OUTside Influence

In this issue

Message from the Chair

Welcome to the inaugural LGBT Law Section Newsletter, "OUTside Influence." In the upcoming year, we plan on growing this Section and enhancing its programming. In this time in our history, when LGBT rights are front and center of current events, court challenges, and daily conversations, it is important to get involved.

As you will see below, we are excited that the Section received a Section/Division Recognition Award from the FBA at the national conference on September 16! We now have a quarterly newsletter in which your announcements and articles are welcome. Also, stay tuned for upcoming networking events. If you are interested in contributing to the newsletter or organizing an event in your area, please reach out to any of the LGBT Law Section Board members. I can be reached at cbadlani@hsplegal.com or LGBTSection@gmail.com.

LGBT Law Section Officers

Chair
Chirag Badlani
Chicago, IL
cbadlani@hsplegal.com

Secretary
David Thompson
New York, N.Y.
dthompson@sctlaw.nyc

Vice Chair
Amelia Wilson
Washington, D.C.
mimi.wilson@gmail.com

Treasurer
David Greco
San Diego, CA
dgreco@nicholaslaw.org

Membership Chair
Brandon King
Washington, D.C.
brmking16@gmail.com

LGBT Law Section Received Section/ Division Recognition Award from FBA

The LGBT Law Section received a Section/Division Recognition Award from FBA national at the 2017 Annual Meeting and Convention of the FBA (September 14-16 in Atlanta, GA). We are very proud, as a newly-formed Section, to be recognized. The Section/Division Recognition Awards recognize excellent administration and leadership efforts, substantive programming and content, and membership outreach and communication. In addition to LGBT Law Section's work establishing itself as an entity, within the last nine months our Section:

- Co-sponsored an event hosted by the Muslim Bar Association of New York, "Path to the Bench with the Honorable Denny Chin of the Second Circuit," on February 16, 2017, in New York, N.Y.;
- Partnered with the with the FBA EDNY Chapter as co-host and co-organizer of the first annual New York Diversity Forum, which was part of the FBA's National Community Outreach Project, April 27, 2017, in Brooklyn, N.Y.;
- Was one of the sponsoring organizations of a day-long CLE event in New Orleans on April 7, 2017, called the "Civil Rights Étouffée," spearheaded by the FBA Civil Rights Law Section, where the Section hosted a panel on the religious-immunity law Mississippi law HB 1523 called "'Religious Freedom' vs. LGBT Equality: Legislative Attempts to Empower Anti-LGBT Discrimination."

The Federal Bar Association's 2017 Annual Meeting and Convention, September 14-16

The Federal Bar Association's 2017 Annual Meeting and Convention took place September 14-16 at the Westin Peachtree Plaza, situated in the heart of Atlanta, with a varied program of events. If you have images or stories about the conference you wish to share, please let us know!

As we look forward to future conferences, please share ideas for panels or presentations about LGBT Law issues.

Can we talk?

Ask Your Friends to Join Our Next Open Call

Starting in November, the LGBT Law Section will hold regular phone conferences open to non-member guests of members. We want to let potential new members learn more about us and current issues facing our membership. Some Open Calls will feature guest speakers. You can invite friends and colleagues to join the call. If there's an issue you want to talk about, we can put you on the agenda. Questions? Email us at LGBTSectionFBA@gmail.com.

Update: LGBT Plaintiffs Challenging Mississippi's Religious Immunity Law Lose in the 5th Circuit – Petition for Rehearsing *en banc* is Pending

By David Thompson, Secretary

This spring, the LGBT Law Section hosted two panel discussions (in New Orleans on 4/7; in New York City on 4/28) concerning Mississippi law HB 1523, a religious immunity law which allows government employees, companies, medical providers, and providers of children's services to discriminate against LGBT people, and immunizes them from any penalty if they claim a religious motivation. Notably, among other aspects of the law, the law immunizes anti-LGBT discrimination by providers of services "assisting abused or neglected children," and by foster parents who impose anti-LGBT beliefs on the children in their custody.

At the time of the LGBT Law Section panels in April, two lawsuits challenging HB 1523 (*Barber v. Bryant*,[1] and Campaign for *Southern Equality v. Bryant*[2])had resulted in an injunction by a federal district court against enforcement of the law, and the Fifth Circuit had just heard oral argument appealing that decision.[3] Attendees at the panels heard members of the legal teams fighting against the religious immunity law give their insights into the case and what might come next.[4]

On June 27th, the Fifth Circuit vacated the district court's injunction and dismissed both lawsuits. A request for en banc review is now pending.

The plaintiffs challenging HB 1523 contended that it violates the First Amendment's Establishment Clause. Unlike Mississippi's existing "religious freedom" law, which already provides a high level of protection for the exercise of any religious belief,[5] HB 1523 singles out three particular religious beliefs -- which condemn LGBT marriage, sex and gender identity -- for special and additional protection. The plaintiffs also argued that Equal Protection forbids protecting some religious believers and not others, and that it also forbids withdrawing the State's legal protections from LGBT people, and only LGBT people, treating them less favorably than all others. The district court agreed, and enjoined enforcement.

Reversing the lower court, the Fifth Circuit held that all plaintiffs (which included LGBT couples, LGBT-friendly clergy, and others) lacked standing because they did not suffer particularized injury. The Fifth Circuit rejected analogies to "religious display" cases, such as those where the local city hall erects a cross, and other religious exercise cases, such as those in which the public high school football game begins with an official prayer. The court said that the plaintiffs in those fact patterns were "confronted" with the State's endorsement of a religion. According to the 5th Circuit, no one is "confronted" by a law merely because it is on the books. Therefore, there is no injury until the law in enforced. For similar reasons, the Fifth Circuit held that there was no Equal Protection claim for either the plaintiffs who were non-believers in the privileged anti-LGBT beliefs, or for LGBT plaintiffs who are the stated targets of such beliefs.

The legal teams arguing against this narrow construction of plaintiff standing argued that the position ultimately adopted by the Fifth Circuit would mean that Mississippi could legislatively declare Southern Baptism the official state religion, and such a law might stand immune to challenge. That argument did not sway the Fifth Circuit panel.

To be clear: the Fifth Circuit did not rule that HB 1523 is constitutional. However, unless en banc review is granted and the current decision is reversed, the law will be allowed to take effect. Under the Fifth Circuit's conception of standing, each provision of HB 1523 must await its own plaintiff who has been "personally confronted" by or suffered injury from implementation of such provision, meaning that any future suit challenging the employment or public accommodations provisions of the law will have no impact on those affected by the housing or family law provisions. The injunction will remain in place while the full court considers the petition for rehearing *en banc*.

David Thompson, partner in the civil rights law firm Stecklow and Thompson, is secretary of the LGBT law section of the Federal Bar Association. He is past cochair of Marriage Equality New York, a grassroots political action organization that fought for same-sex marriage in New York State. Thompson joined Stecklow & Thompson in 2011 and specializes in commercial litigation and civil rights law. Thompson is a graduate of the Cardozo School of Law and served in the chambers of United States District Court Judge Shira A. Scheindlin.

Endnotes

[1]*Barber v. Bryant*, 16-cv-00417 (S.D. Miss).

[2]*Campaign for Southern Equality v. Bryant,* 16-cv-00442 (S.D. Miss).

[3]Fifth Circuit Docket # 16-60477.

[4]The New Orleans panel included Robert B. McDuff of McDuff & Byrd, lead attorney of the legal team in *Barber v. Bryant*, Alysson Leigh Mills of Fishman Haygood, lead local counsel in *Campaign for Southern Equality v. Bryant*, and J. Dalton Courson of Stone Pigman Walther Wittmann, a leading member of the LGBT bar in New Orleans. In New York, we heard from Susan Sommer of Lambda Legal Defense & Education Fund, which is playing a key role in the Barber v. Bryant appeal.

[5]Mississippi's 2014 Mississippi Religious Freedom Restoration Act (SB 2681) says that if any person claims that state action has impinged (or might impinge) on their exercise of religion, then the state bears the burden to justify the action by overcoming a statutory strict scrutiny test, showing that the action is the least restrictive means to achieve a compelling state interest.

President Trump Formalizes Transgender Military Ban; Lambda Legal Defense and ACLU Suit in Federal Courts

By David Thompson, Secretary

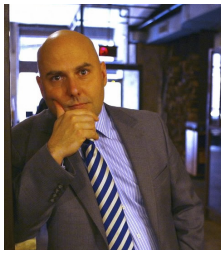
On Friday, August 25th, President Trump formally issued a directive instructing the military to implement a ban on openly-transgender service members and on medical services related to gender transition.[1] This directive reverses a June 30, 2016 directive of the Department of Defense declaring that existing service members who were transgender could serve openly and receive medical care. A process put in place by the Obama administration would have allowed openly transgender recruits to join the armed forces.[2]

On Monday, August 28th, Lambda Legal Defense and Education Fund and the ACLU each filed lawsuits in federal court seeking to enjoin the announced ban. On August 31st, GLBTQ Legal Advocates & Defenders and the National Center for Lesbian Rights filed suit as well.

The ACLU lawsuit was filed in the District of Maryland, where it has been assigned to District Judge Marvin J. Garbis.[3] The suit asserts 5th Amendment equal protection and due process claims on behalf of a number of presently-serving transgender military members. The suit argues that the Obama-era policy amounted to a decision to hold transgender troops to the same fitness and readiness standards as other troops, and that reversal of the policy will impose disadvantages on those troops which are unrelated to the military-wide standard of troop readiness. The suit also argues that the military's various steps to implement this policy caused reliance on the part of the plaintiffs, citing in particular a June 2016 Open Service Directive which allowed open service by current transgender service members, and a September 2016 Implementation Handbook which encouraged transgender service members to be "open and honest" about their gender identity and/or need for related medical care (which the Handbook stated would be provided). The ACLU of Maryland also joins as a plaintiff, asserting its interest in protecting its members as well as non-members from the effects of the policy.

The Lambda Legal Defense lawsuit was filed in the Western District of Washington (Seattle), where it has been assigned to District Judge James L. Robart.[4] The plaintiffs include not only current transgender service members, but transgender people wishing to join the military. The Lambda lawsuit, like that of the ACLU, asserts 5th Amendment equal protection and due process claims. The complaint describes the systematic debate and analysis which led to the June 2016 Open Service Directive as involving all military branches and relevant offices within the DoD, and employing RAND Corporation to provide an independent analysis of key issues such military readiness. The complaint alleges that, in contrast, the Trump administration directive was issued without having, or seeking, a factual basis for the change in policy. The complaint echoes the reliance argument of the ACLU lawsuit. The suit alleges that the new policy, which once again conditions service in the military on silence about one's transgender status, is a violation of all plaintiffs' First Amendment rights to free speech. The plaintiffs include the Human Rights Campaign and the Gender Justice League of Washington State, seeking relief on behalf of their members.

The GLBTQ Legal Advocates & Defenders and the National Center for Lesbian Rights suit, *Doe v. Trump*, is filed on behalf of several Jane/John Doe plaintiffs. The plaintiffs urge that strict scrutiny be applied to the ban, arguing that transgender people are subject to exactly the sort of "history of purposeful unequal treatment" that the Supreme Court has held justified strict scrutiny review of government actions targeting other groups.[5] If the court agreed, this would break new ground in LGBTQ legal rights. Notably, the Supreme Court's major LGBT-rights decisions in the last 20 years have taken no position on whether enhanced scrutiny should apply, even as they have granted major victories to the LGBTQ community.



David Thompson, partner in the civil rights law firm Stecklow and Thompson, is secretary of the LGBT law section of the Federal Bar Association. He is past cochair of Marriage Equality New York, a grassroots political action organization that fought for same-sex marriage in New York State. Thompson joined Stecklow & Thompson in 2011 and specializes in commercial litigation and civil rights law. Thompson is a graduate of the Cardozo School of Law and served in the chambers of United States District Court Judge Shira A. Scheindlin.

The LGBT Law Section will monitor developments in these cases, and welcomes member questions and comments. Email: LGBTSection@gmail.com

Endnotes

[1]The President's directive states: "I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects [on military effectiveness and lethality, unit cohesion, and military resources]." See https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-

Continued on page 6

Whether Title VII Forbids Sexual Orientation Discrimination is Now Ripe for SCOTUS Review

By Don Davis, President, LGBT Bar Association of the District of Columbia, Associate, Employment, Labor & Benefits Practice Group, Mintz Levin

Ripe for decision this term – if the United States Supreme Court grants the recently filed petition for certiorari in *Evans v. Ga. Reg'l Hosp*., 850 F.3d 1248 (11th Cir. 2017) – is whether Title VII's explicit proscription against sex discrimination also forbids an employer from discriminating against an applicant or employee because they are gay, lesbian, or bisexual.

Two women, Kimberly Hively and Jameka Evans – both of whom allege they were targeted for employment discrimination because they are attracted to other women – set the stage for a judicial showdown between the two camps in this battle. Evans is the plaintiff whose loss before the Eleventh Circuit may be taken up for Supreme Court review; Hively's victory before the Seventh Circuit sets up the circuit split which makes *certiorari* a possibility. On one side of the issue are those who say that the courts cannot and should not interpret the text of Title VII to include sexual orientation within the scope of Title VII's ban on sex discrimination, and that it is only within the province of Congress to do so. On the other side are those, including Chief Judge Wood of the Seventh Circuit and a majority of her Seventh Circuit colleagues, who quip that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" To add to the mix, the full Second Circuit Court of Appeals also seems poised to weigh in, granting rehearing *en banc* on the question in *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), after a three-judge panel said it was bound to follow circuit precedent that sexual orientation discrimination is not encompassed by the civil rights statute.

In Evans' case, the Eleventh Circuit fastened its seatbelt for a ride in its time machine back to 1979, dusting off a case decided by its jurisdictional predecessor (*Blum v. Gulf Oil Corp*., 597 F.2d 936 (5th Cir. 1979)) that the court said precludes it from ruling in Evans' favor. Critics of the Eleventh Circuit's decision (including a dissent from the panel's majority opinion by Circuit Judge Rosenbaum) say that the panel ignored several enlightened decisions of the Supreme Court in the intervening years since the Fifth Circuit ruled that Title VII does not contemplate protection against sexual orientation discrimination.

Indeed, the Seventh Circuit relied on those intervening Supreme Court cases in its *en banc* decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017), becoming the first federal appellate court to hold that Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of sexual orientation.

Building on a series of Supreme Court decisions extending Title VII's protections against sex discrimination beyond the common interpretation of the statutory text in other similar realms, in *Hively* the Seventh Circuit determined that the statute's prohibition on sex discrimination encompassed discrimination on the basis of sexual orientation regardless of whether "Congress … realized or understood the full scope of the words it chose." The court noted, for example, that in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), the late Justice Antonin Scalia extended Title VII's protections to same-sex victims of sexual harassment because, while same-sex harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII … [s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

In the view of the Seventh Circuit in *Hively*, Supreme Court precedent holding that Title VII prohibits same-sex harassment and gender stereotyping, combined with Fourteenth Amendment prohibitions against restricting access to marriage based upon race and sex, led inexorably to the conclusion that Title VII forbids sexual orientation discrimination. The eight-judge majority rested its conclusion on three principal theories: (1) discriminating against individuals because of their sexual orientation is engaging in sex stereotyping in violation of Title VII; (2) sexual orientation discrimination is "paradigmatic sex discrimination," meaning the plaintiff was subject to sex discrimination due to the fact that she was a woman dating a woman rather than a man dating a woman; and (3) sexual orientation discrimination is associational discrimination, a theory borne out of Fourteenth Amendment marriage jurisprudence and frequently applied in Title VII cases.

The Seventh Circuit first observed that in *Price Waterhouse v. Hopkins* (1989), the Supreme Court determined that an employer unlawfully discriminated against a female associate when it denied her partnership because she failed to conform to its notions of how a woman should act and dress. The Seventh Circuit reasoned that discriminating against a woman because she is a lesbian is exactly the same: lesbians fail to conform to stereotypes about women; namely, that women should form intimate relationships with men. Accordingly, the court opined, Hively represented the "ultimate case of failure to conform to the female stereotype … she is not heterosexual." Moreover, the court stated, in *Oncale* the Supreme Court rejected earlier cases concluding that Title VII's drafters intended only to protect women against male-initiated harassment, clarifying that a man can bring a sexual harassment claim against another man. In the Seventh Circuit's view, together these cases represented a departure from a traditional understanding of sex-based discrimination and

opened the door for broader protections under Title VII.

Next, the Seventh Circuit applied the "comparative method" to "isolate the significance of the plaintiff's sex to the employer's decision." The court asked, "has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?" Answering this question in the negative, the court found that Hively prevailed under a simple textual analysis. She was, indeed, denied employment "because of…sex." In other words, according to Hively's allegations, if she were a man dating a woman the employer would not have refused to hire her into a full-time position.

Finally, the Seventh Circuit extrapolated from the holdings in two landmark marriage rights cases to conclude that discrimination against a gay or lesbian person is unlawful associational discrimination because of sex. In *Loving v. Virginia*, 388 U.S. 1 (1967) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Supreme Court invalidated state marriage laws that forbade, respectively, mixed-race and same-sex marriages. *Loving* established that discrimination on the basis of the race with whom a person associates is a form of racial discrimination. *Obergefell* applied that reasoning to same-sex relationships when it invalidated state laws that discriminated in the provision of marriage licenses based upon sex. In *Hively,* the court noted that its panel had previously identified the illogical legal regime earlier decisions had established "in which a person can be married on Saturday and then fired on Monday for just that act." While the marriage cases presented federal constitutional questions distinct from Hively's question of statutory interpretation, the court found that the same logic applied. Accordingly, the court concluded that discrimination against someone based on the sex of the person she dates amounts to discrimination because of sex in exactly the same way that discrimination against a white man because he marries a black woman is discrimination because of race.

While Kimberly Hively's employer decided not to appeal the Seventh Circuit's ruling, on September 7, Jameka Evans' lawyers filed a petition for *certiorari*, urging the Court to take up Evans' appeal of the Eleventh Circuit's ruling that her employer could discriminate against her on the basis of her sexual orientation. The Second Circuit reheard *Zarda en banc* in late September. The Supreme Court has yet to rule on Evans' petition, but conventional wisdom and history suggest that because of the circuit split that now exists, the Court is more likely to step in sooner than later to resolve the issue.

Don Davis is an Associate with the Employment, Labor & Benefits Practice Group at Mintz Levin in Washington, DC. He is also President of the LGBT Bar Association of the District of Columbia. Don graduated from North Carolina State University, and received his J.D. from Ohio State University.

Continued from page 4

homeland.

[2]See https://www.nytimes.com/2017/07/26/us/politics/trans-military-trump-timeline.html?mcubz=0&_r=0.

[3]*Stone et al. v. Trump et al.*, 17-cv-02459-MJG; see https://www.aclu.org/legal-document/stone-v-trump-complaint.

[4]*Karnoski et al v. Trump et al .*,17-cv-01297-JLR; see https://www.lambdalegal.org/in-court/legal-docs/karnoski_us_20170828_complaint.

[5]See Plaintiffs' Application for a Preliminary Injunction, p. 13 (citing *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985)). Available at http://www.nclrights.org/wp-content/uploads/2017/08/AS-FILED-PI-Motion-and-Memo-ISO.pdf.

Become a Leader In Your Region

The LGBT Law Section is national, and we're going to do big things everywhere we can reach. All events will get national exposure. Event sponsors can include major law firms. If you're the Section member in your area who steps up to help, you will raise your profile and become a leader, while helping the community. Contact us, even if you're not sure what you can do. Email us at LGBTSectionFBA@gmail.com.

Grow the LGBT Law Section by Getting Involved

By Brandon King, Membership Committee Chair

Our new and young Section needs to grow membership in order to carry out its mission of providing a national forum for LGBT federal practitioners and their allies. If you're reading this newsletter, thank you for being one of the Section's early members. We need your help to bring in more members from all regions of the country.

Join the Section's Membership Committee, which will include both Section officers and regular members like you. People on the Membership Committee will help design and execute our strategy for outreach and growth. You could step up to take responsibility for membership growth in a region of the country where you practice. You might want to help us make personal contact with each existing member of the Section. You might have ideas of your own, which we want to hear and learn from.

Members of the Committee will gain networking opportunities, and will also be positioned to take national roles as they become available. To get started or ask questions, contact Membership Committee Chair Brandon King at: brmking16@gmail.com.

Help Us Reach Out to Your Large or Mid-Size Firm

If you're part of a mid-sized to large law firm, you can help the LGBT Law Section grow. Help us connect with your firm's managing partner, HR manager, or LGBT employees group. We want to make sure that all LGBT and LGBT-Ally attorneys know about us, and have the opportunity to join.

Questions?
Email us at **LGBTSectionFBA@gmail.com.**