on the basis of sexual orientation without

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discriminating on the basis of sex." That statement profoundly articulates an expansion of civil rights protections for LGBT employees.

Hively is, of course, binding law only in the Seventh Circuit, which consists of Illinois, Indiana and Wisconsin. In all of the other circuits that have considered the issue, including the Third Circuit (which covers Pennsylvania, New Jersey and Delaware), there is precedent rejecting the view that Title VII prohibits discrimination on the basis of sexual orientation. *See, e.g., Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009). With *Hively* now creating a conflict among the circuit courts, it will be up to the U.S. Supreme Court — or, less likely, Congress, in the form of an amendment to Title VII — to resolve this important issue for the LGBT community. ◆

Laurie Baulig focuses on employment counseling for small businesses and their executives, including compliance with wage and hour, employment discrimination, workplace safety and health laws (OSHA), and the Patient Protection and Affordable Care Act (Obamacare).

The State of Transgender Soldiers in the Military

By Sharon R. López, Esq.

Transgender men and women were prohibited by policy from serving in the U.S. military for medical reasons. Then on Aug. 19, 2015, the Obama Administration started the process of lifting the ban on soldiers who did serve to identify as their assigned sex. On July 2016, the Department of Defense repealed the ban and directed each branch of the armed services to implement new policies affecting transgender troops. However, President Trump tweeted his intent to reverse this policy. He stated, "After consultation with my generals and military experts, please be advised that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military." He stated, "Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail."

On Aug. 23, 2017, a transgender GLBTQ Legal Advocates and Defenders (GLAD) and the National Center for Lesbian Rights sued in Washington, D.C., on behalf of five transgender service members with nearly 60 years of combined military service. On Aug. 28, 2017, the American Civil Liberties Union (ACLU) filed a lawsuit in Baltimore, Maryland, alleging equal protection and due process violations. At the same time, in Seattle, Washington, a 12-year veteran transgender soldier filed suit against the Trump Administration. On Aug. 29, 2017, Defense

Secretary Jim Mattis announced that transgender troops will be allowed to continue serving in the military pending the results of a study by experts. The fourth lawsuit against the Trump Administration reversal was filed on Sept. 5, 2107 in California by a pair of transgender California residents who have taken steps to join the military as transgender soldiers.

Although the policy is under study, the ban is due to be implemented in early 2018. It should be noted that former Joint Chiefs of Staff are in support of transgender military service and opposed to the ban. "The military's prior considered judgment on this matter should not be disregarded, and we should not breach the faith of service members who defend our freedoms, including those who are transgender," retired Adm. Michael Mullen wrote in a declaration in support of one of the lawsuits. ◆

Sharon R. López is the 123rd president of the PBA. She is a civil rights and employment law attorney whose practice is in Lancaster County. She is a long-term active member of the GLBT Rights Committee.

FEATURED PERSON

A Conversation with Robert Oliver about Diversity Initiatives

Interviewed by Martricia O'Donnell McLaughlin, Esq.

Robert, you are a young member of the bar and have actively been advancing the goal of a more diverse bar, can you tell us a little about yourself?

Thank you, Martricia. I graduated from Temple University in 2008 with a Bachelor's in business administration with a double concentration in finance and risk management/insurance. I went on to Villanova University School of Law, where I graduated with my juris doctorate in 2015. I'm currently 27 years old and fabulous. I have two wonderful dogs (a third one passed away in May), and they've really helped get me through rough patches in law school and in taking the bar exam, which I failed in Pennsylvania the first two times. I only reveal that because I want others to have hope that you can keep trying, and you will eventually make it!

You have participated in diversity programs since you began law school. Why is this an important initiative for you?

It's important to me because the LGBTQIA+ community has been incorporated into the mainstream culture more and more as people's views evolve in this county, but some of us within that community are being left out. I am talking specifically about trans persons or persons who identify as genderqueer or somewhere along the spectrum that is not traditionally male/female. The only way to make something normal is to be present and professional, allowing people to get to know the real you and person. I'm genderqueer, and that's exactly what I'm doing. Sometimes I come to court with a purse. Sometimes I don't. It's who I am. I may get some looks at first, but after a while, no one bats an eye.

Robert Oliver, Esq.

Can you describe some of these initiatives and how they have impacted your professional growth?

I first participated in the Philadelphia Diversity Law Group (PDLG) Program, a program in Philadelphia that matches diverse student candidates with respective firms, including larger, private and in-house firms, for potential internships. At that time, I was interested in family law. Through my participation in this program, I gained an advantage through an introduction to the attorney then chairing the Montgomery County Diversity Program. Ultimately, this allowed me to intern with the family law group at Weber Gallagher in Norristown during my first summer session and with various civil defense litigation groups at Weber Gallagher in the Philadelphia office during my second summer session.

Interning through this program was a wonderful experience. During my time as an intern, I met many lawyers and judges whom I greatly admired. Some of these individuals were very generous with their time and support. In fact, it was through my contact with Judge Daniel Clifford of the Montgomery County Court of Common Pleas that I learned of the opportunity of a clerkship with Judge Gail Weilheimer of Montgomery County. Through this clerkship, I learned a tremendous amount about law and procedure. I have gained greater self-confidence as a professional ready to start my career as a practicing attorney.

These are concrete benefits of diversity program participation.

It seems as if you have gained a great deal from your participation in diversity programs. Is that something you recommend to other young professionals? Who is eligible to take advantage of these programs?

Yes, I recommend the programs. As a matter of fact, I recently wrote an article for the September issue of the *Montgomery County Sidebar*, in which I have encouraged participation in the Summer Internship Diversity Program of Montgomery County.

Anybody who is diverse and in law school can take advantage of these programs. You may be still asking yourself, "Well, what counts as 'diverse'?" Diversity is not really something concretely defined; if you think you may qualify as diverse, then you should apply. Age, race, ethnicity, gender, sexuality, veteran status, etc. The list is

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really non-exhaustive and the priority, of course, goes to those groups of individuals that face the most adversity in society or are the most underrepresented in our field.

My experience of the diversity programs I have engaged with is that the programs are sophisticated. The candidate selection and interview process is carried out collaboratively among the members of the local bar and their respective firms. The programs attempt to accomplish appropriate "matches" between the prospective interns and the firms or other employers who will then interview the selected, prospective summer interns. This matching process assists a young lawyer or law student to clarify career goals and interests. In the programs I participated in, the group of interns had the opportunity during the internship to meet every week for a breakfast event with other interns, bar members and the weekly guest speaker. There are also other activities and events the interns can participate in throughout the summer, and each intern, at the beginning of the summer, is also assigned a "mentor," a local bar member and resource, with whom the students can meet with individually throughout the summer. These are invaluable opportunities for the diverse law student or lawyer to network and create important personal and professional bonds with a variety of professionals.

These programs offer a tremendous opportunity for the diverse lawyer or law student, but what do you think motivates the lawyers, firms and bar associations to develop such programs?

I think the benefits to those who offer internships are many. The focus of a law firm is really similar to that of any business – what's the bottom line? In order to get that bottom line where a firm wants it, they have to generate revenue (business), meaning you've got to be attractive to clients. A lot of firms realize that attractiveness can be raised by committing to a diverse workforce.

In my experience, the lawyers and judges who have acted as mentors also value the experience because they realize that with diversity on the outside comes diversity on the inside. What I mean by that is that a person of color or an LGBT individual usually has unique experiences in life that help shape and mold the way they think today. Their resiliency and determination come forward in their legal arguments and legal writing. I think judges and lawyers really enjoy the diversity and the tangential benefits that come with it.

Also, there is a tremendous benefit in these programs in breaking down barriers. Many of us live our lives consumed with the demands of work, family and community commitments within our own "bubble." That can make members of the diverse community become "other." Diversity programing breaks through the isolated "bubbles" and allows reciprocal understanding to emerge between and among all members of the legal community regardless of color, gender, gender identification, sexual orientation, religion, national origin or other factors. It is easy to fail to understand or recognize the needs and skills of an unknown "other." That is harder to do when you have worked with and socialized with that person in a meaningful way.

At this stage in your career, what are your goals both professionally and in terms of work-life balance? Do you feel differently now because of your participation in diversity programing than you did on the day you started law school, and, if so, can you explain?

That's a great question because, yes, my goals have changed significantly since law school and after participating in the diversity programs. In my 1L year I thought I had to have a job in one of the big Center City firms. I was willing to sign away my life for the income. Then I realized that diversity and acceptance and feeling good wherever I'm working is more important to me. I find that the government jobs are also great at trying to attract and retain diversity, and the work-life balance in government is ideal for me. Family is important, including my dogs, and the work-life balance gives me the time to spend with them. In addition, government and public service positions give many individuals an opportunity for student loan forgiveness, which, if you think about it, compensates for the lower income associated with these positions. My goal in the next 10 years is to have my student loans forgiven or paid off and to be working either in a solicitor's office or a DA's office in Philadelphia or one of its surrounding counties.

Let me also thank you again, Martricia, for taking the time to speak with me and in all that you do for this committee and its newsletter.

Many thanks to you as well! Your willingness to share your experiences is both generous and invaluable. ◆ Good Luck.

Your Other Partner

Upcoming PBA Events

Through Nov. 28
Avoiding Legal Malpractice Seminars

Oct. 25
Civil Litigation Section
Regional Dinner, Erie

Oct. 30
PBI Exceptional Children Conference, Lancaster

Nov. 10-11
Commission on Women in the Profession Fall Retreat, Hershey

Nov. 16
PBA Committee/Section Day, Harrisburg

Dec. 5
Government Lawyers Committee/Administrative Law Section Holiday Reception, Harrisburg

Dec. 5
Civil Litigation Section Trial Minicamp, Johnstown

Dec. 6
Civil Litigation Section Trial Minicamp, Bellefonte

Dec. 11
Civil Litigation Section Trial Minicamp, Williamsport

Jan. 24-28, 2018
PBA Midyear Meeting
Key West, Fla.

For more information, click on the event or go to www.pabar.org and click on the Events Calendar.

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PBA Headquarters
100 South Street
PO Box 186
Harrisburg, PA 17108-0186

Western PA Office
Heinz 57 Center
339 Sixth Avenue, Suite 760
Pittsburgh, PA 15222

GLBT Rights Committee

Chair:
Gerald L. Shoemaker Jr.
Hangley Aronchick Segal Pudlin & Schiller
401 Dekalb St., Fl. 4
Norristown, PA 19401
GLS@hangley.com
610-313-1670

Newsletter Editors:

Martricia O'Donnell McLaughlin
Attorney at Law
26 N. Third Street
Easton, PA 18042
610-258-5609
mclandg@hushmail.com

Robert Daniel Oliver
Court of Common Pleas of Montgomery County
roliver@montcopa.org

PBA Newsletter Liaison:
Diane Banks
diane.banks@pabar.org
800-932-0311, ext. 2217

PBA Staff Liaison:
Ursula Marks
ursula.marks@pabar.org
800-932-0311, ext. 2206

Committee History:
The committee was formed in 2005. The committee's mission is to study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The committee monitors and makes recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

Committee Membership:
The committee is open to GLBT lawyers and allies. The committee welcomes all members who are interested in promoting equal rights for the GLBT lawyers and the GLBT community at large.