

OAJ Employment Law Section Article October 2015

Is There a Pot of Gold at the End of the Rainbow for Ohio Employees? Ohio LGBT Employment Law After *Obergefell*

By Jennifer L. Branchⁱ

On June 26, 2015 the Ohio Supreme Court issued its landmark decision in *Obergefell v. Hodges* holding that the Fourteenth Amendment to the United States Constitution requires states to license and to recognize marriages between two people of the same sex. The immediate result of *Obergefell* was the issuance of marriage licenses, followed soon that day by weddings across Ohio.ⁱⁱ *Obergefell* was a breakthrough decision in LGBT rights. Its effects on family law, probate law and even real estate law are just starting to be understood. But what protection, if any, does *Obergefell* offer employees? What if April and Susan get married one weekend and on Monday April comes to work and shows her friends her wedding photos. Can her supervisor fire her for marrying a woman? The answer is “No,” if she is a public employee. But, as a private employee the answer has been “Yes;” but is it now “Maybe.”

Public Employees and Equal Protection

Public employees are protected from irrational government discrimination under the Equal Protection Clause.ⁱⁱⁱ If April were a public school teacher, and we assume the school district employed women teachers married to men, but fired women teachers married to women, that would state a claim under 42 U.S.C. § 1983 for violating the Equal Protection Clause. See *Glover v. Williamsburg School District*.^{iv} Public LGBT employees have been protected by the equal protection clause for years. In 2004 the jury was instructed in a case brought by a demoted transgender police sergeant that the equal protection clause “prohibits discrimination against public employees on the basis of an employees perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes.” *Barnes v. City of Cincinnati*.^v The Supreme Court in *Obergefell* furthered equal protection jurisprudence when it held that the right to marry is inherent to one’s personal liberty and the Equal Protection Clause prohibits states from depriving same-sex couples of that right and liberty.

Private Employees and Title VII

If April were an accountant for Price Waterhouse she could be fired under Ohio law since O.R.C. § 4112.02 does not protect private employees from being discriminated against on the basis of sexual orientation.^{vi} However, Title VII’s prohibition on sex discrimination may protect her. Despite decades of attempts to amend Title VII, it does not protect LGBT employees.

If April changed her gender identity from male she would have greater protection. Title VII has been used to protect employees who change their gender identity while on the job, like the firefighter in *Smith* and the police sergeant in *Barnes*. *Barnes* successfully argued that when she was still identifying as male at work *Barnes*’ supervisors perceived his feminine appearance, ambiguous sexuality, and lack of “command presence” (whatever that meant) as not masculine enough to be a sergeant. Title VII has prohibited such gender stereotyping since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And in 2012 the EEOC extended protections for a transgender police officer beyond sex stereotyping and found a violation under Title VII’s prohibition of discrimination based on sex.^{vii} The EEOC used religion as an analogy. If an

employee identified as Christian later converted to Judaism, the employer could not discriminate based on religion. The EEOC held the same is true of an employee changing his gender identity.

However, no court has yet found Title VII protects employees based on their sexual orientation. That could change. Soon after *Obergefell*, the EEOC ruled in *Baldwin v. Foxx* that Title VII's protection from sex discrimination protected an employee from sexual orientation discrimination.^{viii} 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 *Baldwin* is an agency decision limited to federal employment law, its reasoning could be used by plaintiff lawyers to extend Title VII protections to private employees discriminated against on the basis of his or her sexual orientation.

Benefits for LGBT Employees

Will employers provide more employment benefits to same sex couples after *Obergefell*? Many Fortune 500 corporations already do.^{ix} Thirteen Ohio corporations, including law firms, earned a 100% rating from the Human Rights Campaign's Corporate Equality Index. Some employers have offered "domestic partner benefits" so same sex couples who could not marry in Ohio could share in their partner's employment benefits. These may fade away after same sex couples are given time to marry.

Only greater anti-discrimination laws and creative lawyering will reveal the full impact *Obergefell* will have in employment law in Ohio.

ⁱ Jennifer L. Branch is partners with Alphonse A. Gerhardstein. Gerhardstein & Branch Co. LPA, concentrates its practice in plaintiff's civil rights litigation including LGBT issues, police brutality, employment discrimination, prisoner rights, and women's reproductive rights. Al Gerhardstein was lead counsel for the plaintiffs in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

ⁱⁱ For a description of the *Obergefell* litigation history see, Branch, J. (2015, September). "Life After Love Wins." *Ohio Lawyer*, September/October 2015 issue, pp. 8-11.

ⁱⁱⁱ See, e.g. *Enquist v. Oregon Dept't of Agriculture*, 128 S.Ct. 2146, 2155 2008; *Glover v. Williamsburg Local School District Bd. Of Educ.*, 20 F. Supp. 2d 1160 (1998) (Judge Susan Dlott) (verdict for a gay school teacher whose employment contract was not renewed when the district found out he was gay; at trial teacher won reinstatement and damages); *Beall v London City School Dist. Bd. of Educ.*, 2006 WL 1582447 (S.D. Ohio 2006)

^{iv} My partner and I tried Glover in 1998 at time when the law was still developing.

^v *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004).

^{vi} *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).

^{vii} *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012)

<http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>

^{viii} *Baldwin v. Foxx*, (EEOC July 15, 2015) <http://www.eeoc.gov/decisions/0120133080.pdf>

^{ix} <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/CEI-2015-rev.pdf>