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The Supreme Court Hears Arguments On The Meaning Of “Sex Discrimination”

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The Gender Policy Report

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High-stakes issues come before the U.S. Supreme Court on October 8th as it considers what constitutes discrimination "because of" or "on account of" sex. Does employment discrimination on the basis of sexual orientation or gender identity violate the nation's premier civil rights law?

In *Altitude Express v. Zarda*, *Bostock v. Clayton County, Georgia*, and *RG & GR Harris Funeral Homes v. Equal Employment Opportunity Commission* the Supreme Court will hear some arguments about the original meaning or the original public meaning of "sex" when Title VII was passed. The Justice Department will contend that "sex" meant biological sex; sexual orientation is not encompassed in Title VII, nor is transgender status a protected class under the statute. The law only means that males and females must be treated equally.

Many LGBT people and supporters of greater equality will closely watch Tuesday's arguments. The debate about the definition of "sex discrimination" under Title VII has likewise received much attention.

However, most remain unaware that, at the heart of the issue of workplace protections for LGBT employees, there exists a broader question about the authority of the Equal Employment Opportunity Commission, which initially brought the complaint against RG&GR Funeral Homes, to interpret existing antidiscrimination law on behalf of the United States government.

Cases highlight LGBT workplace discrimination

Zarda and *Bostock*, to be argued together, focus on whether workplace discrimination because of sexual orientation is covered by Title VII. Zarda, a skydiving instructor, claimed he was fired because he was gay; he sometimes told female clients he was gay to make them feel more comfortable when he held on to them. One, at least, felt uncomfortable. Zarda later died in a base jumping accident and the suit is being pursued by heirs.

Bostock, who worked as a child welfare services coordinator with responsibility for at-risk, abused, and neglected children, had received positive evaluations for a decade, but shortly after the county learned that he had joined a gay softball league, he was fired for "conduct unbecoming of a county employee."

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Aimee Stephens began working for a small funeral home as a male in 2007. In 2013, she wrote a letter to her employer informing him that she is transgender and wished to wear women's clothing to work. Two weeks later she was fired. The owner, claiming to be a devout Christian, believed Stephens was "violating God's commands." The Supreme Court did not invite consideration of the religious claim, but religious refusals to abide by generally applicable anti-discrimination laws lurks in the background.

Stephens, like Zarda and Bostock, claims that her gender identity (or, in the cases of Zarda and Bostock, their sexual orientation), had nothing to do with her job performance, and she argues that her firing constitutes discrimination on account of sex under Title VII.

The EEOC has a legacy of expanding protections

The meaning of sex discrimination has expanded since 1965. The Equal Employment Opportunity Act of 1972 extended Title VII to educational institutions and state and local governments, and it gave the EEOC the ability to sue non-governmental respondents. The Pregnancy Discrimination Act of 1978 later added discrimination based on pregnancy to the definition of unlawful sex discrimination, and amendments to the Civil Rights Act in 1991 codified an earlier Court decision, making workplace sexual harassment a form of sex discrimination under the law. Many of these congressional amendments overturned earlier, more restrictive conceptions of sex discrimination.

Since the EEOC's creation in 1965 to enforce the Civil Rights Act, its guidelines have also played an important role in expanding the definition of sex discrimination. EEOC changes have been called a case of "successful administrative policy entrepreneurship," and these evolving guidelines have enabled a number of victories in federal courts.

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EEOC has historically brought many actions on discrimination on the basis of gender identity and sexual orientation, with sex discrimination charges more than doubling between 2013 and 2016. From 1997 through 2017, approximately 30% of all individual charges filed with the EEOC were charges of discrimination based on sex.

In 2012, the EEOC held that Title VII coverage includes transgender individuals; in 2015, it determined that employment discrimination on the basis of sexual orientation constituted discrimination on account of sex. The EEOC website, even as of October 2, 2019, claims that "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation.** These protections apply regardless of any contrary state or local laws."

Lower courts are divided on LGBT workplace protections

Prior to the arrival of Tuesday's cases before the Supreme Court, the Circuit Courts in *Zarda* and *Bostock* split on whether Title VII extends to discrimination on the basis of sexual orientation.

The issue has been brewing in federal courts, as had the question of discrimination on the basis of gender identity. In 2017, for example, a Court of Appeals decided the case of *Hively v. Ivy Tech. Community College*, in which an openly lesbian instructor claimed she was denied an opportunity to be considered for a full-time academic position because of her sexual orientation. In its decision, the court relied on two arguments. First, it asked whether, if the individual's sex were different but everything else remained the same (i.e. if she were a man married to a woman), she would have been treated the same way. The court also relied on analogies to interracial marriage (*Loving* v. *Virginia*, 1967), whereby someone experiencing discrimination because of their partner's protected class could claim a violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment. The court allowed Hively's case to go forward. Importantly, EEOC holdings supported the outcome.

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But meanwhile, in another case (*Evans v. Georgia Regional Hospital*), another circuit court decided that the plaintiff, who claimed discrimination and retaliation by their employer on the basis of sexual orientation and gender nonconformity, was not covered under Title VII. The case was appealed to the Supreme Court, but the petition for certiorari was denied in December, 2017.

The Circuit Courts split again in early 2018. The Eleventh Circuit ruled that Gerald Bostock failed to state an actionable claim when he argued that he was discriminated against on the basis of sexual orientation and gender stereotyping. In *Zarda v. Altitude Express*, the Second Circuit noted that "legal doctrine evolves" and held that sexual orientation is included in the definition of sex discrimination, reversing earlier Second Circuit precedents.

The EEOC filed a brief in the Second Circuit case arguing that sexual orientation should be included under Title VII. The American Bar Association also passed a resolution in February, 2018 maintaining that sexual orientation and gender orientation should be seen as sex discrimination under Title VII.

In a highly unusual move, the Justice Department then led by Attorney General Jeff Sessions filed a brief in the Second Circuit Zarda case asserting that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade." In attacking the position of this federal agency, the Justice Department was not only attacking Obama-era rule-making and statutory interpretation, but it was also signaling a deeper assault on patterns of policy-making in the administrative state.

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The interesting issue of how much authority the EEOC has to implement law and policy will not be on the Supreme Court's agenda, because the DOJ claims to speak for the government before the Supreme Court. There is no opposing EEOC brief.

But the disagreement has not completely gone away. In RG&GR Funeral Homes, when the Sixth Circuit ruled in favor of Aimee Stephens, the Solicitor General filed a brief before the Supreme Court contending that the prior ruling on behalf of Stephens should be reversed. Yet the EEOC, which brought the complaint against RG&GR Harris Funeral Homes, did not sign the DOJ brief — a strong hint that they were not on board with the effort to bar application of Title VII to transgender employees.

Conclusion

Any prospects for the EEOC to enforce civil rights law on behalf of LGBTQ employees may depend on how the Court's new conservative majority decides these three cases. Some legal scholars see the unanimous *Oncale v. Sundowner Offshore Services* decision, a decision authored by the late Justice Scalia in 1998 allowing that sexual harassment could exist between same sex individuals, as offering some hope. Others think the relatively conservative "but for" argument—that "but for" the employee's sexual orientation or sexual identity, they would have been treated differently—may have some appeal. If not, it is unlikely that Congress would be able to amend Title VII to undo the Court's decisions in these cases.