FLUCTUATIONS IN U.S. CIVIL RIGHTS POLICIES: THE CASE OF LGBT EMPLOYMENT

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Abstract - This paper examines how President Obama has initiated a number of important policy protections for lesbian, gay, bisexual and transgender (LGBT) employees, since the U.S. Congress has failed to enact such legislation. The protection of LGBT person has been considered the new civil rights issue in the U.S.

Index Terms - Civil Rights, Gender Identity, LGBT Employment, Sexual Orientation

I. EMPLOYMENT RIGHTS FOR LGBTS

The year 2015 was historic for lesbian, gay, bisexual and transgender (LGBT) persons in the U.S.In 2015, the U.S. Supreme Court in a 5-4 ruling,Obergefell v. Hodges[12],upheld the constitutionalityof same-sex marriages. This was a milestone for LGBT persons and reflected a cultural transformation in America's relationship to at least gays and lesbians. Same-sex couples can now marry in all 50 states.Yet, they still do not have federal employment protection in all 50 states. Because of the failure of the U.S. Congress to pass such a law President Obama issued a number of policies to protect LGBT workers from employment discrimination. Some, under the current Trump Administration, are being dismantled.

II. PRESIDENT OBAMA INITIATES POLICIES IN SUPPORT OF LGBT PERSONS

A campaign promise in 2008 by Obama, once dubbed "the first gay president" was to take action on employment discrimination against LGBT persons. In defiance of Congress and its inability, failure or reluctance to enact a law to protect LGBTs in the workplace, President Obama took executive action to address LGBT employment rights, thereby creating a significant policy shift in this area of civil rights.

Although executive action is more limited than statutory laws, President Obama took a number of steps to provide LGBTs with employment protections. One of President Obama's first Presidential Memoranda was issued in June of 2009. It directed federal agencies to extend virtually all benefits to the same-sex partners of federal employees.In addition, in June of 2010, President Obama issued "Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees" which went even further than his 2009 directive. It ensured that children of same-sex partnerships were covered, and provided an expansive view of "family." It provided a number of additional benefits to partners of federal workers, including travel and relocation assistance, child care subsidies, and certain retirement benefits[13]. Other actions taken by the Obama Administration in 2010 in support of LGBTs include:

- In January 2010, OPM added gender identity to the equal employment opportunity policy governing all federal jobs. In September 2011, OPM issued additional guidance to federal managers regarding the equal treatment of transgender workers.
- In March 2010, the IRS clarified that domestic partners (and their children) can be designated beneficiaries for VEBA funding/payment purposes.
- President Obama issued a Presidential Memorandum in April 2010 directing HHS to issue regulations requiring all hospitals receiving Medicaid and Medicare to prohibit discrimination in visitation against LGBT people. HHS issued regulations that went into effect in 2011.
- In June 2010, the Office of Personnel Management published a final rule allowing same-sex domestic partners of federal employees to apply for long term care insurance and to take funeral and sick leave to care for a domestic partner.
- In June 2010, the Department of Justice issued an opinion clarifying that the criminal provisions of the Violence Against Women Act related to stalking and abuse apply equally to same-sex partners.
- In June 2010, the Department of State revised the standards for changing a gender marker on a passport, making the process less burdensome for transgender people.
- The Department of Labor issued guidance clarifying in June 2010 that an employee can take time off under the Family and Medical Leave Act to care for a same-sex partner's child, even where the partner does not have a legal or biological relationship to that child.

Although Congress has repeatedly failed to pass a national law protecting LGBT persons from employment discrimination, President Obama used his executive powers to provide such protection as broadly as legally and constitutionally permissible. For example, on July 21,2014, President Obama signed Executive Order 13672, to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity. The executive order also amends E.O. 11478 (1969)

and E.O. 13087 (1998) to include gender identity as a protected class in the federal civilian workforce.These represent significant policy changes on LGBT employment rights. These represent significant policy drifts on LGBT employment rights. At the signing of his executive order, President Obama stated that "It doesn't make much sense,but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay, bisexual, transgender. And that's wrong." He went on to say that because of their "passionate advocacy and the irrefutable rightness of [their] cause, our government—government of the people, by the people, and for the people—will become just a little bit fairer" [14].

President Obama's aims and ideology were also reflected in cases where his federal agencies went beyond Congressional action or statutory law, holding that discrimination against a transgender individual is sex discrimination and therefore prohibited under Title VII of the Civil Rights Act as amended. This rule, a major policy drift, is derived from the adjudicatory powers of the Equal Employment Opportunity Commission (EEOC). In 2012, the EEOC issued a decision in Macy v. Eric Holder,Department of Justice[11] holding that discrimination in the workplace based on gender identity is illegal under Title VII. In this case, Mia Macy, a former Phoenix police officer, presented as a man when she applied for a position with the DOJ's Bureau of Alcohol, Tobacco, Firearms and Explosives. She was promised the job subject to a background check, but when she revealed that she was in the process of transitioning from male to female, she was told the position was no longer available. She later learned that another person had been hired for the position. The EEOC ruled that "Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity"[11, emphasis added].Rulings by the EEOC are significant, because they represent a form of rulemaking by an administrative.

Consistent with the EEOC's decision in Macy, Attorney General Eric Holder in December of 2014announced that theU.S. Department of Justice (DOJ)would now interpret Title VII's prohibition against sex discrimination to cover gender identity, including transgender status. Although statutory law is not changed by Holder's interpretation, it is certainly an indication of the powerful reach of an administrative agency, particularly one where its views mirror that of the President's.

The EEOC in late 2014, for the first time, filed lawsuits against private-sector organizations for gender-identity discrimination. In one case the EEOC asserted that an organization of health care professionals based in Lakeland, Florida discriminated against its Director of Hearing Services, Brandi Branson,in violation of Title VII, because she was transitioning from male to female. Branson was fired, argued the EEOC, because she was transgender (EEOC v. Lakeland Eye Clinic 2014) [6].The case was ultimately settled out of court in April of 2015, where Lakeland Eye Clinic agreed to pay Branson $150,000, and also agreed to train both employees and management on transgender discrimination and develop and implement a new gender discrimination policy[5].Pushing the boundaries of Title VII further, the EEOC held in a 3-2 ruling along party linesin Baldwin v. Anthony Foxx, Department of Transportation(2015) [1]that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and therefore prohibited under Title VII.The EEOC ruled that "sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations" [1].

In a second case, the EEOC filed a lawsuit on behalf of a funeral director, Amiee Stephens, who was fired because of her transgender status, her gender transition, and based on gender-based stereotypes. The district court decision, issued in 2015, argued "that transgender status is not a protected class under Title VII. Thus, if the EEOC's complaint had alleged that the Funeral Home fired Stephens based solely upon Stephens's status as a transgender person, then this Court would agree with the Funeral Home that the EEOC's complaint fails to state a claim under Title VII. But the EEOC's complaint also asserts that the Funeral Home fired Stephens 'because Stephens did not conform to the [Funeral Home's] sex- or gender-based preferences, expectations, or stereotypes" [7]. Thus, the court found that the EEOC had successfully argued a sex-stereotyping genderdiscrimination claim under Title VII

In sum, the Obama administration took a series of progressive actions in support of LGBT persons when Congress refused to. But, policies, unlike legislation, can easily be undone when a new President enters the White House.

III. THE TRUMP ADMINISTRATION'S REGRESSIVE POLICIES

The Trump Administration has worked to undo a number of important policies for LGBT persons put in place by the Obama Administration. When he first took office, he stated that his administration would

issue executive orders to overturn Obama's, including the executive order which protects employees from anti-LGBT workplace discrimination while working for federal contractors. Trump backed off here, only at the urging of his daughter, Ivanka and her husband, Jared Kushner. Notwithstanding, Trump has taken a number of other steps to dismantle protections for LGBT persons. For example, he attempted to ban transgender people from serving in the military and removed questions about LGBTQ seniors from a national survey of the Department of Health and Human Services relied upon to determine services for elderly Americans. In October of 2018, Trump proposed narrowly defining gender as a biological, immutable condition determined at birth. Although no definitive action has been on this proposal, it has led to demonstrations throughout the U.S. protesting the Administration's efforts to deny the basis of the existence of transgendered persons.

CONCLUSIONS

In sum, a national law or policy that protects LGBTs from employment or other forms of discrimination may be a long time coming. Perhaps Representative Barney Frank (D-MA), who introduced ENDA to the House in 2007, got it right when he once observed that "there is more resistance to protection for people who are transgender than for people who are gay, lesbian and bisexual"[3]. But he also argued that "This is not a good fact, but ignoring bad facts is a bad way to get legislation passed"[3].Notwithstanding, political stakeholders, including elected officials, bureaucrats, interest groups and even various religious organizations are intent on continuing the fight for civil rights for LGBTs.

The U.S. lags behind at least European countries in terms of employment protections for LGBTs. In the European Union (EU) for example, discrimination on the basis of sexual orientation is prohibited by the Employment Equality Directive and the Gender Equality Directive [4]. And, based on the interpretation of case law by the Court of Justice of the European Union (CJEU), these edicts also cover discrimination on the grounds of gender identity, including those who underwent, are undergoing through or intend to undergo gender reassignment. Certainly, this does not imply that there is no employment discrimination on the basis of LGBT status. But it does signify the EU's commitment to combating such discrimination [8].

Other countries that have also enacted laws to protect workers at least based on sexual orientation include: Israel, Canada, Australia, Botswana, Cape Verde, Mauritius, Mozambique, Seychelles, South Africa and some parts of Philippines and Taiwan [2] [9]. Latin American countries vary on their treatment of LGBTs. However, there are far more countries that not only lack employment protections for LGBTs, but they also criminalize any type of behavior based on sexual orientation or gender identity [2]. In Russia as well as a number of countries in Africa, for example, penalties can include fines, corporal punishment (e.g., Tanzania), prison terms of varying lengths, deportation (nonresidents) and even death penalties (e.g., Sudan and Mauritania) [10].

This paper has illustrated that policy shifts and gains for LGBT persons in the workplace have largely materialized due to administrative action in the Executive Branch of the U.S. government. But because employment protection for LGBT workers has not garnered enough attention or support, perhaps because society has been very slow to offer tolerance or acceptance of LGBT lifestyles, Congress has not been willing to pass a law to protect LGBT workers. Thus, any employment protection is subject to the vicissitudes of the President. Under the current Administration, protections are unlikely.

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