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Predicting the Unpredictable: The Future of LGBTQ Protections Under the Trump Administration

LGBT Discrimination

The task of predicting whether the Trump administration will continue the Obama administration's trend toward protecting LGBTQ individuals in a variety of areas is nearly impossible. In this *Bloomberg Law* Insights article, Ballard Spahr attorneys Shannon Farmer and Ashley Wilson discuss the potential impact the Trump administration could have on LGBTQ rights. Given the large number of vacancies on the federal bench and the ability to change the leadership of nearly all federal agencies, they say, the impact could be significant. However, they add, regardless of what happens at the federal level, state and local governments can continue to offer additional protections.

BY SHANNON FARMER AND ASHLEY WILSON

The task of predicting whether the Trump administration will continue the Obama administration's trend toward protecting LGBTQ individuals in a variety of areas is nearly impossible. On one hand, President Trump mentioned several times during his presidential campaign that discrimination would have no place in his administration. During that same campaign, however, President Trump confirmed that he would support the First Amendment Defense Act, which, if signed into law, would prevent the federal government from taking adverse action against people, businesses, or institutions that discriminate based on sexual orientation arising out of a belief that marriage is (or should be recognized as) the union of a man and woman or that sexual relations should be limited to such a marriage.

On Jan. 31, 2017, the White House announced that President Trump would not repeal Executive Order 11478, signed by President Obama in July 2014, which prevents federal contractors from discriminating based on a person's sexual orientation or gender identity. The statement noted that President Trump ''is proud to have been the first ever GOP nominee to mention the LGBTQ community in his nomination acceptance speech, pledging then to protect the community from violence and oppression.''

Ballard Spahr's Shannon Farmer, a partner, and Ashley Wilson, an associate, are members of the firm's Labor and Employment practice. They represent employers and advise them on all types of civil rights issues, including LGBTQ matters.

That same day, however, a draft of an executive order on religious freedom protections leaked. The order, ''Establishing a Government-Wide Initiative to Respect Religious Freedom,'' weakens anti-discrimination policies that protect LGBTQ workers, taking an expansive view of what constitutes ''religious freedom'' and granting exemptions to people and private organizations that oppose same-sex marriage and transgender identity. In relevant part, it reads: ''Americans and their religious organizations will not be coerced by the federal government into participating in activities that violate their conscience and will remain free to express their viewpoints without suffering adverse treatment from the federal government.'' When questioned, the White House explained that the draft is one of hundreds that are in circulation and that not all reflect the administration's thinking. It further stated that President Trump did not have any plans to sign it at the time.

On Feb. 5, 2017, Vice President Mike Pence said in an interview that anti-LGBTQ discrimination has ''no place'' in President Trump's administration, confirming

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both his and President Trump's support for LGBT individuals. But as governor of Indiana, Pence signed into law a religious freedom bill allowing businesses to refuse service to LGBTQ individuals based on religious beliefs. In addition, while in Congress, Vice President Pence voted against employment discrimination protections for LGBTQ workers. *See* Liam Stack, *Trump Victory Alarms Gay and Transgender Groups*, New York Times (Nov. 10, 2016), *available at* https://www.nytimes.com/2016/11/11/us/politics/trump-victory-alarms-gay-and-transgender-groups.html?_r=0. However, without further clarification of the Vice President's current views, no reliable predictions can be made about how, and in what direction, he could try to influence the administration's policies on LGBTQ rights.

Changes in protections for the LGBTQ community at the federal level could come through legislative action by Congress, through administrative action by federal agencies, or through the federal courts and could touch on areas such as employment, education, and marriage, among others. For example, former Secretary of State Hilary Clinton granted transgender individuals the right to change the gender on their passports to match their gender identity. This policy could be revoked by the State Department under Secretary Rex Tillerson.

Given the large number of vacancies on the federal bench and the ability to change the leadership of nearly all federal agencies, President Trump could have a significant impact on LGBTQ rights at the federal level. Regardless of what happens at the federal level, state and local governments can continue to offer additional protections.

Title VII and Protection Against Discrimination in Employment

Title VII of the Civil Rights Act of 1964 established that ''it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.'' Today, it is generally understood that, in addition to someone's physical sex, individuals can also be discriminated against based on their gender identity and sexuality. Over the last 15 years, the fight has been about whether Title VII protects gender identity and sexuality, because, as written, Title VII does not expressly prohibit discrimination on these bases.

At the legislative level, additional federal protections for sexual orientation and gender identity in employment seem unlikely in the near future. Congress has repeatedly rejected attempts to expand Title VII's protections to explicitly address sexual orientation and gender identity discrimination. For example, some version of the Employment Non-Discrimination Act (ENDA), which would prohibit employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity in the workplace, has been introduced to Congress in every session since 1994. The closest that ENDA has come to passing was in 2013 when the Senate passed ENDA, but 80 percent of the House of Representatives voted against its passage. Given the current composition of Congress, it appears unlikely that ENDA will be enacted in the near future. Actions by the federal courts and the Equal Employment Opportunity Commission (EEOC) could render ENDA unnecessary, however.

Since at least 1989, federal courts have held that Title VII's protections against discrimination on the basis of sex include protections for individuals who are discriminated against or subjected to a hostile work environment because of the perception of supervisors or coworkers that they do not meet certain sex-based stereotypes. *See, e.g., Oncale v. Sundowner Offshore Serv.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, Ann Hopkins alleged that the company had discriminated against her when it denied her a promotion in part because other partners at the firm felt that she did not act as a woman ''should.'' The U.S. Supreme Court found that the facts constituted evidence of sex discrimination, explaining that ''[i]n the . . . context of sex stereotyping, 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.''*

Notably, the sexual orientation or gender identity of the aggrieved employee may not be relevant or even known to the court because the employee is only required to demonstrate that they were targeted because of others' perceptions. For example, on March 23, 2017, a federal district court in Pennsylvania denied a former employer's motion to dismiss, holding that Title VII prohibits gender stereotyping and discrimination. *See Ellingsworth v. The Hartford Ins. Agency, Inc.*, No. 5:16-cv-03187 (E.D. Pa. Mar. 23, 2017). In *Ellingsworth, the plaintiff, whom the opinion notes is not a member of the LGBTQ community, alleged she suffered bias and harassment because of her appearance and perceived sexual orientation. Allowing the case to proceed, the court found that Marykate Ellingsworth had alleged a plausible claim that she was discriminated against ''because of her sex.''*

These court cases may provide protection for LGBTQ individuals who are perceived to be outside of traditional gender norms. They do not, however, provide protection for LGBTQ status itself. As a result, under the Obama administration, the EEOC attempted to secure greater protections through its own enforcement efforts under Title VII.

In 2012, the EEOC released its Strategic Enforcement Plan, which included the protection of LGBT individuals as a top priority. Since then, the EEOC has pressed an aggressive litigation stance on sexual orientation discrimination under Title VII.

On July 15, 2015, the EEOC held that discrimination on the basis of sex includes discrimination on the basis of sexual orientation in violation of Title VII. *See Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (2015)). In its opinion, the EEOC wrote that ''sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.'' The EEOC explained that sexual orientation necessarily involves treating workers less favorably because of their sex. It further noted that sexual orientation is rooted in noncompliance with sex stereotyping and gender norms.*

The effect the Baldwin decision will have on sexual orientation discrimination jurisprudence more generally remains to be seen because the decision itself only directly affects the rights of federal employees, over whose discrimination claims the EEOC has adjudica-

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tory power. In addition, it is unclear whether the EEOC will continue its expansive view of Title VII under the Trump administration. President Trump has appointed Victoria A. Lipnic as Acting Chair of the EEOC and she was one of two commissioners who voted against the *Baldwin* decision. In addition, President Trump can immediately fill one open seat, and will have a second vacancy to fill when former Chair Jenny R. Yang's term expires in July. With these appointments, Republicans likely will hold the majority of the five-member EEOC. In addition, President Trump can immediately nominate a new EEOC general counsel who is likely to help shape the EEOC's legal views. On the other hand, changes in EEOC policy, unlike cabinet-level agencies, tend to occur more slowly because its actions are primarily determined by the votes of its bipartisan commissioners. As a result, unless and until the EEOC rules to the contrary in a future case, discrimination by a federal agency based on sexual orientation is unlawful.

Recognizing the limited reach of its adjudicatory powers, the EEOC has also used its ability to act as a plaintiff to advance its agenda to protect LGBTQ rights. For example, in *EEOC v. Scott Medical Health Center, P.C., Case 2:16-cv-00225-CB (2016), the EEOC argued that a teleworker was subject to harassment and constructively discharged based on her sexual orientation in violation of Title VII. Notably, the EEOC announced that it was pursuing this case for the purpose of seeking federal court rulings that match its own position in Baldwin that Title VII protects sexual orientation and gender identity itself, not just failure to conform to stereotypes. On Nov. 4, 2016, a federal district court in Pennsylvania denied the employer's motion to dismiss and held that ''Title VII's 'because of sex' provision prohibits discrimination on the basis of sexual orientation.'' Previously, in Bibby v. Philadelphia Coca-Cola Bottling, 260 F.3d 257 (3d Cir. 2001), the Third Circuit held that ''Title VII does not prohibit discrimination on the basis of sexual orientation.'' Responding to the Bibby decision, the court in Scott stated that its facts were distinguishable on the following: (1) the Bibby plaintiff did not base his argument on the relationship between sexual orientation and sex stereotyping; (2) most of Title VII jurisprudence on which the Third Circuit in Bibby relied either predated Price Watehouse or did not analyze Title VII in depth; and (3) since Bibby, several federal district courts have held that Title VII prohibits sexual orientation discrimination.*

Whether the EEOC's legal strategy continues in this case and others and whether it is successful will have a significant, national impact on the rights of the LGBTQ community to protection from discrimination in employment and harassment in the workplace. It is worth noting that since being appointed, Chair Lipnic has stated that the EEOC is not changing its strategic priorities, suggesting, at least for now, that no change in the EEOC's focus is imminent.

At the circuit level, on April 4, 2017, the Seventh Circuit became the first federal appellate court to accept the EEOC's position on LGBTQ discrimination. *See Hively v. Ivy Tech,* No. 15-1720 (2016). In *Hively*, the plaintiff brought a claim under Title VII against her former employer, alleging that she was repeatedly passed over for full-time employment and ultimately discharged because she is a lesbian. A Seventh Circuit panel, albeit conflicted, upheld a lower court's dismissal on the plaintiff's case, noting that it was bound by its own precedent to find that Title VII does not cover sexual orientation discrimination. Sensing the magnitude of the issue, the majority of the court agreed to hear the case en banc. At argument, several judges seemed to embrace the position of the plaintiff and the EEOC that discrimination on the basis of sexual orientation is necessarily because of sex, and the opinion written by Chief Judge Diane Wood echoed that sentiment. In its opinion, the court explained that its holding was based in part on *Price Waterhouse*, ''as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.''

The *Hively* decision sets up a circuit split with the Eleventh and, potentially, Second Circuits. On March 27, 2017, the Second Circuit in *Anonymous v. Omnicom Group, Inc.*, No. 16-748 (2017), reinstated claims that the court found alleged discrimination on the basis of gender stereotyping, not sexual orientation. The Second Circuit explained that, while there was circuit precedent holding that discrimination based on sexual orientation is not covered by Title VII, LGBTQ individuals are still entitled to the same level of protection as heterosexual individuals for gender stereotyping under Title VII. A few weeks earlier, on March 10, 2017, a divided Eleventh Circuit panel held that Title VII does not protect against discharge based on sexual orientation, relying on a 1979 Fifth Circuit decision. *Evans v. Georgia Regional Hosp.,* Case 15-cv-15234 (2017). Notably, the court held that gender nonconformity is a separate cause of action, protected by Title VII, not ''just another way to claim discrimination based on sexual orientation.''

This circuit split can only be resolved by the U.S. Supreme Court, rendering vital the Court's composition when the Court decides to address it.

Title IX and the Rights of Transgender Students

The Obama administration sought to use other federal laws to extend protections to LGBTQ individuals outside of employment. These efforts are currently under attack and their future is uncertain in the courts and in the Trump administration.

In January 2015 and May 2016, the Department of Education issued guidance instructing schools and other covered entities that failing to allow students to use the bathroom and other facilities that matches their gender identity would place them in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., into law. Title IX prohibits sex discrimination in federally funded education programs and activities, including not only colleges, universities, elementary, and secondary schools, but also training programs operated by a recipient of federal financial assistance. The guidance interpreted the prohibition on sex discrimination to include protection of gender identity.

Legal challenges to the guidance were filed in federal courts in Nebraska and Texas by two groups made up of 23 states. A Texas district court issued a nationwide injunction in August 2016 blocking the guidance. *See Texas v. United States*, Case No. 7:16-00054-O (N.D. Tex. 2016). The Department of Justice filed an appeal to the Fifth Circuit, which was pending at the time of President Trump's inauguration. On Feb. 22, 2017, the Trump administration withdrew the guidance, leading to voluntary dismissal of both the Texas and Nebraska cases. The joint letter from Attorney General Jeff Sessions and Education Secretary Betsy DeVos criticized

the guidance for not having gone through the process of public notice and comment and for lacking legal analysis tied to the language of Title IX itself.

Litigation over whether Title IX protects transgender students is far from over. In 2014, the American Civil Liberties Union (ACLU) filed a complaint with the Department of Justice and Department of Education on behalf of a transgender high school student, Gavin Grimm, alleging that denying him the right to use the bathroom and locker room facilities that match his gender identity violates Title IX. Based on the Department of Education's 2015 guidance, Grimm sued his school district in federal district court in Virginia seeking an injunction to allow him to use the boys' bathroom. *See G.G. v. Gloucester County Sch. Bd.*, Case No. 4:15-cv-00054-RGD-DEM (2015). The district court denied the injunction, but the Fourth Circuit reversed and remanded the case in April 2016, finding that the district court did not accord sufficient weight to the Department of Education guidance. Case No. 15-2056 (2016). The school district appealed to the Supreme Court, which granted certiorari and was scheduled to hear arguments on March 28, 2017. *See Gloucester County Sch. Bd. v. G.G., Case No. 16-273 (2016). After the Department of Education guidance was withdrawn, however, on March 6, 2017, the Supreme Court vacated its grant of certiorari, over the objections of both parties, and remanded the case to the Fourth Circuit to consider the case in light of the revoked guidance.*

Other litigation on the issue is pending as well on both sides of the debate. In February 2017, a federal district judge in Pennsylvania ruled in favor of three transgender students who challenged their school's bathroom choice policy under the equal protection clause of the 14th Amendment to the U.S. Constitution and Title IX, granting a preliminary injunction to allow them to use the bathroom of their gender identity while the litigation is pending. *See Evancho v. Pine-Richland Sch. Dist.*, Case No. 2:16-cv-01537-MRH (W.D. Pa. 2016). In its decision, which came days after the Department of Education's Title IX guidance was withdrawn, the court found that the students were likely to succeed on the merits of their equal protection clause claim but unlikely to prevail on their Title IX claim.

On the opposite side of the issue, a Berks County, Pa., school district was sued on March 21, 2017, by a high school student represented by two conservative faith-based organizations alleging that the school's policy of allowing students to use the restroom and locker facilities that match their gender identity violates the student's rights. *See Doe v. Boyertown Area School Dist. et al., Case No. 5:17-cv-01249-EGS (E.D.Pa. 2017). The complaint alleges violation of the ''right to bodily privacy contrary to constitutional and statutory principles, including the Fourteenth Amendment, Title IX, invasion of seclusion, and the Pennsylvania's Public School Code of 1949.''*

Even with the Trump administration's withdrawal of the Department of Education guidance, it is likely that the issue of protections of transgender students in school and what some consider to be the competing rights of their classmates will be litigated in the federal courts for years to come. Ultimately, these issues are likely to be resolved by the U.S. Supreme Court, making its composition crucial.

Section 1557 of the Affordable Care Act and Discrimination in Health Care

In May 2016, the U.S. Department of Health and Human Services (HHS) issued a final regulation under Section 1557 of the Affordable Care Act (ACA) that would require hospitals and health care providers to provide gender transition services and procedures and would require group health care plans to cover these procedures and services. Section 1557 prohibits discrimination on the basis of sex, just as Title IX does.

Several states and medical groups sued in federal district courts in Texas and North Dakota, arguing that the rule violates the Religious Freedom Restoration Act and the Administrative Procedures Act (APA). On Dec. 31, 2016, the Texas court issued a nationwide preliminary injunction blocking the rule, holding that HHS did not have the authority to change the definition of sex discrimination and likely violated the APA by doing so. *See Franciscan Alliance, Inc. v. Burwell, Case No. 7:16-00108 (N.D. Tex. 2016). The judge who issued the injunction is the same one who enjoined the Obama administration's transgender guidance under Title IX. After the election, the ACLU sought to intervene in the case out of a concern that the Trump administration would not defend the HHS regulation. The judge denied that request in January 2017. The government did not appeal the preliminary injunction, which the plaintiffs are currently seeking to have made permanent.*

In light of the Trump administration's failure to appeal the preliminary injunction, its withdrawal of the Title IX guidance, and its expressed desire to repeal the ACA, it appears unlikely that the HHS regulation will ever go into effect in its current form.

Same-Sex Marriage

In 2015, the U.S. Supreme Court held that same-sex marriage was protected by the U.S. Constitution, striking down state law bans. *See Obergefell v. Hodges,* 135 S.Ct. 2584 (2015). Some have questioned whether that decision is placed at risk by the upcoming changes in the composition of the Supreme Court. It is unlikely that new Supreme Court Judge Neil Gorsuch would lead to a change in the Court's jurisprudence on same-sex marriage. Judge Gorsuch will be replacing Justice Antonin Scalia, who was a dissenter in *Obergefell* decision. Therefore, his replacement by another conservative justice is unlikely to change the balance of the Court on this issue.

Even if President Trump has the opportunity to replace one or more additional justices with conservative appointees, there is reason to question whether the Court will change course on same-sex marriage. The Supreme Court has historically been reluctant to revoke rights that have previously been granted by the Court, particularly in the area of personal liberties and fundamental rights, no matter the personal views of later justices. Here, if the decision were reversed there could be widespread disruption not only to people's relationships, but also to parental rights, tax laws and property rights. These concerns may well convince the Supreme Court to use restraint in revisiting the issue.

What remains to be seen is how state attempts to test the limits of same-sex rights will fare. The position taken by the Trump administration, in addition to the views of the judges whom President Trump appoints, could influence the shape of these efforts for years to come.

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