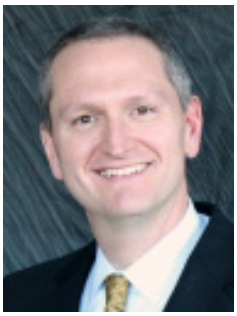
Federal Bar Association
**Labor and Employment Law Section**
Winter 2014

# The Labouring Oar



## Message from the Chair

By Craig Cowart

The Labor and Employment Section looks forward to an exciting and productive year! Our Section is off to a great start. There are many opportunities for you to become involved with the Section, and you are invited to find your place of contribution.

We are very excited about our upcoming Sixth Biennial Labor and Employment Law Conference. The Conference will be held at the Westin in New Orleans on March 12-13, 2015. We have a dynamic and informative program planned with excellent presenters. The topics will be timely and helpful for anyone with labor and employment law as a part of their practice. There are many sponsorship opportunities still available. If you or your firm are interested in sponsoring the Conference, please email me. We look forward to seeing you in New Orleans where you will enjoy a great venue while obtaining continuing education credit and networking with attendees from all over the country.

Our Section is dedicated to providing valuable and informative resources to Section members. We provide regular *Circuit Updates* with timely information about labor and employment law decisions rendered by federal appellate courts. We also publish this quarterly newsletter with articles on important labor and employment law topics and news about our Section. We are always looking for members who would like to become involved by contributing to our publications. If you are interested in writing for our publications, please contact either Corie Tarara, Chair of our Committee on Publications and Public Relations, or me.

Our Section is also committed to providing outstanding programming for the benefit of Section members. In addition to our March 2015 Biennial Conference, we are planning several other programs for the coming year. The Section will be presenting a number of webinars throughout the year. We are also planning for a live presentation on labor and employment law basics that can be presented in conjunction with FBA Chapters all over the country. If you have any questions about our Section programming, please contact Donna Currault, Chair of our Committee on Programming and CLE, or me.

I would like to express my great appreciation to my fellow Board and Committee members. Your hard work is very much appreciated, and I look forward to a great year! ■

## A Look at What's Inside



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## Legislation and Congressional Relations Standing Committee Update: The Election is Over

By Steven F. Griffith Jr., Betsy Chestney, and Allison Moore

The Federal Bar Association Labor & Employment Section's Committee on Legislation and Congressional Relations is poised and ready to report on a host of issues that can be anticipated over the coming year. Specifically, with the conclusion of the 2014 Congressional elections, we all anticipate a shift in the balance of power in Congress and, with it, the possibility for less action on significant issues. That said, the Committee stands ready to report on those activities as they occur, and should you have any questions, do not hesitate to reach out to any three of your Committee members: Steve Griffith, sgriffith@bakerdonelson.com; Betsy Chestney, bchestney@cornellsmith.com; or Allison Moore, amoore@branscombpc.com. On the heels of the election, we have identified three legislative developments that can be anticipated over the course of the next year:

**Active Agency Enforcement**

With full control of Congress, the Republican agenda will likely dominate the floor of both the Senate and the House over at least the next two years. As such, the President will be forced to continue to turn his power to direct agency action to promote his message. In order to finance the President's efforts, the Department of Labor and the Internal Revenue Service have already been directed to step up enforcement efforts in certain industries, targeting oil field services and transportation industries as well as any business known to heavily rely on independent contractor services. It is anticipated that additional areas of targeted enforcement will be identified and investigators will be more closely reviewing how employers are classifying exempt employees and independent contractors universally. The Department of Labor and the Internal Revenue Service already participate under a Memorandum of Understanding to mutually benefit from investigations revealing misclassified and underpaid employees, the effects of which are only just beginning to be seen and felt.

**NLRB/Congressional Stand-Offs**

The National Labor Relations Board has been particularly active during the Obama presidency. NLRB Board Member Nancy Schiffer's term expires this December, and the President had nominated Sharon Block as Schiffer's replacement. Block's previous recess-appointment was declared unconstitutional by the Supreme Court in the *Noel Canning* case. Although it was anticipated that she would be confirmed during the lame-duck session, on November 12, 2014, right after the midterms, the President withdrew Block's nomination in the wake of Senate Republicans' criticism of Block. The President has nominated Lauren McFerran, the chief labor counsel for the Senate Health, Education, Labor and Pensions Committee instead. If she is confirmed, the Board will have a full panel of five members at the beginning of 2015. This could result in continued uncertainty for employers and the attorneys who advise them, with a Board that will likely keep taking pro-labor positions facing off against the Republican-controlled Congress. For instance, Republican legislators have expressed outrage at the recent NLRB interpretation of the definition of "joint employer" to mean that corporations share joint employer status with franchise owners, which prompted two Republican Senators to introduce a bill that would transform the NLRB from its current form (three Democrats, two Republicans) to a board comprised of equal numbers of Republicans and Democrats in an attempt to neutralize its role.

**Minimum Wage Shifts**

For years, President Obama and the Democratically-controlled Senate have sought to advance a minimum wage bill that sought to raise the minimum wage under the Fair Labor Standards Act. Congressional Republicans responded that those decisions were better left to local jurisdictions, if the minimum wage needed to be adjusted at all. With the Republicans taking control of the Senate, we can anticipate that the likelihood of any bill making it out of Congress to raise the minimum wage is *de minimum*, at best. Instead, we anticipate observing that the fight to raise the minimum wage will shift (and, in some cases, continue to proceed) at the state and local level with state-specific minimum wages and, in some cases, local municipality minimum wages.

We will continue to report on these issues over the course of the coming year. We look forward to an exciting year, and let your committee members know if there are any issues of particular note on which you would like us to report. ■

## Message from the CLE & Programming Committee:

Join us for the L&E Section's 6th Biennial Conference in New Orleans on March 12-13!

Registration is now open for this program with 10 scheduled hours for presentations on L&E topics. Speakers from federal agencies such as the EEOC and NLRB as well as judges and lawyers from around the country will address topics of interest to L&E practitioners. Early-bird registration ends on January 30, 2015, so register now! Sponsorship opportunities are also available. Stay tuned for more information or go to Fedbar.org and select Event Registration in the Member Resources section. ■

## Labor and Employment Law Section Receives Awards at FBA Annual Meeting and Convention

In September, the Federal Bar Association held its 2014 Annual Meeting and Convention in Providence, Rhode Island. The Labor and Employment Law Section was well represented and brought home awards for the work and achievements of the Section during the past year.

The Federal Bar Association encourages Sections to provide programming, publications, continuing education, and networking opportunities through activities throughout the year. The Labor and Employment Law Section works hard to carry out the mission of the FBA to strengthen the federal judicial system by serving the needs of the federal practitioner, judiciary, and the public they serve. In recognition of its work in providing numerous opportunities for professional growth to its members throughout the year, the Labor and Employment Law Section was awarded the "Sections and Divisions Award." Congratulations to everyone who had a part in the successful undertakings of the Labor and Employment Law Section during the past year.

The Labor and Employment Law Section was also recognized for the quality of the newsletter, *The Labouring Oar*, it provides to Section members on a regular basis. In recognition of the work of the authors, contributors, organizers, and editors in providing an outstanding newsletter, the Labor and Employment Law Section received the "Meritorious Newsletter Recognition Award." Special thanks goes to Donna Currault for her hard work and dedication in coordinating and editing the Section newsletters during the past year and to Corie Tarara as she continues the tradition of excellence this year. ■


Outgoing chair Karleen J. Green with incoming chair Craig Cowart accepting awards and the 2014 FBA Annual Meeting and Convention

## Labor and Employment Law Section Awards Outstanding Contributors

During the FBA Annual Meeting and Convention in September, the Labor and Employment Law Section recognized several outstanding contributors to the work of the Section. The Labor and Employment Law Section takes pride in the quality publications it provides to Section members throughout the year. Circuit Updates provide cutting edge information about decisions of the U.S. Courts of Appeals that impact the practice of labor and employment law. Additionally, this newsletter, *The Labouring Oar*, provides Section members with in-depth analysis of timely topics important to the practice. In recognition of his years of outstanding contributions to the publications of the Section, Stephen E. Tromboli of Trimboli & Prusinowski, L.L.C. (New Jersey) was awarded the "Author of the Year" award from the Section.

The Section also seeks to collaborate with other FBA Chapters to support members and the mission of the organization. The "Chapter Recognition Award" was given to the New Orleans Chapter of the Federal Bar Association. The New Orleans Chapter provides outstanding programming and benefits to FBA members and has been invaluable in its support of the Labor and Employment Law Section. The Section looks forward to the Labor and Employment Law Biennial Conference in New Orleans on March (March 12-13, 2015) where we will be able to again work with the outstanding members of the New Orleans Chapter.

Finally, each year the outgoing Section Chair recognizes the work of a Section member in support of the Section during the past year. This year, outgoing Chair, Karleen Green, selected incoming Chair, Craig Cowart, to receive the "Chair's Award." The full Board of the Labor and Employment Law Section works hard to provide benefit to Section members, and you are invited to take advantage of one or more of the many ways to become more involved in the work of the Section. ■

Kathryn Knight; Donna Currault; Chris Afieri, current New Orleans chapter president; Wendy Hickok Robinson, immediate past-president of New Orleans chapter; and Karleen J. Green, outgoing chair of Labor and Employment Law Section). Chapter award presented by Green to New Orleans Chapter.

The Labor and Employment Law Section
of the Federal Bar Association announces the

# 6th Bi-annual Labor and Employment Law Conference

## March 12–13, 2015
## Westin Canal Place • New Orleans


**Register by January 30 to save $50! Visit www.fedbar.org and register today!**

# Federal Bar Association

## Labor and Employment Law Section

Federal Law Clerks Panel: Marc Betinsky; Elizabeth Welter; Kate Bruce; and Brian Rochel, Schaefer Halleen, Moderator

### Labor and Employment Law Section hosts CLE with Minnesota Chapter of FBA

On Friday, Sept. 26, 2014, the Labor and Employment Law Section and the Minnesota Chapter of the Federal Bar Association hosted a half-day CLE in Minneapolis. Sessions included *Ethical and Strategic Issues in Employment Law Mediations, Effective Strategies for Working with the EEOC,* and *Federal Law Clerks' Tips for Dispositive Motions and Trying Employment Cases.*

CLE committee: Brian Rochel; Corie Tarara; and Joel Schroeder with then-chair Karleen Green

Ethics panel: Corie Tarara, Seaton Peters Revnew, Moderator; Jim Ryan, Ryan Law Firm; Barbara D'Aquila, Norton Rose Fulbright; Hon. Arthur J. Boylan (ret.) , Arthur J. Boylan ADR

Stacey Bolton, Supervisory Investigator, EEOC Minneapolis; Julie Schmid, Acting Director, EEOC Minneapolis; Joel Schroeder, Faegre Baker Daniels, Moderator

## Private Settlement of FLSA Claims: Federal District Courts Grapple with *Lynn's Food* and *Martin*

By Elizabeth S. "Betsy" Chestney and Emily Ardolino

The Fair Labor Standards Act ("FLSA" or "the Act") vests workers with the rights to a minimum hourly wage and to overtime (unless the workers are exempt). Because these rights are not subject to waiver, private settlement of FLSA claims prior to litigation or in the context of FLSA lawsuits has long been thought to require court approval for settlement to be enforceable, based primarily on the Eleventh Circuit's reasoning in *Lynn's Food Stores Inc. v. United States*, 679 F.2d 1350 (11th Cir. 1982). But in 2012, a Fifth Circuit decision opened the door to the possibility that—at least in some circumstances—private litigants can settle FLSA claims without subjecting the settlements to judicial scrutiny. *See Martin v. Spring Break '83 Productions*, 688 F.3d 247, 255 (5th Cir. 2012). The other circuits have remained silent on the issue, leaving district courts in those circuits to choose between the approaches of the Eleventh and Fifth Circuits, or to attempt to reconcile them.

### I. FLSA Rights Not Subject to Waiver

The FLSA's purpose is "to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (internal quotations omitted). To effectuate this purpose, the FLSA: (1) guarantees workers a minimum hourly wage; (2) entitles them to overtime compensation for weeks where workers more than 40 hours in a seven-day workweek (unless exempt); and (3) provides for liquidated damages. These statutory rights cannot be contracted around or waived. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945); *DA Shulte, Inc. v. Gangi*, 328 U.S. 108, 114 (1946). As the Supreme Court noted, "[n]o one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act." *O'Neil*, 324 U.S. at 706-07. Moreover, these statutory rights are guaranteed to *individual* workers, and not even a union can waive these rights through collective bargaining. *Barrentine*, 450 U.S. at 745 ("FLSA rights . . . are independent of the collective-bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable.").

But in *Gangi* and *O'Neil*, the Supreme Court expressly left often the question of whether private litigants can settle FLSA claims where the dispute is not regarding the statutory rights, but involves a dispute over the number of hours the employee worked, or what the employee's regular rate is. *See Gangi*, 328 U.S. at 114-15 ("Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment."); *O'Neil*, 324 U.S. at 714 (noting that the decision did not reach the issue of "validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide compromise and settlement."). Although the FLSA was subsequently amended in response to FLSA, confusion has remained regarding the extent to which the amendments answered the question left open in *Gangi* and *O'Neil*. *See Martinez v. Bohls Bearing Equip Co.*, 361 F. Supp. 2d 608, 623-31 (W.D. Tex. 2005) (explaining in detail the subsequent amendments to the FLSA and analyzing the legislative history regarding those amendments, and noting that the lack of consensus between the Circuits on the meaning of the amendments). In particular, a question arose regarding whether the 1949 amendment that introduced a mechanism by which an FLSA claim could be settled with Department of Labor oversight foreclosed the possibility of settling FLSA claims—even ones that involved disputes over the regular rate or the number of hours worked—by any other means.

### II. Eleventh Circuit in Lynn's Food Requires Court Approval

The Eleventh Circuit was the first to weigh in on this question. In *Lynn's Food*, the DOL had audited the employer and determined that it owed more than $10,000 in back wages and liquidated damages to its employees for minimum wage and overtime violations. *Lynn's Food*, 679 F.2d at 1352. The company and the DOL failed to reach a settlement, so the company directly offered its employees—who were not represented by counsel—$1,000 to be distributed amongst those who signed a release of their FLSA claims. *Id*. The company then sought a declaratory judgment to enforce the releases against any subsequent DOL assessment. *Id*. The district court held the release was unenforceable. *Id*.

The Eleventh Circuit affirmed the district court's decision and held there were "only two ways in which back wage claims arising under the FLSA can be settled for compromised by employees": (1) payment supervised by the Secretary of Labor, or (2) court approval of a stipulated settlement in the context of an FLSA lawsuit. *Id.* at 1352-53. The Eleventh Circuit noted that settlements negotiated within the adversarial context of litigation are "more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching" and distinguished Lynn's settlement by pointing out that Lynn's employees had not filed a suit for back wages, seemed unaware that the DOL had determined Lynn's owed them back wages, had not consulted attorneys prior to signing the agreements, and had been discouraged from pursuing FLSA claims. *Id.* at 1354. In reviewing a transcript of the purported "negotiations" between Lynn's and its unrepresented employees, the court noted that the Lynn's representative "repeatedly insinuated that the employees were not really entitled to any back wages, much less the amounts calculated by the Department of Labor," suggested that "only malcontents would accept back wages owed them under the FLSA," and side-stepped the concerns of employees who suggested they had been paid unfairly. *Id.* The court identified these circumstances as the reason for requiring that such settlements be negotiated in the adversarial context of a lawsuit and approved by a court. *Id.* at 1355.

Thus, after *Lynn's Food*, district courts in the Eleventh Circuit and elsewhere required litigants who had reached settlements in FLSA lawsuits to submit their proposed settle-

ment agreements and stipulated judgments for approval by the presiding judge. Due to silence by the Supreme Court and the other Circuits, *Lynn's Food* remained the seminal case for years, with courts around the country endorsing its rationale and following this procedure.

### III. The Fifth Circuit Arguably Creates a Circuit Split With Martin

Thirty years later, the Fifth Circuit expressly addressed the question analyzed by *Lynn's Foods*, and reached the opposite conclusion, holding that private compromises of FLSA claims involving disputes over the number of hours worked were enforceable, even when the settlement agreements were not first submitted to a court for approval. *See Martin v. Spring Break '83 Productions*, 688 F.3d 247, 255 (5th Cir. 2012). Notably, in reaching its decision, the Martin court explicitly endorsed the rationale of *Martinez*, the district court decision metioned above, which had so carefully analyzed the legislative history of the FLSA amendments post *Gangi* and *O'Neil*. *Id*. at 254-55 (discussing *Martinez*, 361 F. Supp. 2d at 630-34).

The plaintiffs in *Martin* were union members who filed a grievance claiming they were not paid for overtime worked. *Id.* at 249. A union representative investigated the grievance and concluded that it would be impossible to determine whether the employees had worked on the days they alleged. *Id.* The union and employer subsequently entered into a settlement agreement that paid the employees "amounts due and owning" for the disputed number of hours they claimed they had worked and not been paid for. *Id.* at 256. Two weeks prior to the union settlement, four member employees individually filed FLSA claims in federal court. *Id.* at 249-250. The employees who had filed suit accepted and deposited the funds they received from the union settlement, but continued to pursue their federal claims on the basis that the union settlement agreement was an invalid waiver of FLSA claims under the *Lynn's Food* standard. *Id.* at 249.

The Fifth Circuit held that the union agreement was enforceable and binding. *Id.* at 255-256. The Fifth Circuit noted that it had previously held that a private settlement giving employees everything to which they were entitled under the FLSA was enforceable because "[a]lthough no court ever approved this settlement agreement, the same reason for enforcing a court-approved agreement i.e., little danger of employees being disadvantaged by unequal bargaining power," and that this reasoning applied with equal force in the context of the facts in *Martin*. *Id*. (quoting *Thomas v. Louisiana*, 534 F.2d 613, 615 (5th Cir. 1976)). Because the union agreement was negotiated in a sufficiently adversarial context and the employees, who individually accepted payment under the agreement, did so after they had engaged counsel to represent them in an FLSA action in federal court, the agreement was enforceable. *Martin*, 688 F.3d at 256-257. The Fifth Circuit emphasized that the union agreement was a compromise on a bona fide dispute over the amount of hours the employees worked, and not a waiver of their substantive rights under the FLSA. *Id.* at 256.

Finally, it is important to note that the Fifth Circuit did not see its decision in *Martin* as contrary to *Lynn's Food*. In fact, the court explicitly addressed *Lynn's Food*, noting that in *Lynn's Food*, the employees agreed to a settlement outside the context of a lawsuit, without the benefit of counsel, and in a situation where the employees (some of whom did not even speak English) did not even seem to be aware that the DOL had determined that they were owed back wages. *Martin*, 688 F.3d at n. 10. The employees in *Martin*, in contrast, knew about their FLSA rights, had retained attorneys, had filed a lawsuit, had entered a settlement agreement, and had accepted payment. According to the Fifth Circuit, under these circumstances, where the "[s]ettlement of their bona fide dispute did not occur outside the context of a lawsuit," the Eleventh Circuit's concerns in *Lynn's Food* "were not implicated." *Id*.

### IV. The Post-Martin Landscape

The Fifth Circuit's willingness in *Martin* to uphold a settlement agreement that had not been submitted to a Court for approval in the context of litigation means that employment law attorneys in the Fifth Circuit can now secure dismissal of FLSA lawsuits without jumping through the procedural hoops imposed by *Lynn's Food*. *Accord Bodle v. TXL Mortg. Corp.*, 2012 WL 5828616 (S.D. Tex. Oct. 2, 2012) (following *Martin* and *Martinez* and enforcing the release of FLSA claims that had not been submitted to a court for judicial approval). Even district courts in the Eleventh Circuit are finding ways to reconcile *Martin* with *Lynn's Food* and to narrow *Lynn's Food*. *See, e.g., Fernandez v. A-1 Duran Roofing, Inc*., 12-CV-20757, 2013 WL 684736 (S.D. Fla. Feb. 25, 2013) (citing *Martin* and indicating *Lynn's Food* court-approval not required in the context of an FLSA lawsuit where the employee is represented by counsel).

Litigants from other jurisdictions who have argued that their cases can be dismissed without judicial oversight have not all succeeded. In an Eastern District of New York case, the plaintiff invoked *Martin*, and argued that submission of the settlement agreement to the court was not required. S*ee Archer v. TNT USA, Inc.*, No. 12-CV-1297 SLT RML, 2014 WL 1343126, at *14 (E.D.N.Y. Mar. 31, 2014). The court disagreed, continuing to following the *Lynn's Food* procedural approach, and distinguished *Martin*, noting that while the settlement at issue was "unquestionably reached during a litigation in which the employees were represented by counsel," in contrast to *Martin*, "the parties have not adduced any evidence that their settlement resolves a 'bona fide dispute' over hours or rates of pay and does not compromise the non-waivable substantive rights afforded by the FLSA."

Other district courts have been open to side-stepping the procedural requirements of *Lynn's Food*, but warn about the risk of doing so. In two recent cases out of the District of Columbia, the district judges noted that there is no binding precedent in their circuit requiring prospective judicial approval of settlements of FLSA claims, but cautioned that "any FLSA settlement that is not approved by a court leaves the parties in an uncertain position . . . [since] the private settlement may be held unenforceable if the employer attempts to enforce the employees' waiver of the claims per the settlement at a later date." *Sarceno v. Choi*, 2014 WL 4380680 *8 (D.D.C. Sept. 5, 2014) (quoting *Carrillo v. Dandan*, Inc., 2014 WL 2890309 *5 (D.D.C. Jun. 26, 2014).

**V. Why Martin Matters**

The D.C. federal courts' warnings illustrate the dilemma facing practitioners in the Fifth Circuit and other jurisdictions where courts are willing to dismiss FLSA lawsuits without first requiring submission of the settlement for approval. Failure to undertake the additional procedural step imposed by *Lynn's Food* potentially invites a subsequent attack on the settlement agreement on the grounds that it does not comport with every aspect of *Martin*.

However, in many FLSA cases, accepting the risk of a subsequent challenge may make sense for the parties. FLSA suits often involve claims for small amounts of back wages, and even with the imposition of liquidated damages, attorneys' fees can easily and quickly exceed the amount of back wages and liquidated damages in controversy. Anything that requires extra work for the attorneys necessarily means higher costs associated with settlement. Plus, submitting a motion for approval of the settlement agreement to the Court takes time, and often results in the disclosure of settlement terms that the employer would prefer not become public record. Where both sides are represented by counsel, and a reasonable compromise is reached in the context of an adversarial proceeding, practitioners may decide that the small risk of a (likely unsuccessful) challenge is worth taking, given the savings in time and money for their clients, and the ability to settle cases more discretely. ■

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## "Making a Federal Case Out of It": Title VII Protection for the LGBT Community

By R. Scott Oswald

Twenty-one states plus the District of Columbia have laws on the books that prohibit discrimination based on an employee's sexual orientation or gender identity.[1] In a report issued by the Human Rights Campaign, approximately 88% of all Fortune 500 companies include in their company policies a prohibition on sexual orientation discrimination. This figure is up by more than twenty five percent from only ten years ago.[2] As the tide continues to turn in favor of extending civil rights and protections to the LGBT community, I would not be at all surprised to see a few more states and companies added to these lists between the time of writing and of publishing.

Yet, despite seemingly widespread support to protect LGBT workers from harassment and discrimination, federal efforts to pass comprehensive anti-discrimination laws for the LGBT community have continued to stagnate. For example, the Employment Non-Discrimination Act, popularly referred to as ENDA, is a piece of federal legislation that is, broadly, designed to prohibit employers from engaging in workplace harassment and discrimination against employees on the basis of their sexual orientation or gender identity.[3] Despite being first introduced more than twenty years ago (and reintroduced by nearly every Congress since), the legislation has been unable to pass through both houses of Congress. Whether one wants to attribute this fact to typical partisan gamesmanship, Congressional gridlock, or, of more recent significance, concerns about the impact of the *Hobby Lobby* decision on ENDA's effectiveness,[4] there exists no explicit federal prohibition on discrimination against members of the LGBT community.

### I. Overview of Protections

But this lack of federal anti-discrimination laws does not mean that it is open season for employers to discriminate against LGBT employees. In addition to the protections available at the state level (and in the court of public opinion), recent opinions suggest that employers may find themselves embroiled in litigation in federal court should they discriminate based on sexual orientation or gender identity.

As any employment practitioner is aware, Title VII of the Civil Rights Act prohibits discrimination based on race, color, national origin, religion, and sex. I think that the protections against sex and religion discrimination are likely to prove problematic for discriminating employers moving forward.

### II. Sex-Based Discrimination & Gender Stereotyping

Beginning first with sex-based discrimination as it applies to the LGBT community, courts have long recognized the theory of gender-stereotyping under Title VII. From the Supreme Court's landmark opinion in *Price Waterhouse v. Hopkins*,[5] a plaintiff can state a viable claim of discrimination under Title VII by alleging that his or her failure to comply with societal norms of how a man or woman should or should not behave led to an adverse employment action.[6] The following excerpt from a recent Third Circuit opinion in *Prowel v. Wise Business Forms, Inc*., reflects how this may be achieved:

> The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes. He acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his nale encoder with "pizzazz."[7]

The Third Circuit Court of Appeals went on to provide that, "There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not."

Any "gender stereotyping" claim naturally requires a female to play up her masculinity or a male to emphasize his femininity. Such tactics are likely to be uncomfortable for members of the LGBT community, many of whom have likely spent their lives trying to fight *against* such stereotyping. In March 2014, the District Court for the District of Columbia took Title VII's protections for the LGBT community one step further. In *Terveer v. Billington,*[8] Judge Kollar-Kotelly permitted a homosexual male to proceed on his discrimination claims under Title VII where he alleged little more than the fact that his "sexual orientation [was] not consistent with the Defendant's perception of acceptable gender roles" and his "status as a homosexual male did not conform to the Defendant's gender stereotypes."[9] Judge Kollar-Kotelly did not require the male plaintiff to discuss the "pizzazz" with which he performed his job duties or the fact that he "crossed his legs." Rather, her very direct assessment that the plaintiff's status as a homosexual male did not conform to the employer's perception of gender roles permitted the plaintiff to proceed on a claim of discrimination under Title VII.

### III. Religious Discrimination

It appears that an LGBT plaintiff's best bet for moving forward with a claim of discrimination under Title VII is to use either a gender stereotyping sex-based discrimination claim. However, a less tested means for extending Title VII protections to the LGBT community is to file a claim based on religious discrimination. *Pedreira v. Kentucky Baptist Homes for Children, Inc*.[10], a 2009 case from the Sixth Circuit, helps to illustrate the point. The defendant in that case, KBHC, terminated its employee, Pedreira, after discovering a picture of her and her female partner at an AIDS fundraiser. KBHC went so far as to include in its termination letter that she was fired, "because her admitted homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values." The District Court granted KBHC's motion to dismiss and the case went up to the Sixth Circuit Court of Appeals to determine whether Pedreira properly alleged religious discrimination as the cause of her termination.

Ultimately, the court concluded that Pedreira "has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC."[11] But, in so doing, the court also held open the possibility that an LGBT employee's claim of religious discrimination could, potentially, survive a motion to dismiss. "While there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has failed to state a claim upon which relief could be granted."[12]

Perhaps not as cut and dry as the "gender stereotyping" claim, one could still easily imagine an LGBT employee alleging that a difference of religion (or religious interpretation) is what led to a rift in the employment relationship.

### IV. Concluding Thoughts and a Warning to Management

As previously noted, nearly half of the states prohibit discrimination on the basis of sexual orientation or gender identity. But employers operating in those jurisdictions without such protections are at risk of finding themselves litigating claims in federal court under Title VII. It behooves employers to tread lightly and behave as though discrimination against the LGBT community is, in fact, illegal. Regardless of whether a law like ENDA ever makes it on to the books, it is my belief that many more jurisdictions will soon allow LGBT plaintiffs to proceed on theories of religious and sex-based discrimination. This is precisely the type of issue that the Supreme Court would love to take on. No company wants to end up in the history books as the one on the wrong side of the "v" if that proves to be the case. ■

*R. Scott Oswald is the Managing Principal of The Employment Law Group, P.C., a law firm that represents employees who claim wrongdoing by their employers, including violations of various anti-discrimination and whistleblower laws. Based in Washington, D.C., Mr. Oswald litigates employment cases nationwide and is the immediate past president of the Metropolitan Washington Employment Lawyer's Association.*

### Endnotes

[1]Statewide Employment Laws and Policies, Human Rights Campaign (May 15, 2014), hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/statewide_employment_5-2014.pdf.

[2]Corporate Equality Index 2013, Human Rights Campaign, (Dec. 20, 2012), www.hrc.org/files/assets/resources/CorporateEqualityIndex_2013.pdf.

[3]S. 815, 113th Cong. § 2 (2013).

[4]*See Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751 (2014). Though not the focus of this article, many LGBT activists have renounced their support of ENDA in its current form. The fear is that the same arguments about the impact of the Religious Freedom Restoration Act of 1993 ("RFRA") and the Free Exercise Clause will be used to eat away at ENDA as they did the employer mandated birth-control provision of the Affordable Care Act.

[5]*Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (stating, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

[6]*Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, 576 (7th Cir. 1997) (holding that a plaintiff had presented sufficient evidence to support a charge of discrimination where he demonstrated that co-workers harassed a him because he wore an earring, questioned him about his gender, and threatened him with sexual assaults (vacated on other grounds).

[7]*Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009).

[8]*Terveer v. Billington*, CV 12-1290 (CKK), 2014 WL 1280301 (D.D.C. Mar. 31, 2014).

[9]*Id.*

[10]*Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009).

[11]*Id.*

[12]*Id.*

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