

SCOTUS mulls extending Title VII protection to gay, transgender workers

By **Tricia Gorman**

In wide-ranging arguments in three potentially landmark cases, the U.S. Supreme Court questioned the text and history of Title VII as it prepares to decide whether federal protection against sex discrimination applies to gay and transgender employees.

Bostock v. Clayton County, Georgia, No. 17-1618; Altitude Express Inc. et al. v. Zarda et al., No. 17-1623, oral argument held, 2019 WL 5087133 (U.S. Oct. 8, 2019).

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission et al., No. 18-107, oral argument held, 2019 WL 5087134 (U.S. Oct. 8, 2019).

In two separate arguments Oct. 8, the second day of the high court's new term, justices considered whether Title VII of the Civil Rights Act of 1964's prohibition against employment discrimination "because of ... sex" covers bias based on sexual orientation and gender identity.

The justices and counsel discussed the language of the statute's ban, 42 U.S.C.A. § 2000e-2, and how to apply the court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that Title VII covers claims based on nonconformance with gender-based stereotypes.

The justices also inquired about gender-specific bathrooms and collegiate sports teams segregated by sex, and repeatedly asked when separation and disparate treatment based on sex is discriminatory and when it is not.

The questioning also showed some of the justices' concern that the court not take over legislative duties by adding prohibitions Congress did not consider in 1964 and has not added since then.

"If the court takes this up and interprets this 1964 statute to prohibit discrimination based on sexual orientation, we will be acting exactly like a legislature," Justice Samuel Alito said.

Justice Neil Gorsuch acknowledged the "legitimacy" and "importance" of the claims in the transgender bias suit, but said the question comes down to judicial interpretation of the law's text.

"We're not talking about extra-textual stuff ... We're talking about the text. It's close," Justice Gorsuch said. "At the end of the day,

should [the judge] take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that ... Congress didn't think about it?"

The justices and counsel also discussed the evolution of Title VII protection against sexual harassment claims.

"No one ever thought sexual harassment was encompassed by discrimination on the basis of sex back in '64," Justice Ruth Bader Ginsburg said.

3 CASES

The justices heard arguments in appeals from two conflicting federal circuit court rulings over whether Title VII protects against workplace bias based on sexual orientation and a third ruling that Title VII covers workplace bias against transgender people.

In the first case, Gerald Bostock alleged he was fired from his job as a child welfare specialist for Clayton County, Georgia, because he is gay. The 11th U.S. Circuit Court of Appeals ruled that Title VII does not prohibit discrimination based on sexual orientation. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018).

The second case involves a skydiving instructor, now deceased, who alleged Altitude Express Inc. fired him because he was gay. The full 2nd U.S. Circuit Court of Appeals ruled that such bias is a form of sex discrimination prohibited by Title VII, overruling its own precedent. *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (2d Cir. 2018).

In the third case, the Equal Employment Opportunity Commission sued a Detroit funeral home operator for allegedly discriminating against transgender funeral director Aimee Stephens. The 6th U.S. Circuit Court of Appeals said Stephens stated a viable Title VII claim by alleging the company decided to fire her after she told them she was transitioning from male to female. *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018).



'ALL ABOUT PARAMETERS'

Several attorneys who were not involved in the cases offered their take on the arguments.

"The arguments were all about parameters," Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone partner Sharon Stiller said. "The justices were looking at where to draw the line — when is disparate treatment allowed and when is it not permitted."

The justices were aware that their ruling in these cases could be historic, according to Carolyn Wheeler, senior counsel at Katz, Marshall & Banks.

"The focus was on whether recognizing that Title VII would encompass claims of sexual orientation and transgender

discrimination would be the type of seismic change that only Congress should make rather than the court," Wheeler said.

Seyfarth Shaw senior counsel Lawrence Lorber suggested that the justices' focus in each of the two arguments was different and perhaps portend different decisions.

In *Bostock/Zarda*, the justices "addressed the fact that Supreme Court precedent in *Hopkins* ... recognized that reliance on sex stereotypes would possibly violate Title VII," Lorber noted.

But in *Harris Funeral Homes*, the justices "focus[ed] on the fact that Congress has failed to pass amendments to Title VII covering transgender [people] ... but had passed other laws covering transgender individuals."

DISCRIMINATION

Attorneys discuss SCOTUS arguments



Sharon Stiller – partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone

It was clear that all the justices did not necessarily view the issues in all the cases as being the same. Chief Justice Roberts was continually questioning whether the Aimee Stephens case differed from the *Bostock/Zarda* case, and whether there was a different standard that should be applied. Was she being treated differently because of sex or because she was transgender, and does that make a difference? There was also a great deal of discussion of bona fide occupational qualifications and where that fits in, and how the law should recognize and account for differentials between men and women.

One of the most important and troubling questions is whether the decision is for Congress and not the courts. While the argument that the plain text prohibiting discrimination because of sex covers both sexual orientation and transgender or transitioning discrimination was clearly appealing to several of the justices, they noted that this is not how it's been interpreted over the years. Instead, for 50 years, federal appeals courts had agreed that Title VII does not cover discrimination based on sexual orientation and each year, Congress has considered extending coverage of the anti-discrimination laws to add sexual orientation and transgender or transitioning (as have many states), but has not done so.

While Justice Kagan addressed that argument by noting that the court interprets the statute and does not look at subsequent legislative enactments, even that is difficult given the great changes in society since 1964. Justice Ginsberg highlighted how difficult it is to argue that coverage was in Congress' contemplation in 1964, when she asked the attorneys to square that with the fact that in 1964, the American Psychiatric Association labeled homosexuality as a mental illness and homosexuality was criminalized in several states.

Another recurring theme was sex stereotyping, which seemed to be the unifying factor between the three cases. In the sexual orientation cases, the male workers alleged that they were fired because they did not comport with the male heterosexual stereotype and in the Stephens case, she was fired because she did not comport with the stereotype for the sex she was assigned at birth, once she notified her employer that she was transitioning and would begin to come to work dressed as a woman. The court's prior decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may prove to be integral to how this case is decided; at the very least, the justices will have to further refine its meaning.

It will be necessary for the court to address all these themes, and it is clear that this will be anything but a unanimous decision. The justices are very aware of the ramifications of their decision. They will have to address the troubling issue of whether the plain language of the statute does cover discrimination based on sexual orientation and/or transgender and if so, whether this trumps how the issues have been interpreted by other courts (and Congress) over the years. The court will also have to address how it interprets a statute given the historical context, when societal views have evolved so greatly.

I believe that there will be a clear division between the justices but that each will have to address many of these issues and the outcome may well be based upon judicial philosophies of the appropriate role of the court and of Congress.

But Justice Sotomayor advocated her own reality check, asking toward the end of the arguments in sum and substance, if it is clear that people are being discriminated against based on being homosexual or transgender, and that some people regard this as a "suspect" classification, then when should the court step in to prevent against invidious discrimination?



Davida Perry – managing partner Schwartz Perry & Heller LLP

In arguing that sexual orientation discrimination is covered by Title VII, plaintiffs' counsel argued that word "sex" necessarily includes sexual orientation and also gender identity, rejecting the idea that they were asking the court to "redefine" the term. In fact, according to counsel for the plaintiffs it is about looking at whether the employment actions are based on sex and when you think about sexual orientation one cannot escape that fact that it is root in sex ... same-sex ... but sex nonetheless.



Carolyn Wheeler – senior counsel Katz, Marshall & Banks

The arguments reflected core concerns with the meaning of discrimination because of sex and how it is proved – with many examples and arguments related to the appropriate "comparator" for establishing discrimination based on sex. The employers' attorneys and the Solicitor General said to prove the discrimination is because of sex the comparator for the gay man must be a lesbian, and for the transgender woman the comparator would have to be a transgender man, because that's the only way to isolate whether the discrimination is because of sex.

Justices Ginsburg, Kagan, Sotomayor, and Breyer all seemed to agree that under the simple test of different treatment based on sex, the employers would lose. Justice Gorsuch at some points seemed to agree that under the plain language the employees' position would prevail.

There was considerable discussion of the motivating factor and "but-for" causation standards, and general agreement among the justices who spoke that sex is at least a motivating factor in these cases. Justice Alito posed a hypothetical he thought would eviscerate the employees' argument when he posited an employer who refused to hire someone because of their sexual orientation without knowing their sex.

The employees' advocates all said ruling in their favor would not represent a legislative change but merely interpreting the words of the statute. The other argument against the court recognizing this expanded meaning of discrimination on the basis of sex was that it would not allow for a legislative weighing of possible religious objections, but the advocates for the employees stressed that there are already defenses in Title VII for religious employers.

In exploring the basic meaning of sex discrimination as different treatment on the basis of sex the court seemed concerned that segregated bathrooms and sex specific dress codes would be unlawful, but some seemed satisfied that direct challenges to such terms of employment might fail because they cause de minimis harm or could be addressed under the BFOQ defense.

It was striking in listening to the arguments, that almost all the cases cited and discussed supported the arguments of the employees for an expansive understanding of discrimination on the basis of sex – *Hopkins*, *Phillips v. Martin Marietta*, and *Oncale*. The counter-arguments which may ultimately prevail, seemed to be only that it is for Congress, not the court to recognize forms of discrimination that Congress did not have in mind in 1964.



Lawrence Lorber – senior counsel Seyfarth Shaw

The arguments perhaps revealed different results for the two cases.

Bostock/Zarda involved an analysis as to whether the prohibition of sex discrimination in Title VII covered the question of whether discrimination based on sexual orientation. For example, Justice Breyer pressed the employer's lawyer with the question as to whether inter religious or inter racial marriage could be relied upon to deny employment or fire an employee. The employer's lawyer tried to distinguish those examples by noting that Title VII prohibited racial and religious discrimination. Justice Breyer responded: "And all I find in that example is an identical case to this one."

Justice Kagan focused on the *Manhart* decision which held that reliance on sex-based annuity tables to charge higher premiums to women violated Title VII. Her questions focused on the fact that Title VII required focus on individual, not large groups particularly when stereotypical characteristics were app to these cases.

Justice Gorsuch suggested that a plain meaning of the statute might well apply so that sex could include sexual stereotypes referencing *Hopkins*. Raised in these cases as well was the question of unisex bathrooms or the recognized religious exemption.

Justice Ginsburg suggested in the sexual orientation context there may not be a need to address the bathroom issue and that nothing in *Bostock/Zarda* implicated the religious exemption. The Chief Justice and Justice Gorsuch expressed some concern that the court would be making new law, a role for Congress.

The argument in *Harris Funeral Homes* was somewhat different. There was a much greater focus on the bathroom question where the Solicitor General and Justice Gorsuch raised questions as to how that issue could be addressed since sex transition resulted in the change in sexual appearance. There was also a greater focus on the fact that transgender individuals fell outside the coverage of sex discrimination.

Justices Kagan and Sotomayor suggested that the court has not relied on the failure of Congress to act, but Justice Gorsuch suggested that when there was a major change in accepted values that the actor should be the Congress rather than the court.

While it is difficult to predict results particularly as Justice Kavanaugh asked only one question and the Chief Justice was generally neutral all though he did express concern about the court making new law, the argument may suggest different resolution of the sexual orientation and gender identity cases with the latter raising a more difficult issues for Justice Gorsuch and the other conservative justices.

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