Health Care in Motion

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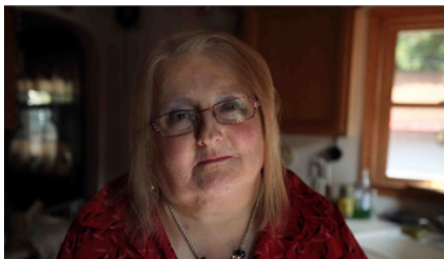
Discrimination in Health Care: Good News from the Supreme Court

We continue our *Health Care in Motion* series on discrimination in health care with an analysis of the Supreme Court's decision in *Bostock v. Clayton County, Georgia*. Last week, the Supreme Court released its decision in the *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, Altitude Express, Inc. v. Zarda*, and *Bostock v. Clayton County, Georgia* cases, ruling that "[a]n employer who fires an individual merely for being gay or transgender defies the law."

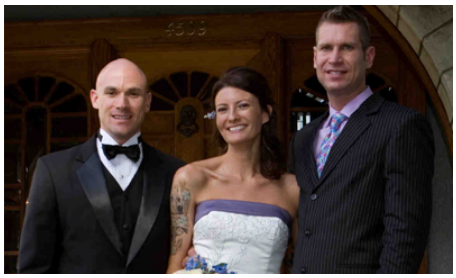
Below, we provide a recap of the cases and brief analysis of the decision.[1] We recognize at the outset that this moment comes as a result of dedicated efforts put forth by the late Aimee Stephens, the late Don Zarda, Gerald Bostock, and their counsel to ensure that people are protected by employment law, and by the millions of voices raised in the workplace, in the streets, in rallies, in front of elected officials, and online that never gave up.

Recapping the Cases

Last October, the Supreme Court heard oral arguments for three cases: *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* and *Altitude Express, Inc. v. Zarda* consolidated with *Bostock v. Clayton County, Georgia*. These cases each focused on the primary federal civil rights law that prohibits employment discrimination, known as Title 7 of the Civil Rights Act of 1964. Among other things, Title 7 prohibits employers from firing their employees "because of sex." Until now, the Supreme Court had not directly answered the question whether Title 7 encompasses employer decisions to fire employees because of sexual orientation or gender identity. Are such decisions made "because of sex?"



Aimee Stephens, Photo Credit: Charles William Kelly/American Civil Liberties Union



Don Zarda (left), Photo Credit: ACLU

Don Zarda and Aimee Stephens are not here to learn of the decisions released last week. Aimee Stephens passed away last month due to complications of kidney failure. Don Zarda passed away in 2014 due to a BASE jumping accident. Both have left behind incredible legacies for LGBTQ communities and have sacrificed much in the furtherance of civil rights protections.

[1] Quotations included in this *Health Care in Motion* can be attributed to *Bostock v. Clayton County, Georgia* and omit all internal citations.

In *Altitude Express, Inc. v. Zarda* and *Bostock v. Clayton County, Georgia*, two gay men filed lawsuits for being fired because of their sexual orientation, claiming violation of Title 7. The employees relied on three different arguments to support their claims. First, they argued that when an employer discriminates because of sexual orientation, the employee's sex is the "but-for" cause of the discrimination. That is, when an employer fires a man for being attracted to men, but would not fire a woman for being attracted to men, the sex of the employee is the basis for the employment decision. Therefore, the employer made its decision "because of sex." Second, the employees argued that discrimination because of sexual orientation is sex discrimination because it constitutes "association discrimination" because of sex. When an employer fires a woman for being in a relationship with a woman, but would not fire a woman for being in a relationship with a man, the employer discriminates based on the sex of the person with whom their employee associates. The plaintiffs drew parallels to the race discrimination context, where discrimination against interracial couples is deemed to be race discrimination on the same associational theory. Lastly, the employees argued that sexual orientation discrimination constitutes discrimination because of sex stereotypes, which the court found violated Title 7 in a 1989 case called *Price Waterhouse v. Hopkins*. Plaintiffs argued that an employer who discriminates against a gay man does so because that employee's sexual orientation departs from a sex stereotype about how men ought to behave.

In *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, Aimee Stephens filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) that her former employer violated Title 7 when it fired her after learning of her transgender identity. The EEOC agreed and brought a lawsuit against the funeral home for employment discrimination. With the change of administration in 2017 (and the government's shift in views on LGBTQ protections), Aimee Stephens (represented by the ACLU) intervened in the case to ensure her interests were properly characterized. In the case before the Supreme Court, she argued first that discrimination because of transgender status is itself sex discrimination. When an employer fires an employee, who was assigned male at birth for presenting as a woman, but will not fire an employee who was assigned female at birth for presenting as a woman, the employer makes a decision because of sex. Stephens further argued that discrimination against a transgender employee is also discrimination based on a failure to conform to sex stereotypes. Here, Stephens' employer fired her based on sex stereotypes that a person assigned male at birth should continue presenting as a man and should not identify or present as a woman.

In all three cases, the employers argued that their conduct did not violate Title 7 because the statute does not protect against sexual orientation or gender identity discrimination. The employers argued that when Congress passed Title 7 in 1964, the public meaning of "sex" was a binary understanding of sex as assigned at birth, not sexual orientation or gender identity. The employers – backed by many supporters – believed that Title 7 only covered situations where the employment decision was made against a man for being a man or against a woman for being a woman. Nothing else, in their view, was within the meaning of Title7's language prohibiting decisions made "because of sex."

Amicus Briefs

The employee plaintiffs in both cases received support from a wide range of stakeholders in the form of amicus briefs. In addition to LGBTQ organizations, briefs were filed by labor unions, medical associations, gender justice organizations, business groups, and several state governments. Here is a sample of how health advocates contributed to the amicus brief filings:

- The American Psychological Association, writing alongside several other mental health professional groups, presented scientific literature regarding gender and sexuality to demonstrate how stigmatization based on sexual orientation and gender identity is rooted in sex-role stereotyping. The brief cites to peer-reviewed literature to define the terms "sexual orientation," "gender identity," and "gender expression," while explaining how each term is intrinsically tied to sex. The brief analyzes the root causes of sexual orientation and gender identity stigmatization as tied to stereotypes about who men and women should be attracted to and how people should identify and express their gender based on their sex assigned at birth.
- The American Medical Association argued in its brief that protecting against discrimination based on gender identity is important for the health of transgender people. The brief cites to medical literature to define gender dysphoria and corresponding treatment protocols, and explains that experiencing employment discrimination can exacerbate a transgender person's gender dysphoria, impede their access to medical care, and lead to worse health outcomes.
- The Center for Health Law and Policy Innovation of Harvard Law School coauthored a brief submitted by Law and History Professors that argued there is no indication Congress intended to exclude transgender individuals from the protections of Title 7. The brief traces existing state and local laws in place at the time of Title 7's passage to show that contemporaneous determinations based on sex were understood to implicate transgender people. The brief further argues that subsequent Congresses were aware that sex implicated transgender individuals each time they passed amendments to Title 7.

The Supreme Court Decision

In last Monday's landmark ruling, the Supreme Court held that "[a]n employer who fires an individual merely for being gay or transgender defies [Title 7]." In a 6-3 opinion written by Justice Neil Gorsuch, the Court explains that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Readers should understand that for the purposes of this litigation, all of the parties agreed, for the sake of argument, that "sex" should be understood as a binary male/female construct. The Supreme Court opinion thus does not address this concept in any way. This was a strategic concession by the Plaintiffs, seen as a necessary step on the road to achieving a favorable interpretation of Title 7." The Court referred to examples to show how firing an employee because of gender identity or sexual orientation inherently makes sex a "but-for" cause of discrimination.

> "[H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." – United States Supreme Court

The Opinion also expends considerable effort refuting the employers' arguments. For example, the Court responds to the argument that an employer is not discriminatory if it applies an anti-LGBTQ policy in the same manner regardless of sex (e.g., an employer that fires men attracted to men and women attracted to women.) The Court notes that Title 7 does not focus on how an employer treats *groups* comparably, but rather focuses on how an employer treats an *individual*.

The Court also rejects the idea that employers who discriminate because of sexual orientation or gender identity can do

so without intending to discriminate against their employee because of sex. (The cases at hand involved disparate treatment claims and thus require discriminatory intent.) In this example, the Court considers a holiday party of an employer with a policy to fire people who are gay. Employees are asked to bring their spouses. If a model employee arrives with their female spouse, the employer's decision whether to fire the employee or not will hinge on the employee's sex: if the model employee is male, all is well; but if the model employee is female, enforcement of the policy would leave her without a job. Here, the court notes, "to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex."

The Court even addresses the idea that an employer might enforce an anti-LGBTQ policy in a situation where they do not *know of* an individual's sex. What if an employer with a discriminatory policy reviewed new job applicants on the basis of their qualifications and knowledge that the person was gay or transgender, but without knowledge of their sex assigned at birth? They might decide not to hire someone in such circumstances knowing only of the person's sexual orientation or transgender status, but not their sex? How could such an employer intentionally discriminate against someone because of a characteristic they don't know? The Court responds that not only must individuals consider sex when describing themselves as homosexual or transgender, but that employers would not be able to discriminate against individuals who identify as such without discriminating against them because of their sex. "Any way you slice it, the employer intentionally [discriminates] in part because of the affected individuals' sex, even if it never learns [their] sex."

The employers also proffered historical evidence suggesting that Title 7's sex-based protections would not have been understood at the time of the law's passage in 1964 to encompass discrimination based on sexual orientation or gender identity. In response, the Court noted that historical context is often helpful in proving that the meaning of a term has changed since the law's passage; but in this case, employers used historical context to argue that the *application* of the law was unexpected. Again, the Court offers no conclusion regarding the employers' belief that "sex" is binary. The employees argued not that the definition of the word had changed, merely that this was an application of the law, encompassed by that meaning. The Court concludes that while the drafters of Title 7 in 1964 may not have anticipated such a law being used to prohibit discrimination on the basis of sexual orientation or gender identity, that fact itself is not a reason to consider the statute ambiguous or use legislative history to block applications of the plain meanings of words.

Broad protective laws are often applied in a manner that is unexpected to the drafters. The Opinion specifically points to *Pennsylvania Dept. of Corrections v. Yeskey*, for the notion that Congress may not have imagined that the term "public entity" in the Americans with Disabilities Act would apply to prisons.

> But to refuse enforcement just because . . . the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

Many laws have been interpreted to reach actions that are beyond the "principal evil Congress was concerned with," including male-on-male sexual harassment, firing an employee for refusing sexual advances, sex-segregated job announcements, and policies of not hiring mothers of young children. Justice Gorsuch adds these cases to that list.
The Court is clear that its decision is narrow, and only answers the question of whether an employer who fires an employee for being gay or transgender has discriminated because of the person's sex.[2] It explicitly does not answer questions about

[2] The Court refers most often to an employee being homosexual and transgender, rather than broader terms that would encompass, more explicitly, other sexual orientations and gender identities. Justice's Alito's dissent alludes to this in a footnote where he comments that the Court's failure to define "transgender status," along with the American Psychological Association's definition of "transgender" and "gender identity", leads to the conclusion that "there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity." He also makes a note that sexual orientation encompasses people who are bisexual and later acknowledges that the term "transgender" may apply to people who identify as gender fluid.

workplace bathrooms, lockers rooms, or dress codes, or whether discrimination because of sex in other statutes or contexts will be interpreted in the same manner. The Court leaves open the possibility that an action may not be considered discrimination if in its treatment it does not "injure protected individuals" or that an action may be justified by other statutory provisions. The Court also leaves open the possibility that religious protections, such as the Religious Freedom Restoration Act, may "supersede Title VII's commands in appropriate cases."

Justice Alito—joined by Justice Thomas—authored a vehement dissent, accusing the majority of overstepping judicial bounds by "legislating" what Congress had already declined to do in failing to pass the Equality Act. Justice Alito takes particular exception to the emphasis of the majority opinion as resting solely on the "plain language" of the statute and nothing more. This method of judicial interpretation, known as "textualism," has long been the favored philosophy of conservative judges. Justice Alito—unhappy with the outcome—sharply objects to Trump appointee Justice Gorsuch and his application of the method here. "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society." Much focus is placed on past definitions and understandings of sex and on the ability for employers to implement anti-LGBTQ policies without considering sex. Justice Alito refers back to many of the hypotheticals the Court considered, to argue that such examples prove that sex can be considered separately from sexual orientation, and thus the two are not inherently intertwined.

In addition to addressing other arguments put forth by employees and amici, Justice Alito includes a long list of "potential consequences from the Court's decision," including issues raised regarding bathrooms, locker rooms, women's sports, housing, employment by religious organizations, freedom of speech, and constitutional claims. Justice Alito also includes health care in his list, noting that transgender employees have filed lawsuits based on Title 7 and Section 1557 of the Affordable Care Act and that "[s]uch claims present difficult religious liberty issues." Justice Alito's opinion may very well be used as a road map for future advocates looking to extend Justice Gorsuch's opinion to its outermost limits.

Justice Kavanaugh also wrote a dissenting opinion, focusing on the majority's "literal" approach rather than what he argues is the ordinary meaning of "discriminate because of sex." He cites to cases where the Court has previously interpreted a statute according to the ordinary meaning of its language, rather than its literal meaning. Justice Kavanaugh asserts that the ordinary meaning of "discriminate because of sex" does not encompass discrimination because of sexual orientation.[3] He contends that to do so would not only ignore "common language, human psychology, and real life," but history as well:

> Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Impact on Health Care

Title 7 governs employment discrimination. Because as many as 150 million Americans receive health coverage from their employers, this decision will necessarily have a significant impact on access to care. In the past, many LGBT individuals had trouble accessing employer-sponsored health care. The outcome of these cases has important consequences for health care advocates across the entirety of the health care landscape as well. Section 1557, the nondiscrimination provision of the Affordable Care Act, also prohibits sex discrimination. It does so with reference to Title 9 of the Civil Rights Act, which prohibits sex-based discrimination in educational settings, and which is often interpreted in parallel with Title 7.

[3] Justice Kavanaugh's opinion only analyzes discrimination on the basis of sexual orientation, though he mentions in a footnote that the analysis would apply similarly for discrimination on the basis of gender identity.

In our previous installment of *Health Care in Motion*, we reviewed HHS' Final Rule reinterpreting Section 1557 in a far more restrictive fashion. The Trump administration has since published the final rule in the Federal Register. HHS' reinterpretation removes many of the explicit protections that had been in place for transgender and gender non-conforming people, among others, and puts forth justifications that run counter to the Supreme Court's recent decision.

Even though the *Bostock* decision was released prior to the new Final Rule's publication (an unpublished version of the Final Rule was released three days before *Bostock* but was not formally published for another week), HHS only alludes to *Bostock* and its companion cases insofar as to cite to the government's brief supporting the employers. In fact, while HHS concedes the connection between Title 7 and Title 9, the agency seems to lay the groundwork for an argument around the Supreme Court's decision.

> The Department continues to expect that a holding by the U.S. Supreme Court on the meaning of ''on the basis of sex'' under Title VII will likely have ramifications for the definition of ''on the basis of sex'' under Title IX. Title VII case law has often informed Title IX case law with respect to the meaning of discrimination ''on the basis of sex,'' . . . . At the same time, as explained below, the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context. Those implications might not be fully addressed by future Title VII rulings even if courts were to deem the categories of sexual orientation or gender identity to be encompassed by the prohibition on sex discrimination in Title VII.

While *Bostock v. Clayton County* lights the path of interpreting Section 1557 in line with the 2016 Final Rule and makes clear that discrimination on the basis of gender identity and sexual orientation violates federal law, health care advocates may continue to face resistance from the federal government when protecting civil rights.

Next Steps

The *Bostock* decision represents a big win for LGBTQ communities; but the work does not stop here. Advocates continue to play a central role in the fight for health care rights and we must work to ensure that transgender and gender non-conforming people can find spaces free of discrimination in the health care system. This week, Lambda Legal filed a lawsuit against the federal government on behalf of Whitman-Walker Health, the TransLatin@ Coalition and its members (including leaders of affiliated organizations like Arianna's Center in Florida), Bradbury-Sullivan LGBT Community Center, the Los Angeles LGBT Center, GLMA: Health Professionals Advancing LGBTQ Equality, AGLP: The Association of LGBTQ Psychiatrists, and four individual doctors. Others are expected to file shortly as well.

As noted last week, the Center for Health Law and Policy Innovation, along with Transgender Law Center, Transgender Legal Defense & Education Fund, and the National Women's Law Center, remain committed to opposing this rule. If you or the communities that you work with have specific fears about how the new rule will cause harm, please be in touch with H*ealth Care in Motion* directly.

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