PBA GLBT Rights Committee – Then and Now!

By Helen Casale, Esq.

Long ago, before everyone had an iPhone and e-mail was only accessible via a desktop or laptop computer, I received a telephone call from our former chair of the PBA Gay and Lesbian Rights Committee, Michael Viola. Of course, on that day in October 2004, such a committee did not exist and Mr. Viola was not yet the chair of anything. The call involved the discussion of forming a committee in the Pennsylvania Bar Association that specifically dealt with the unique issues surrounding the GLBT community.

At that time in 2004 the formation of such a committee was not commonplace among bar associations and was somewhat controversial. The purpose of the committee was not only to deal with legal issues associated with LGBT rights, but also to allow a place for those lawyers who identified as LGBT to feel as though their specific needs were being met. In 2005 the PBA Gay and Lesbian Rights Committee became a standing committee under the leadership of then-President Michael Reed. Michael Viola and J. Alan Fuehrer were our first official co-chairs. Mr. Viola was from the Philadelphia area and Mr. Fuehrer from the Pittsburgh area. It was the perfect combination to begin what would ultimately be the important work of this committee.

At the outset, the committee had to determine its scope and how it would service the legal community. Right from the beginning it was quite clear that we wanted to be sure to have our voice heard on important pending legislation. In 2005, a bill was pending to amend the Adoption Act. The Committee had its work cut out for it as the bill was trying to statutorily preclude GLBT

The EEOC Finds Title VII Proscribes Sexual Orientation Discrimination

By Sharon Rose López, Esq.

Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in the workplace. Title VII does not specifically include or exclude sexual orientation as part of the analysis of sex discrimination. However, in 1998, the United States Supreme Court issued an opinion in Oncale v. Sundowner Offshore Services, Inc., finding same-sex harassment is proscribed under Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). Justice Scalia, who authored the unanimous Oncale decision, reasoned sex-specific and derogatory terms may prove harassing treatment is “because of sex” and therefore proscribed by Title VII.

This line of reasoning is referred to as sex-stereotyping. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Since 1998 the Circuit Courts have addressed sex discrimination cases involving homosexual and transgender employees only within the limited context of sex-stereotyping. However, during the summer of 2015, the EEOC issued an opinion clarifying a more expansive application of Title VII protections for homosexuals beyond sex-stereotyping and finding allegations of discrimination based on sexual orientation alone are sufficient to state a claim for discrimination on the basis of sex. See David Baldwin v. Dep’t of Transportation, EEOC Appeal No. 120133080 (July 15, 2015), http://www.eeoc.gov/decisions/0120133080.pdf.

The Complainant in the Baldwin case was an air traffic control tower supervisor who complained that he was not selected for a manager position because he is gay. The Complainant alleged that when discussing his partner’s recent trip to Mardi Gras in New Orleans, the Complainant’s
Committee Chair Chatter

Jerry Shoemaker, Esq.

We had a successful retreat on Sept. 2, 2015, and we are gearing up for a busy year. At the retreat, we discussed membership, marketing, service to the public, diversity, legislation and strategic relationships. I would like to thank John Schaffranek, Sharon López, Jennifer Ellis, Jane Allen and Courtenay Dunn for their excellent assistance in making the retreat a success by leading discussions on the topics.

At the retreat, we generated a list of ideas to help our Committee develop in each of these areas. We were the first Committee to have a retreat to discuss the topics which mirrored the PBA’s Strategic Plan, so we are ahead of the game and spearheading an effort that hopefully will be a model for other PBA Committees and Sections.

One of the items that made the list of action items is for our Committee to host a reception at the PBA Annual Meeting in May in celebration of the Committee’s 10th anniversary. We are hopeful that the Committee’s leadership from past years will be present to celebrate our ongoing work. At that same celebration, we will present the David Rosenblum Award.

Another issue that our Committee will likely be addressing is the influx of cases that courts are seeing in relation to defining the length of the relationship for same-sex parties who were precluded from marrying. For example, parties may have been together for 20 years, yet only married for one year prior to a dissolution action. In these cases, how are we defining the length of the relationship during which the parties acquired assets? This issue is pending in several courts.

Finally, we discussed potentially drafting a resolution to address the issue of dissolution of civil unions and domestic partnership. Pennsylvania has never recognized these legal relationships and because of this, there is no mechanism to dissolve them. Effectively, this is the same issue practitioners were dealing with when marriage equality was not the law of this Commonwealth, and there are some cases pending currently on this topic.

That is a bird’s eye view of some of the issues our Committee will be faced with over the coming months. Please be sure to attend the monthly conference calls, as we are trying to get everyone involved. There is more than enough work to go around.

Title IX: Progress, but Still Limited Protections for LGBT Students

By Laurie T. Baulig, Esq.

On Nov. 2, 2015, the U.S. Department of Education’s Office of Civil Rights (OCR) determined that an Illinois public high school district violated Title IX, the federal law prohibiting sex discrimination in education, by denying a transgender student access to the girls’ locker room. OCR’s determination letter represents the first time the agency has announced its intent to pursue enforcement action in a case involving discrimination against a transgender student. It also reinforces a 2010 OCR policy document addressing bullying and harassment in schools that expressly found lesbian, gay, bisexual and transgender students protected, at least in part, by Title IX.

Civil rights and LGBT activists have applauded OCR’s aggressive posture in the Illinois case. Many view it as part of the agency’s broader federal effort to expand Title IX’s protections to LGBT students in school districts, as well as colleges and universities, throughout the United States. As I explain below, however, Title IX protects some — but not all — LGBT students from discrimination in education.

Title IX Text and Key Court Decisions

The substantive text of Title IX of the Education Amendments of 1972 provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. “20 U.S.C. §1681 (emphases added). The United States Supreme Court has held that discrimination under Title IX includes “harassment” when it is “so severe, pervasive, and objectively offensive that it can be said to deprive

See Title IX on page 6
people from adopting children. Many conservative members of the legislature were trying to circumvent the outcome of 2002 Pennsylvania Supreme Court decision that allowed second-parent adoptions. The pending changes to the Adoption Act would have done just that. The committee immediately took a stand and drafted a resolution, which was ultimately approved by the Board of Governors. No such bill amending the Adoption Act ever passed. In that inaugural year the Committee also took the steps to draft a policy to be presented at the Board of Governors, which encouraged law firms across the Commonwealth to preclude employment discrimination on the basis of “race, color, religion, sex, sexual orientation or preference, national origin or disability.” It may seem odd to the current members of the committee in 2015 to see the fight the being waged about second-parent adoption and discrimination. In 2005 there was very little protection for the LGBT community. The idea of same-sex marriage was completely foreign. Most same-sex couples were fighting for their rights to custody of their own children and therefore the idea of no longer having the ability to adopt was quite frightening.

The following year, in 2006, the Committee was not discussing marriage equality; rather, it spent most of the year fighting against marriage discrimination. That year, the legislature first introduced a bill to amend the Constitution of the Commonwealth of Pennsylvania prohibiting marriage between same-sex couples. Again, the Committee snapped into action and became the leader in drafting a resolution opposing the Anti-Marriage Amendment, ultimately joined by several other PBA committees and then passed by the Board of Governors. The Committee spent a good bit of time in those early years fighting off a limitation of their rights rather than affirmatively fighting for their rights.

Bringing awareness to LGBT issues was high on the agenda in those early years. First and foremost, our hard-working co-chairs had to make sure everyone across the Commonwealth knew this Committee existed. The best way to accomplish that goal was to coordinate CLE programs. For five years straight, the Committee coordinated the program known as “Missed Opportunities: Issues Affecting the Legal Rights of the Gay & Lesbian Community.” This program was offered in Philadelphia and Pittsburgh and provided information on a wide variety of topics such as immigration, criminal law issues, employment issues, and family law issues. The Committee was also a contributing member to the PBA Minority Bar Committee’s Annual Diversity Summit each year it took place. In addition, the Committee presented an award each year to an outstanding member of the GLBT community. In 2006, the award was presented to the Honorable Ann Butchart who, at the time, was the first openly lesbian judge to be elected to the Common Pleas Court. Judge Butchart still sits today in the Court of Common Pleas of Philadelphia County and there are many more openly gay judges sitting in the Commonwealth. In fact, Montgomery County just elected its first openly gay judge. Dan Clifford, Esquire will be sworn in on January 6, 2016. Hugh McGough, an openly gay District Judge has also just been elected to the Court of Common Pleas in Allegheny County. He also will be sworn in in January 2016. The Committee also worked closely with other affinity groups in the area and made its presence known at certain

See Then and Now on page 4
pride festivals and events throughout the Commonwealth throughout the year.

It may seem odd to think it took until 2005 for the PBA to form such a committee, but ten years ago it finally did happen. The Committee had over 40 members right from the beginning, and it has stayed strong ever since. It recently had a retreat in September of this year. More than 30 members attended for the entire day in Mechanicsburg. Discussions were had over all of the victories for gay rights that have occurred since the inception of this Committee. To think marriage equality is now enjoyed by not only the members of this great Commonwealth but by every member of every state in this country is just something the original leaders of this Committee would not have ever anticipated. To think that the legislature is working so hard and is so close to passing a comprehensive non-discrimination bill including sexual orientation is beyond comprehension.

The original 40 or so members of this Committee might say otherwise, however. They might say they had no doubt. They saw great things to come for the GLBT community and many more things are still to happen. ★

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EEOC

Continued from page 1

supervisor, who was involved in the selection process, told him “We don’t need to hear about that gay stuff.” His supervisor also accused the Complainant of being a distraction when he discussing his same-sex partner with other co-workers in the radar room. The Complainant believed he was denied the promotion because he is gay. He filed a proper complaint with the agency Equal Employment Opportunity Counselor, and the agency processed the complaint under its internal federal agency procedures but not pursuant to Title VII anti-discrimination. Upon review of the agency decision, the EEOC reversed, finding the agency should have processed the claim as a federal sector EEOC complaint subject to LGBT non-discrimination order and protections under Title VII. “Title VII’s prohibition of sexual discrimination means that employers may not ‘rely upon sex-based considerations...when making employment decisions...’” Id. at 5 citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 241-42 (1989); Macy v. Dept of Justice, EEOC Appeal No. 0120120821. “This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.” Id.

Sexual orientation inherently takes gender into account or relies on sex-based consideration.

The EEOC found sexual orientation cannot be “defined or understood without reference to sex.” Id. at 6. Who you are emotionally or sexually attracted to is a question that is answered with a reference to someone’s gender or sex. The EEOC concluded that sexual orientation is “inseparably linked to sex...and involves sex-based considerations.” Id.

Sexual orientation discrimination would not occur but for the sex of the employee.

The EEOC reasoned that gay employees who are harassed because they are attracted to men would not be harassed but for the fact the employee is a man who is attracted to men. In this scenario, it is clear that female employees who are attracted to men are treated more favorably than male employees who are attracted to men. Being treated differently but for your sex is a sex-based consideration and is proscribed by Title VII.

Sexual orientation discrimination is prohibited as associational discrimination.

Title VII prohibits employers from treating employees differently because of their association with a person in a protected class, such as race, religion or sex. The EEOC compared gay and lesbian relationships to the association discrimination cases involving discrimination based on interracial marriage or friendship. Id. at 8 citing Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009). It follows that employers who discriminate against employees who marry their same-sex partners are prohibited from discriminating against the worker because the employer would not have discriminated against the employee had they married a person of the opposite sex.

Discrimination against an employee because the employee does not fit the gender stereotype also prohibits sexual orientation discrimination.

Sexual orientation discrimination is motivated by the employer’s need to “enforce heterosexually-defined gender norms.” Id. at 11 citing Centola v. Potter, 183 F.Supp.2d 403, 410 (D. Mass 2002). The EEOC reasoned sexual orientation discrimination often considers stereotypes about the proper roles of men and women. “The harasser may discriminate against an openly gay co-worker...because he thinks, “real” men should date women and not other men.” Id.

The EEOC distinguished prior decisions excluding sexual orientation from Title VII protections.

Several Circuit Court of Appeals disposed of sexual orientation discrimination claims by concluding summarily Title VII does not prohibit discrimination on this basis. See Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005); DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979). The EEOC reasoned these opinions reached bare conclusions based on precedent and only considered traditional notions of sex. The EEOC reiterated the broader policy proscribing discrimination and harassment in the workplace from the Oncale decision. “[S]tatutory prohibitions often go beyond the principal evil they were passed to combat to cover reasonably comparable evil, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” David Baldwin v. Dep’t of Transportation, Supra, at 11, quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. at 78-80.

The EEOC reasoned Congressional inaction on specific sexual orientation anti-discrimination statutes does not preclude an inclusive reading of Title VII’s inclusion of sexual orientation discrimination.

The EEOC reviewed opinions that clearly state Congressional inaction can mean many things, including the existing statutory language already incorporates the protections or prohibitions. Id. citing Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990). The EEOC further argued that association discrimination, as with the interracial marriage cases, did not create a new protected class, but was subsumed in the prohib-

See EEOC on page 8
the victims of access to the educational opportunities or benefits provided by the school.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999). Moreover, the harassing conduct must “so undermine and detract” from the educational experience that it effectively “denies equal access to an institution’s resources and opportunities.” 526 U.S. at 652.

*Davis* establishes a high bar for recovery of monetary damages in private Title IX lawsuits: the plaintiff must show the institution had “actual knowledge” of the harassing conduct and remained “deliberately indifferent.” 526 U.S. at 642. The Supreme Court has recognized, however, that OCR has the power to “promulgate and enforce requirements that effectuate Title IX’s nondiscrimination mandate” even in circumstances that fall short of the “actual knowledge and deliberate indifference” standard required under *Davis*. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998). Thus, OCR has effectively expanded the reach of Title IX through its administrative authority.

**OCR Standards for Title IX Compliance**

Since the *Davis* decision, OCR has provided guidance on (1) the type of conduct that constitutes “sexual harassment;” and 2) the compliance standard it would apply in investigations and administrative enforcement of Title IX harassment claims:

1. Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, Or Third Parties* (OCR, Jan. 19, 2001).

2. A school is responsible for addressing harassment incidents about which it knows or reasonably should have known...

When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred... If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. “Dear Colleague” Letter from Russlynn Ali, Assistant Secretary for Civil Rights, (OCR, Oct. 26, 2010, at pp. 2-3) (*Ali Letter*).

**OCR Guidance on Title IX’s (Limited) Protection of LGBT Students**

OCR has expressly stated, “Title IX does not prohibit discrimination based solely on sexual orientation.” *Ali Letter* at p. 8 (emph. added). However, “Title IX does protect all students, including lesbian, gay, bisexual and transgender (LGBT) students, from sex discrimination.” *Id.* According to OCR:

- Title IX prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation or hostility based on sex or sex stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex or for failing to conform to stereotypical notions of masculinity and femininity.

- Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target. *Ali Letter* at p. 8 (emph. added); see also “Questions and Answers on Title IX and Sexual Violence” (OCR, April 29, 2014, at pp.5-6).

The idea that sex stereotyping is a form of sex discrimination stems from case law developed under Title VII of the Civil Rights Act of 1964, *See Title IX on page 7*
Title IX

Continued from page 6

which prohibits employers from discriminating “because of sex,” a phrase nearly identical to Title IX’s similar prohibition in education “on the basis of sex.” The leading case in this area is Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which involved a woman’s denial of promotion based on her male colleagues’ negative reaction to her “unfeminine” behavior. In order to improve her chances for partnership at the accounting firm, Ann Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.” 490 U.S. at 235. Another partner recommended she take “a course at charm school.” Id. On these facts, the Supreme Court held that “sex stereotyping” violated Title VII, reasoning, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” 490 U.S. at 250. Hopkins thus established a new theory of sex discrimination in the workplace, which has since been incorporated into case law and administrative enforcement under Title IX.

Summary and Conclusion

The applicability of Title IX to LGBT students can be summarized as follows:

• Title IX does not prohibit discrimination in education on the basis of sexual orientation. Thus, neither a private lawsuit nor administrative complaint to OCR will succeed if based solely on this theory.

• Title IX does, however, prohibit discrimination based on sex-stereotyping. As OCR explains, and as echoed by the Price Waterhouse case, “it can be sex discrimination if students are harassed for failing to conform to stereotypical notions of masculinity and femininity.” “Butch” lesbians and “effeminate” gay men may be able to assert a Title IX claim under this theory (as would heterosexual students who defy stereotypical dress or behavior).

• According to OCR, Title IX also prohibits “gender-based harassment,” and discrimination based on “gender identity,” which captures claims frequently asserted by transgender students. Indeed, in the recent Illinois case mentioned at the beginning of this article, the complaint to OCR alleged that the school district “denied [the student] access to the girls’ locker room because of her gender identity and gender non-conformity.”

• On the other hand, students who identify as lesbian, gay or bisexual, and whose outward gender expression matches their biological sex, will have no recourse under Title IX (unless the harassing or discriminatory conduct is “on the basis of sex” rather than sexual orientation). This final bullet point illustrates the reality that LGBT discrimination can still exist in the classroom and on campuses across this country without the possibility of legal redress. And it may come as a surprise to some that a constitutional right to same-sex marriage does not eliminate all inequities directed at the LGBT community. As is the case with employment, housing and public accommodations, new laws — at both the federal and state levels — are needed to fully protect Pennsylvanians and all Americans from education discrimination on the basis of sexual orientation.

Note: With the exception of the cases cited in this article, all other documents can be found on the website of the U.S. Department of Education, Office of Civil Rights, at the following link: http://www2.ed.gov/policy/rights/guid/ocr/sex.html.

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EEOC

Continued from page 5

The same subsuming of sexual orientation discrimination into the clearly stated prohibition against sex discrimination is therefore supported without the need for new statutory language. Id. at 14 citing Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588-89 (5th Cir. 1998).

Conclusion: The EEOC clarifies several theories by which a gay or lesbian employee can seek anti-discrimination protections in the workplace.

Although federal and anti-discrimination statutory law has not been amended to specifically proscribe sexual orientation discrimination, gay and lesbian workers may file discrimination charges under several theories. 1) Sex-based considerations are inherently considered in sexual orientation cases; 2) Disparate treatment because of sexual orientation is the same as disparate treatment because of sex; 3) Discrimination based on sexual association with a same-sex partner is sex discrimination; and 4) Sex stereotyping is sex discrimination. The law proscribing sex discrimination does not need to explicitly mention sexual orientation to prohibit discrimination on that basis in the workplace. Just as the Oncale v. Sundowner Offshore Services, Inc. decision marked a sea change in the workplace that articulated possible workplace protections for gays and lesbians, the David Baldwin v. Dep’t of Transportation decision shifts the argument. The agency charged with enforcing the anti-discrimination laws spoke clearly that protections are not merely possible, but they are present and real.

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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.

Upcoming PBA Events

Commission on Women in the Profession Full Commission Meeting
Jan. 11, 2016 • Harrisburg, Philadelphia and Pittsburgh

Family Law Section Winter Meeting
Jan. 15-17, 2016 • Lancaster Marriott at Penn Square
Get more information on the Events Calendar, including meeting brochure and link to make online hotel reservations.

PBA Midyear Meeting
Jan. 27-31, 2016 • Westin St. Maarten Dawn Beach Resort & Spa
St. Maarten, Netherlands Antilles

50th Annual Conference of County Bar Leaders
Feb. 25-27, 2016 • Nittany Lion Inn, State College
Get more information on the Events Calendar including links to the meeting brochure and online registration.

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