New Workplace Protections, Progress for LGBT Rights

By Annie Kernicky

The historical evolution and consideration of sexual orientation and gender identity as protected classes, and the trending direction of protections, are hot topics legislatively and judicially. In a Philadelphia Bar Association CLE program hosted by the Labor and Employment Law Committee titled "New Protections for LGBT Individuals in the Workplace: Fact or Fiction" on Feb. 16, a panel discussed recent developments in employment protections for members of the LGBT (lesbian, gay, bisexual, and transgender) community whether such developments will withstand appellate and legislative challenges.

The panelists were Hon. Elizabeth T. Hey, U.S. Magistrate Judge for the Eastern District of Pennsylvania; Gina Ameci, shareholder, Buchanan Ingersoll & Rooney PC; Brian McGinnis, associate, Fox Rothschild LLP;, and Thomas Ude Jr., legal and public policy director, Mazzoni Center. Moderated by Kathleen Kirkpatrick, cochair, Women in the Profession Committee, the program provided practice tips from both the plaintiffs' and defense perspective. Ameci began with a comprehensive background of LGBT issues and the historical thought process that has evolved since the 1960s. Ameci also discussed how the U.S. Supreme Court decision in *Price Waterhouse* in 1989 is still relied upon for LGBT rights cases under the theory that gender stereotyping relating to sexual identity and orientation is actionable as sex discrimination. *Oncale* was the next big decision that Ameci said is still relied upon today, holding that same-sex sexual harassment is actionable. Although there is no express protection for sexual orientation or gender identity in Title VII of the Civil Rights Act of 1964, many of the same theories that have been used in other contexts are now being applied to these claims, she said.

Judge Hey explained that courts are addressing emerging LGBT issues on a case-by-case basis as they come up.

McGinnis discussed two recent Third Circuit cases where, tension was perceived in their outcomes. McGinnis pointed out that in 2001, the Third Circuit determined that *Bibby v. Coca Cola Bottling Company*, framed as a sexual orientation discrimination complaint under Title VII, was properly dismissed. In 2009, the Third Circuit decided *Prowel v. Wise Business Forms, Inc.*, which also alleged harassment, but there, the plaintiff was allowed to pursue a Title VII claim by alleging that he was targeted for harassment because he failed to conform to gender stereotypes. McGinnis said that the ensuing case law has added extra scrutiny as to whether a plaintiff is "bootstrapping" a sexual orientation claim to one of gender non-conformity.

Ude next explained the legal theories of Title VII and gender identity, saying that while Title VII does not expressly include sexual orientation or gender identity, it also does not expressly exclude them either. Ude discussed the "three theories" of sex discrimination, including that sexual orientation discrimination necessarily involves sex-based considerations, associational discrimination, and gender stereotyping. Ude recognized sex-discrimination parallels to other associational-discrimination paradigms, such as under the Americans with Disabilities Act and race discrimination under Title VII. Ude also spoke about various types of gender identity and gender expression, and how "sex" is a much more complicated issue than many employers may realize.

McGinnis said that *Hively v. Ivy Tech Community College*, which the Seventh Circuit recently heard en banc, will address whether federal civil rights law already prohibits workplace discrimination on the basis of sexual orientation. He believes that the Third Circuit's trend is towards protecting sexual orientation discrimination. Judge Hey said that with the lack of clarity on how the law applies, there seems to be a higher motivation to settle these types of cases. Ameci agreed, and said there has been a significant rise in Equal Employment Opportunity Commission discrimination claims with the desire to resolve cases before getting to federal court. All panelists concluded that, at some point in the near future, the U.S. Supreme Court will need to address these emerging in the LGBT community.

Photo by Thomas E. Rogers

Robert H. Barron (left to right); Sarah R. Lavelle, cochair, Labor and Employment Law Committee; Brian McGinnis, associate, Fox Rothschild LLP; Hon. Elizabeth T. Hey, U.S. Magistrate Judge, U.S. District Court for the Eastern District of Pennsylvania; Gina M. Ameci, shareholder, Buchanan Ingersoll & Rooney PC; Kathleen Kirkpatrick, cochair, Women in the Profession Committee; and Thomas Ude Jr., Legal and Public Policy Director, Mazzoni Center; at the Philadelphia Bar Association CLE on Feb. 16.

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CLE Topic Idea?

To submit a topic idea for a CLE course or volunteer to be a course planner or presenter, contact Director of Continuing Legal Education, Tara D. Phoenix, at 215-238-6349 or tphoenix@philabar.org.

One Year of CLE

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to open suspect files.

Most firms outsource the security and information technology of their systems to a vendor. During initial negotiations with the vendor, outline what it is permitted to do with the information it is holding for you and what security measures it will use to prevent outsiders from accessing the information. However, make sure the vendor has insurance and do not permit the vendor to suspend your access to the information if you miss a payment. As it relates to insurance needs, check what the firm's commercial general liability policy covers and invest in a cyber insurance policy to cover forensics, crisis management and public relations costs. Attorneys are obligated by the Rules of Professional Conduct to make reasonable efforts to prevent unauthorized access to client information. So, set yourself up for success by investing in proactive measures and developing a disaster plan.

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