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**LESBIAN, BISEXUAL, GAY,
TRANSGENDER (LBGT)
EMPLOYMENT UPDATE
AND SAME SEX MARRIAGE
#LoveWins**

Obergefell v. Hodges, **135 S.Ct. 2584 (2015)**

- *Obergefell v. Hodges* does not directly affect employment.
 - Obergefell struck down same-sex marriage bans across the country as unconstitutional under the due process and Equal Protection clauses of the Fourteenth Amendment
 - The Fourteenth Amendment requires states to license and to recognize marriages between two people of the same sex

LGBT Employees Are Discriminated Against

- A 2014 report by the Center for American Progress compiled the following data on LGBT employment discrimination:
 - 11 to 28% of lesbian, gay, and bisexual, or LGB workers are denied or passed over for a promotion because of the sexual orientation.
 - Gay and bisexual men make 10 to 32 percent less than straight men working similar jobs.
 - 7 to 41% of LGB workers were verbally or physically harassed or had their workplace vandalized

- 47% of transgender people reported being fired, not hired, or denied a promotion because of their gender identity.
 - Of the 47% trans employees discriminated against, roughly 26% report being fired from a job they already had simply because of their gender identity.

Are LGBT Employees Protected from Discrimination?

- Only 18 states and the District of Columbia have laws explicitly protecting LGBT workers from being fired because of their sexual orientation or gender identity.
- Ohio is Not one of them
- Title VII offers no Direct protection
- *Obergefell* offers no Direct protection
- **Public Employees are Protected**



Obergefell struck down same-sex marriage bans across the country as unconstitutional under the due process and Equal Protection clauses of the Fourteenth Amendment

- The Fourteenth Amendment requires states to license and to recognize marriages between two people of the same sex
- *Obergefell* held that the right to marry is inherent to one's personal liberty and that the Equal Protection Clause prohibits states from depriving same-sex couples of that right and liberty

Obergefell and Benefits

- Employers must recognize the broader definition of marriage.
- If *Obergefell* is applied **retroactively**, then same sex couples who have been together before Ohio ended common law marriage in 1991 may be married.
- Employers that offer **spousal health insurance benefits** are bound by *Obergefell* and must provide benefits to legal spouses on an equal basis, regardless of sexual orientation.
- Employers have a choice whether to continue to offer spousal benefits or domestic partner benefits to unmarried same-sex and opposite-sex couples.

14th Amendment and Employment

- It is a violation of the Equal Protection Clause to discriminate on the basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (May 20, 1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997)
- Including at work. *Glover v. Williamsburg Local School Bd.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (gay school teacher protected from irrational government discrimination)

Governments May Protect Their Employees from LGBT Discrimination

City of Cincinnati Municipal Code Chapter 914

- All employers who employ 10 or more persons within the City of Cincinnati are prohibited from discriminating on the basis of sexual orientation or transgendered status.
- It is unlawful for any employer to discriminate by refusing to hire any person or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment.
- If an employer discriminates, it is subject to a maximum \$1,000 fine.

Ohio Executive Order 2011-05K

- In January 2011 Governor Kasich declared it the policy of the State of Ohio that **no person employed** by an agency, board or commission **may discriminate on the basis of sexual orientation** in hiring, layoff, termination, transfer, promotion, demotion, or rate of compensation.
- Governor Strickland's executive Order included a prohibition from discriminating on the basis of gender identity. Executive Order 2007-10S

Das v. Ohio State Univ.

115 F. Supp. 2d 885, 892 (S.D. Ohio 2000)
aff'd, 57 F. App'x 675 (6th Cir. 2003)

- Employee brought public policy claim using Columbus City Ordinance
- City codes can support public policy claim
- City code did not conflict with state statute
- Claim was valid, she lost however because there was no proof

Title VII Protects LGBT Employees from Discrimination

- Title VII does not directly protect LGBT employees But Title VII Prohibits Sex Discrimination
 - **Sex Stereotyping** is prohibited under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).
 - Trans employees are protected. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004) (good discussion of all case law); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004).
 - LGB employees are **NOT** protected under sex stereotyping prohibition. *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 763 (6th Cir. 2006)

Are LGB employees protected from sex stereotyping? Maybe

NO

- *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 763 (6th Cir. 2006) (The Court limited sex stereotyping to gender non-conforming behavior observed at work.)

No, but...

- *Gilbert v. Country Music Association, Inc.*, 2011 WL 3288655, (6th Cir. 2011) (dismissed but... if plaintiff had made a better claim of stereotyping, he may have stated ...)

Are LGB employees protected from sex stereotyping? Maybe

NO

- *Taylor v. H.B. Fuller Co.*, 2008 WL 4647690 (S.D. OH, 2008) (Barrett J.) (no evidence the “deplorable and unacceptable” actions of his co-workers, were “because of sex”).

Yes

- *Herbert v. Milford Towing*, S.D. Ohio, 1:00-cv-855 (Hogan M.J.), male on male sex harassment alleged men touching plaintiff was because of sex because men did not touch female employees

- **Sex Discrimination** prohibition protects **LGBT**
- Trans employees- *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012).
 - The EEOC took the position that any transgender discrimination is sex discrimination, because it inherently involves taking gender—and therefore sex—into account. This is true even if the employer takes an action that simply reflects animus against transgender individuals or a desire to exclude them from the workplace, rather than a concern, specifically, about gender non-conformity. While the decision applied to the appeal of a federal employee, it could have broader application

- LGB employees- ***Foxx v. Baldwin***, (EEOC July 15, 2015).
 - Title VII's protection from sex discrimination protected an employee from sexual orientation discrimination. The EEOC reasoned that if a man marries a man and is fired for marrying a man, he is being discriminated against based on sex because if the man had married a woman he would not have been fired. While the employee's claims were against his federal employer, plaintiff's employment lawyers will try to use *Baldwin v. Foxx* to extend Title VII protections to private employees discriminated against on the basis of his or her sexual orientation

Does Ohio Law Protect LGBT employees? NO

- Courts have held that O.R.C. 4112 **does not** apply to sexual orientation. *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 2014-Ohio-1190, ¶ 13 *appeal not allowed sub nom. Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 139 Ohio St. 3d 1473 (App. 10th Dist 2014)
- But would Ohio courts accept same reasoning as EEOC in Foxx and Macy and federal courts in Smith and Barnes?

Transgender Employee Bathrooms

