**SCHEINMAN LGBTQ WEBCAST #1**

**JUNE 2, 2015**

**Legal Issues for LGBTQ Teachers and Administrators:**

**What Every School Worker Needs to Know**

**ILLUSTRATIVE CASE LIST AND DESCRIPTIONS:**

**Constitutional Protections**

There are two main constitutional amendments that could afford protections to public school teachers – the 1st amendment and the 14th amendment.

1st Amendment – Speech and Association Rights – Protection for Academic Freedom and Political Activity

1. Meagher v. Andover School Committee, 2015 WL 1442517 (D. Mass., March 31, 2015) - found that a high school teacher who was a union official enjoyed 1st Amendment protection for an email she sent to other teachers urging them to take particular action in support of the union’s demands in contract negotiations

14th Amendment – Due Process and Equal Protection Rights

At a minimum, Supreme Court rulings on gay rights cases over the past twenty years recognize that public policies that discriminate against gay people may be struck down if they arise from anti-gay animus rather than some legitimate policy justification, and at least one circuit court of appeals, the 11th based in Atlanta, has ruled that discrimination by a public employer against a transgender employee would be treated as sex discrimination under the 14th Amendment, putting a substantial burden of justifying its action on the employer. In other words, courts have recognized due process and equal protection rights for gay people in conflicts with the government.

THERE WAS NOT AN ILLUSTRATIVE CASE FOR THIS

**Statutory Protections for Public School Teachers**

**FEDERAL**

This includes Title VII under the Civil Rights Act of 1964 and Title IX under the Education Amendments of 1972 and the EEOC decisions as the Supreme Court tends to follow their lead. (??)

In 1993, pro-gay members of Congress adopted an alternative strategy proposing the Employment Non-Discrimination Act (EDNA), a stand-alone law that would ban sexual orientation discrimination. In its most recent version, it would also explicitly ban gender identity discrimination. The House approved the narrower version in 2007, and the Senate approved the broader version more recently, but it has never been approved by both houses of Congress in the same session. Consequently, there is no explicit ban on sexual orientation or gender identity discrimination in federal legislation.

The EEOC has also undertaken a campaign to gain further protection for transgender people under Title VII by initiating government lawsuits against employers in several cases, hoping to generate more federal court precedents and perhaps take a case to the Supreme Court. Prior to this initiative, all the transgender cases litigated under Title VII were filed by private plaintiffs.

Sex Discrimination

1. Price Waterhouse v. Hopkins. (490 U.S. 228) 1989 Supreme Court decision – case which set precedent for complaints of discrimination that may implicate the concept of gender stereotypes; after this the EEOC and lower courts started to accept gender stereotyping claims, most significantly workplace harassment
2. Oncale v. Sundowner Offshore, 523 U.S. 75 (1998) - the Supreme Court said that harassment of a man by other men in the workplace could be held to violate Title VII’s ban on sex discrimination
3. Smith v. City of Salem, 378 F.2d 566 (6th Cir. 2004) - By early in this century, some federal courts accepted the view that discrimination against transgender applicants or employees was usually based on gender stereotyping
4. Macy v. Holder, Appeal No. 0120120821, Agency No. ATF-2011-00751 (EEOC, April 20, 2012); Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, Complain No. ATF-2011-00751 (U.S. Dept. of Justice, Complaint Adjudication Office, July 8, 2013) – more formal opinions issued by the EEOC and the Justice Department issued in the past few years
5. Lusardi v. McHugh, Appeal No. 0120133395 (EEOC) - the EEOC ruled that the Department of the Army had violated Title VII in its treatment of a transgender civilian employee; the EEOC said that the employer could not impose its own test to determine whether somebody was a woman or man when that person had been under the supervision of a doctor, undergoing all protocols and signed appropriate documentation
6. Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. En banc, 2002) - important ruling by the US Court of Appeals for the 9th Circuit where a gay male employee was subjected to vicious harassment by male co-workers; it was a split decision but a majority was willing to see this as sex discrimination.

These following trial court rulings show the impatience of some federal trial judges with the failure of Congress to ban sexual orientation and gender identity discrimination explicitly, and an increasing acceptance that such discrimination is really about sex and should be treated the same as sex discrimination. The rulings suggest that employers subject to Title VII should be sensitive to its potential application in situations involving LGBTQ employees.

1. Deneffe v. Skywest, Inc., 2015 U.S. Dist. LEXIS 62019 (May 11, 2015)
2. TerVeer v. Billington, 2014 WL 1280301 (D.D.C. Mar. 31, 2014)

**STATE AND LOCAL LAWS**

22 States, D.C., and several hundred counties, municipalities and towns have legislated to ban discrimination based on sexual orientation, and most of those policies also cover gender identity, either expressly or by interpretation. New York has banned sexual orientation discrimination for more than a decade. Although it does not expressly ban gender identity discrimination in the state human rights law, many cities in New York ban such discrimination, and as you can see from the developing federal cases, a good argument can be made that New York’s ban on sexual discrimination may also cover gender identity discrimination. Some trial level courts in the state have already made that connection.

Even in states where there is no statewide protection, there are many local ordinances.

In states such as Ohio, Michigan, Florida and Texas, the lack of a state law is significant, but most of the major cities ban sexual orientation and gender identity discrimination.

What does the term express ban mean?

* A straightforward discrimination case will not waste time litigating about whether the applicable law covers sexual orientation or gender identity, instead focusing directly on the employer’s motivation or the cause of the discriminatory action
* Under many laws, facially neutral policies that particularly disadvantage gay or transgender people may be found illegal
* Employers may be obligated under these laws to post anti-discrimination policies in their workplaces. To avoid liability for discriminatory conduct by supervisors and co-workers, the employers have to have a grievance mechanism in place that will address discrimination claims and provide appropriate remedies
* The adoption of such policies can provide a mechanism for employee training and sensitivity to LGBT issues

PUBLIC EDUCATION

New York: sexual orientation discrimination

1. Martinez v. County of Monroe, 850 N.Y.S.2d 740 (4th Dept. February 1, 2008) - The court held, first, that NY public agencies were obligated to recognize legal same-sex marriages performed in Canada – a point that has now been definitely nailed down by the passage of the Marriage Equality Act in 2011 – and that refusing to extend equal access to employee benefits violated the Human Rights Law ban on sexual orientation discrimination. The NY Court of Appeals, our highest court, refused to review this decision by the Appellate Division 271

Tenure Laws:

1. Grossman, 127 N.J. Super. 13, 316 A.2d 39 (N.J. App. 1974) – early case where tenured teacher after gender reassignment surgery was discharged because it was decided her actions would “severely impair the Board’s ability to conduct an efficient and orderly school system”; calls into question “expert testimony”

Current climate in the workplace:

The biggest issues these days, as reflected in recent litigation, focus on the sensitivity of school administrators, including fears about the reactions of parents, to the reality of the lives of their LGBT faculty and staff members, including their sexual lives. These issues are reflected in recent cases where courts refused to dismiss sexual orientation discrimination claims upon a showing that the reasons stated by administrators for adverse actions are pretext – they are trying to remove an openly gay or lesbian employee by seizing on some alleged rules violation, or by magnifying private actions. Some of these cases are clearly on the borderline of what people might characterize as inappropriate conduct. For example, some courts have upheld discharges of gay male teachers for having sexually-oriented materials on their school computers or placing ads on gay dating sites, while others have called out a double standard, finding that school authorities are being hypersensitive about possible controversy concerning gay teachers. In earlier times, there were cases about dismissal of gay men and lesbians who were employed as coaches for athletic teams, based on exaggerated concerns – usually unsubstantiated -- about potential sexual conduct between teachers and students.

But there are cases where courts have found that gay or lesbian teachers, just like heterosexual teachers, have crossed a line of appropriate conduct. The issue is whether the decision-maker is applying the same standard of conduct that would be applied to heterosexual teachers.

Compare and contrast the following two cases in NYC:

1. Asch v. NYC Board/Department of Education, 104 A.D.3d 415, 960 N.Y.S.2d 106 (N.Y.A.D. 1 Dept. 2013) -affirming arbitrator’s imposition of discipline on gay male school employee who failed to observe appropriate boundaries concerning touching male students.
2. Brito v. Walcott, 115 A.D.3d 544, 982 N.Y.S.2d 105 (N.Y. App. Div., 1st Dept., March 20, 2014) - discharge was disproportionate discipline for lesbian teacher found to have engaged in sexual activity with another teacher in a classroom after regular school hours

**ADDITIONAL ILLUSTRATIVE CASES – NOT REFERENCED IN WEBCAST**

1. Boutillier v. Hartford Public Schools, 2014 WL 4794527 (D. Conn., Sept. 25, 2014) (district court denied motion to dismiss lesbian teacher’s Title VII claim, finding adequate allegations that employer may have engaged in gender stereotyping).
2. Dawkins v. Porter, 2013 U.S. Dist. LEXIS 158818, 2013 WL 5952005 (M.D.N.C., Nov. 6, 2013) -- magistrate recommends letting gay teacher assert equal protection claim against school principal who did not renew teacher’s contract, but recommends dismissing claims against other school officials.
3. DeMoss v. Norwalk Board of Education, 21 F.Supp.3d 154 (D. Conn., May 9, 2014)(gay teacher’s sexual orientation discrimination and retaliation complaint survives summary judgment motion; school’s purported reason for discharge was pretextual).
4. Dias v. Archdiocese of Cincinnati, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012)(recognized cause of action for pregnancy discrimination under Title VII by lesbian Catholic school employee who was terminated after becoming pregnant through donor insemination).
5. Federal Way School District No. 210 v Vinson, 261 P.3d 145 (Wash., Sept. 29, 2011)(upholding the finding by a hearing officer that a gay teacher who was terminated after getting into a verbal confrontation with a former student in a restaurant was discharged without sufficient cause and that the school district had no right under statutory law to review the hearing officer’s decision)
6. Herx v. Diocese of Ft. Wayne, 2013 U.S. Dist. LEXIS 144420, 120 Fair Empl. Prac. Cas. (BNA) 573, 28 Am. Disabilities Cas. (BNA) 1104, 2013 WL 5531376 (N.D. Indiana, Oct. 7, 2013), aff’d, 2014 WL 6734843 (7th Cir Dec. 1, 2014) (unmarried lesbian discharged by Catholic school upon reporting to her principal that she was pregnant through donor insemination is entitled to discovery in her Title VII pregnancy discrimination suit; no religious exemption).
7. Krolikowski v. St. Francis Preparatory School (New York, Queens County Supreme Court, Sept. 2013) (rejecting motion to dismiss transgender teacher’s employment discrimination claim against Catholic school under NYC Human Rights Ordinance).
8. Paschal v. State of Arkansas, 2012 Ark. 127 (March 29, 2012) (holding state law making it a crime for a public school teacher to have sex with a student under 21 cannot be constitutionally applied to a teacher who had sex with a student who was 18, because an adult student had a fundamental right to privacy)
9. Price v. Warrensville Heights City Schools, 2013 WL 1337713 (N.D. Ohio, March 29, 2013) (unpublished) (Employer entitled to judgment on sexual orientation discrimination claim where plaintiff failed to show decision-maker was aware of her sexual orientation when she was dismissed).
10. San Diego Unified School District v Commission on Professional Competence (Lampedusa), 194 Cal.App. 4th 1454, 124 Cal.Rptr.3d 320 (April 4, 2011) (ordering the dismissal of a gay teacher who placed an explicit advertisement for sex, including graphic pictures of himself, on Craigslist, holding that the posting of the ad is evidence of his unfitness to be a teacher).
11. San Ysidro Unified Sch. Dist. v. Comm'n on Prof'l Competence, 2013 Cal. App. Unpub. LEXIS 5539, 2013 WL 3995009 (Cal. App. 4th Dist., Aug. 5, 2013) (affirming decision to hold a gay teacher unfit to teach after his ex-boyfriend “accidentally” emailed inappropriate information to a student, and the school investigation found sexual images and other inappropriate documents on teacher’s school computer, even though the teacher had received multiple awards for his skill.)
12. Sandiford v. City of New York Department of Education, 94 A.D.3d 593, 943 N.Y.S.2d 48 (April 24, 2012) (holding that lesbian allegedly terminated as a school aide in Brooklyn after she reported discriminatory treatment by the principal may go forward with retaliation and sexual orientation discrimination claims against Department of Education)
13. Savoie v. The Lawrenceville School, 2013 WL 1492859 (N.J. Super. Ct. App. Div. Apr. 12, 2013) (unpublished) (trial judge improperly awarded summary judgment to employer on issue whether its reason for discharge of gay teacher was pretext).
14. Schroeder w Hamilton School District, 282 F.3d 948 (7th Cir., March 11, 2002) (rejecting gay teacher’s equal protection claim asserting that the school failed to take action to stop harassment he experienced based on his sexual orientation, as the court found that the employee failed to establish that his employer deliberately subjected him to disparate treatment)
15. State v. Edwards, 288 P.3d 494 (Court of Appeals of Kansas, Nov. 2, 2012) (affirming conviction of high school teacher for sexual conduct with student who was of the age of consent; holding state had compelling interest to prevent sexual relationships between teachers and students).
16. Wiessmann v State College Area School District, No. 11-cv-00940 (JEJ) (M.D. Pa.) (Centre Daily Times, May 18, 2011) (suit brought asserting that the denial of benefits to employees’ same-sex partners violates equal protection provided for both by the federal and state constitutions) (in a consent decree, the school district agreed to expand the district’s health care benefits program (Centre Daily Times, July 12, 2011)) (settlement reached wherein the school district agreed to pay the plaintiff $42,500 (Centre Daily Times, Oct. 25, 2011))