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Because of Sex: Whether Title VII Protects Sexual Orientation and Gender Identity

Scott A. Budow

The U.S. Supreme Court will analyze whether Title VII of the 1964 Civil Rights Act protects gay and transgender employees from employment discrimination nationwide. This article discusses the historical context and the cases that the Court will hear. The highly anticipated decision will have immediate import for private sector employers and employees in the 26 states where no such state analogue exists.

Can an employee be fired for being gay? Transgender? The U.S. Supreme Court will answer those related, yet distinct, questions in the upcoming term.

The Court will analyze whether Title VII of the 1964 Civil Rights Act protects gay and transgender employees from employment discrimination nationwide. However, 21 states and the District of Columbia explicitly prohibit an employer from discriminating against an employee due to the employee's sexual orientation or gender identity. Three other states interpret state law prohibitions on sex discrimination to apply to sexual orientation and/or gender identity. Therefore, the cases that the Court will hear have immediate import for private sector employers and employees in the 26 states where no such state analogue exists.

HISTORICAL CONTEXT: TITLE VII

In the immediate aftermath of President Kennedy's assassination in November 1963, President Johnson sought and ultimately signed into law the 1964 Civil Rights Act (the Act). The Act was primarily aimed at combating racial discrimination in the private sector, which had been

Scott A. Budow is an associate at Kauff McGuire & Margolis LLP, where he practices labor and employment law. He may be reached at *budow@kmm.com*.

an elusive goal for many since the *Civil Rights Cases* in 1883, when the Court declared that Congress lacked the power to do so.

Titles II, III, and IV of the Act outlawed discrimination in public accommodations, desegregated public facilities, and desegregated public education. Title VII of the Act prohibited discrimination in employment.

Initially, the draft bill of what would become Title VII protected employees against discrimination because of race, color, national origin, and religion. Just before the then-bill was set to be voted on in the House, a controversial amendment was added that also prohibited discrimination in employment because of sex. The amendment was added by a declared opponent of civil rights, possibly as a poison pill to undermine support so that it would not pass. However, the amended bill passed the House without significant debate, leaving future jurists with "little legislative history to guide [the interpretation of] the Act's prohibition based on 'sex.'"[1]

Title VII prohibits an employer with 15 or more employees from "discriminating against any individual . . . because of . . . sex." A plaintiff establishes unlawful discrimination by demonstrating that sex was a motivating factor for the employment practice, even though other factors may have also contributed.[2]

Before 2015, the Equal Employment Opportunity Commission (EEOC) and every circuit to have reviewed the question concluded that Title VII's prohibition on discrimination "because of . . . sex" did not apply to sexual orientation claims. Then in 2015, the EEOC reversed itself, and found that Title VII prohibits discrimination based on sexual orientation.[3] The U.S. Courts of Appeals for the Seventh and Second Circuits followed suit in 2017 and 2018, respectively. Also in 2018, the U.S. Court of Appeals for the Sixth Circuit found that Title VII's prohibition applied to gender identity.

SEXUAL ORIENTATION: *ZARDA V. ALTITUDE EXPRESS* AND *BOSTOCK V. CLAYTON COUNTY, GEORGIA*

Donald Zarda, a gay skydiving instructor, alleged that he was fired from his job at Altitude Express because his employer became aware of his sexual orientation. Zarda claimed that he was fired "because of . . . sex" in violation of Title VII. The district court ruled against Zarda,[4] but the Second Circuit reversed,[5] finding that Zarda had established a prima facie case of unlawful discrimination for three independent reasons.

First, the Second Circuit found that sexual orientation is a function of sex, and discrimination on the basis of sexual orientation is therefore discrimination "because of . . . sex." As it explained, "[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex."[6] Drawing from Supreme Court precedent, the Second Circuit employed the "comparative test," which determines whether the relevant trait is the basis for discrimination

by asking whether that employee's treatment would have been different "but for that person's sex."[7] Therefore, the question is whether a woman and a man, both of whom are attracted to men, would receive equal treatment from this employer. Because the answer is obviously "no," the comparative test reveals that Zarda was discriminated against "because of . . . sex."

In an amicus brief, the federal government argued that this misapplied the comparative test. The correct test, it argued, compared a gay man to a lesbian woman. Because both the man and the woman would have been fired for their sexual orientation, neither was fired "because of . . . sex." Rather, each was fired due to "sexual orientation," which the government argued was conspicuously absent from the text of Title VII. The Second Circuit rejected this formulation of the comparative test, in part because it did not respond to the complaint, which alleged sexual orientation discrimination, not disparate treatment between gay men and lesbian women.

Next, the court found that gender stereotyping provides an independent "basis for concluding that sexual orientation is a subset of sex discrimination."[8] The Supreme Court has repeatedly found that employment determinations may not be predicated on stereotyped impressions about men and women.[9] Further, in *Oncale v. Sundowner Offshore Services*, it held that discrimination "because of . . . sex" applied between members of the same sex. Acknowledging this precedent, the Second Circuit identified a familiar, yet unstated bigotry, noting that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women . . . The gender stereotype at work here is that 'real' men should date women, and not other men."[10] Indeed, in a society where the vast majority of people identify as heterosexual, same-sex orientation can be viewed as the "ultimate case of failure to conform."[11] In other words, firing an employee for his/her sexual orientation – which is inherently a minority position that fails to conform to gender stereotypes – necessarily discriminates against that person "because of . . . sex."

Finally, the court held that associational discrimination provides yet another independent reason for concluding that Title VII protects sexual orientation. It explained that an employer's decision to fire a gay employee for being gay is inherently predicated upon the employer's opposition to that employee's romantic associations. Borrowing in part from the reasoning in *Loving*, where the U.S. Supreme Court struck down an anti-miscegenation statute for violating the 14th Amendment, the Second Circuit explained that equal application of an unlawful discriminatory practice does not make the practice lawful. In *Loving*, the Commonwealth of Virginia argued that anti-miscegenation statutes did not violate the 14th Amendment because they applied equally to white and black citizens – both races were equally prohibited from marrying the other. But the Court rejected this argument, noting that anti-miscegenation laws are still unlawfully premised "upon distinctions drawn according to race."[12] Similarly, discriminating against a gay man for his romantic association to another man is still associational discrimination

regardless of the fact that a lesbian woman would receive equal treatment for her romantic association to another woman.

Zarda will be consolidated with *Bostock v. Clayton County, Georgia*, a U.S. Court of Appeals for the Eleventh Circuit decision also issued in 2018 that reaffirmed circuit precedent and held that Title VII does not apply to sexual orientation claims. The Supreme Court will resolve the newly-formed circuit split in the upcoming term.

GENDER IDENTITY: *EEOC V. R.G & G.R. HARRIS FUNERAL HOMES, INC.*

In *EEOC v. R.G. & G. R. Harris Funeral Homes, Inc.* (Harris),[13] the U.S. Courts of Appeals for the Sixth Circuit held that a funeral home violated Title VII when it fired employee Aimee Stephens after Stephens revealed her intentions to transition from male to female.[14] It concluded that Stephens' employer, R.G. & G.R. Harris Funeral Homes, Inc. (the Funeral Home) violated Title VII because it discriminated on the basis of (1) sex stereotypes, and, alternatively (2) transgender/transitioning status. It also rejected two defenses that the Funeral Home and related amici raised concerning religious liberty, finding that neither the ministerial exception to Title VII nor the Religious Freedom Restoration Act (RFRA) provided a permissible defense for the employer's discriminatory action.

Aimee Stephens was formerly known as Anthony Stephens and born biologically male. Starting in October 2007 Stephens worked as a funeral director at the Funeral Home, using her then-legal name, William Anthony Beasley Stephens. In the summer of 2013, Stephens informed the owner of the Funeral Home, Thomas Rost, that she had struggled with her gender identity her entire life, and that she "decided to become the person that [her] mind already is."[15] She further explained that she intended to have sex reassignment surgery, and that after an upcoming vacation she would return as her true self, Aimee Australia Stephens. Rost fired Stephens just before she left for vacation because Stephens "was no longer going to represent himself as a man."[16]

Two additional elements play a significant role in this litigation. First, the Funeral Home has different required uniforms for its male and female employees, and Stephens clearly communicated to Rost before she was fired that she intended to comply with the appropriate female uniform requirements upon returning to work. Second, the owner of the Funeral Home, Rost, had been a devout Christian for over 65 years. He believed "that God has called him to serve grieving people,"[17] which is why the Funeral Home's website noted that its "highest priority is to honor God in all that we do as a company and as individuals."[18] While the Funeral Home conceded that it is not a religious institution, Rost personally believed "that the Bible teaches that a person's sex is an immutable God-given gift" and that he would violate God's commands if he "were to permit one of the funeral directors to deny their sex while acting as a representative of [the] organization."[19]

The Sixth Circuit first found that Rost's termination of Aimee Stephens unlawfully discriminated on the basis of sex stereotypes. In *Price Waterhouse v. Hopkins*,[20] a plurality of the U.S. Supreme Court found that a female employee could properly state a claim for discrimination under Title VII after suffering an adverse employment decision for failing to "walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry."[21] In other words, the employee could state a claim "even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough."[22] Here, Rost fired Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman."[23] According to the Sixth Circuit, this was unlawful sex stereotyping because Rost fired Stephens "simply because she refused to conform to the Funeral Home's notion of her sex."[24]

The court also found that the Funeral Home unlawfully discriminated against Stephens due to her transgender or transsexual status. Rejecting the Funeral Home's argument that "sex" in Title VII refers to a binary choice between male and female based on chromosomal physiology and reproductive function, the court noted that it is "analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[25] Employing the comparative test, it asked whether Stephens would have been fired if she had been born a woman and sought to comply with the women's dress code. Because Stephens obviously would not have been fired, the test reveals that Stephens was fired due to her sex. Further, since transgender or transitioning status is inherently a gender-non-conforming trait, discriminating against an individual for either status is unlawful sex stereotyping.

Finally, the Funeral Home and related amici raised two defenses grounded in religious freedom that the court rejected as inapplicable.

Amici argued on First Amendment grounds that the ministerial exception, which applies to the employment relationship between a religious institution and its ministers, precluded enforcement of Title VII.[26] While the exception applies in certain limited circumstances, the court easily concluded that the Funeral Home was not a religious institution, both because it admitted as much in its brief and because it lacked typical religious characteristics, such as being affiliated with a particular church or having articles of incorporation that claim a religious purpose. Additionally, Stephens was not a "ministerial employee," because her title – funeral director – and responsibilities were secular rather than religious.

The Funeral Home also argued that RFRA precluded enforcement of Title VII. RFRA prevents the government from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability,"[27] unless the government can demonstrate that it satisfies strict scrutiny (i.e. its action furthers a compelling governmental interest and is the least restrictive means of doing so).[28]

The Funeral Home was unable to show that it was substantially burdened. It argued that permitting a funeral director to wear a uniform

designed for members of the opposite sex would distract those in mourning, and hinder the healing process. But the court explained that customers' "presumed biases"[29] are legally incapable of establishing a substantial burden under RFRA. Further, the Court rejected Rost's argument that he would be substantially burdened and ultimately pressured to leave the funeral industry because permitting Stephens to represent herself as a woman would cause him to "violate God's commands."[30] While Rost believed he would be "directly involved in supporting the idea that sex is a changeable social construct," the Court concluded that tolerating Stephens' own understanding of her gender identity is "not tantamount to supporting it."[31] Therefore, the court found that the Funeral Home's free exercise of religion was not substantially burdened, and rejected its RFRA defense.[32]

A LOOK AHEAD

The Supreme Court will soon determine whether "sex" in Title VII encompasses sexual orientation and/or gender identity. It could conclude that "sex" applies to one, but not the other, or that it includes both or neither. Given the current conservative majority on the Court, and its apparent preference for strict constructionism, it seems more likely than not that a majority will favor a limited reading of Title VII that excludes sexual orientation. But, gender identity may more naturally fall within the realm of "sex," even for those justices less likely to favor an expansive reading of Title VII.

The decisions will shape life at work for gay and transgender employees across the United States, as well as exposure to liability for employers, and potential defenses for religious institutions. Exceedingly few interactions between employees and employers typically lead to litigation, but the perceived availability of a judicial remedy can define the daily contours of the relationship.

Should the Supreme Court conclude that Title VII does not protect gay and/or transgender employees, and the 26 states without any current protections maintain their status quo, it will likely become increasingly difficult for employers in those states to attract the talent they need, regardless of their individual employment practices. All else being equal, the significant and growing minority of the U.S. workforce that does not conform to mainstream sex stereotypes may look to live and work in places where their identity cannot threaten their job.

NOTES

1. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986).
2. 42 U.S.C. § 2000e-2(m).
3. Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

4. Which is not surprising, given that the district court was bound by circuit precedent holding that Title VII did not protect gender identity. *See* Simonton v. Runyon, 232 F.3d 33, 35 (2d. Cir. 2000).

5. Zarda v. Altitude Express Inc., 883 F.3d 100 (2d Cir. 2018).

6. *Id*. at 113.

7. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

8. *Zarda*, 883 F.3d at 115.

9. *See e.g.,* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

10. *Zarda*, 883 F.3d at 121.

11. *Id*.

12. Loving v. Virginia, 388 U.S. 1, 10-11 (1967).

13. 884 F.3d 560 (6th Cir. 2018).

14. The court also concluded that the EEOC may bring a separate charge of discrimination against the employer for administering a discriminatory clothing-allowance policy. This article does not discuss that issue.

15. *Harris*, 884 F.3d at 568.

16. *Id*. at 569.

17. *Id*. at 568.

18. *Id*. at 568.

19. *Id*. at 569.

20. 490 U.S. 228 (1989).

21. *Id*. at 235.

22. *Harris*, 884 F.3d at 572.

23. *Id*. at 572.

24. *Id*. at 573.

25. *Id*. at 575.

26. The Supreme Court confirmed the existence of the ministerial exception in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012). It had previously only been recognized by several circuit courts.

27. 42 U.S.C. § 2000bb-1.

28. A RFRA claim requires that the government be a party to the action, because it is premised on the government interfering with the free exercise of religion. Here, that requirement was satisfied because Stephens filed a charge with the EEOC, and the EEOC later filed a complaint directly against the Funeral Home to initiate this litigation. Stephens intervened in the case, seeking to have her individual claims remanded to the district court, with instructions to bar a RFRA defense once those claims were severed from the EEOC action. The court rejected Stephens' request, but explained that if Stephens had initiated a private lawsuit to vindicate her rights, the Funeral Home could not "invoke RFRA as a defense because the government would not have been party to the suit."

Therefore, the potential applicability of a RFRA defense is circumscribed to situations where a government agency brings a claim against an organization with a colorable religious purpose.

29. *Harris*, 884 F.3d at 586.

30. *Id.* at 588.

31. *Id.*

32. Perhaps mindful of the existing circuit split regarding sexual orientation, and the reasonable probability that the Supreme Court would review Title VII's prohibition "because of . . . sex," the court also analyzed whether the EEOC satisfied strict scrutiny, assuming in the alternative that the Funeral Home had established a substantial burden. It concluded that the EEOC had a compelling interest in eliminating sex discrimination, and that enforcing Title VII through litigation is the least restrictive way to further its compelling interest.