Title VII at 55: Where We've Been and Where We're Going

Tyler Clemons, SPLC
J. Dalton Courson, Stone Pigman
LSBA Labor & Employment CLE
November 5, 2019

What We Plan To Cover

- Title VII: text, passage, and later case law
- Developments regarding sexual orientation and gender identity-based discrimination claims
- Current cases pending before SCOTUS
- 7 Alternatives to Title VII?

Title VII in 1964


STOP
RACIAL
DISCRIMINATION
NOW!
RACE
HAS NO PLACE IN
AMERICAN
STOP
RACIAL
DISCRIMINATION
NOW!
STOP
RACIAL
DISCRIMINATION
NOW!
CORE
COOPERATE
FOR
JOBS
HOUSING
JUSTIC
etc.
NAACP
OLDS
RAMBLER
SprayCraft
PAINTING
PAINT ANY CAR
SEAT COVERS

Title VII Text

- It shall be an unlawful employment practice for an employer -
  - to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

Inclusion of Sex in Title VII

Early Rulings: Sex Generally

- 1965: EEOC rules that dividing job advertisements into male and female columns was not sex discrimination.
  - 1966: National Organization for Women (NOW) founded.
- 1971: *Phillips v. Martin Marietta Corporation*, 400 U.S. 542.
  - Policy prohibiting employment of women, but not men, with young children was sex discrimination.
  - Reversal of Fifth Circuit
- 1976: *General Electric Company v. Gilbert*, 429 U.S. 125
  - Pregnancy discrimination was not sex discrimination.
  - Overturned by the Pregnancy Discrimination Act of 1978

Early Rulings: LGBTQ

- 1977: *Holloway v. Arthur Anderson & Company*, 566 F.2d 659 (9th Cir.)
  - Gender identity discrimination was not sex discrimination
- 1979: *DeSantis v. Pacific Telephone & Telegraph Company*, 608 F.2d 327 (9th Cir.)
  - Sexual orientation discrimination as not sex discrimination
  - Congressional Intent: "This court concludes that Congress had only the traditional notions of 'sex' in mind" when enacting Title VII."
  - Anti-classification: "Whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex."

Rejecting Anti-Classification

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Sex Stereotyping Covered by Title VII

Price Waterhouse v. Hopkins

- In 1982, Price Waterhouse had 662 partners, only 7 of which were women.
- Anne Hopkins was recommended for partnership that year.

“virtually at the partner level”

intelligent

extremely competent

strong and forthright

very productive

bold

decisive

energetic and creative

overly aggressive

overcompensated for being a woman

“macho”

hard-nosed

unduly harsh

impatient

needed a “charm-school course”

Price Waterhouse v. Hopkins

- In 1982, Price Waterhouse had 662 partners, only 7 of which were women.
- Anne Hopkins was recommended for partnership that year.
- Partner denying Hopkins partnership told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Price Waterhouse v. Hopkins

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, *Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.*

490 U.S. at 251 (emphasis added)

Rejecting Congressional Intent

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998)

- Same-Sex Sexual Harassment Covered by Title VII

Oncale v. Sundowner Offshore Services

- 1986: *Merritor Savings Bank v. Vinson*, 477 U.S. 57
  - Sexual harassment is a form of sex discrimination under Title VII.
- Joseph Oncale was subjected to sexual harassment by his male coworkers on an oil rig in the Gulf of Mexico.
- Both Oncale and his harassers were straight.

Oncale v. Sundowner Offshore Services

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. *But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.* Title VII prohibits discrimination because of sex in the terms or conditions of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

523 U.S. at 79-80 (emphasis added)

- Upshot: "Sex on the Brain" Theory
  - Same as any other form of discrimination prohibited by Title VII
  - *See Macy v. Department of Justice*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

LGBT Employment Discrimination

LGBT Employment Discrimination

LGBT Employment Discrimination Persists

- Report by the Williams Institute, UCLA Law (Nov. 2015)
- Estimated 88,400 LGBT adults part of Louisiana's workforce
- Discrimination against LGBT workers is persistent and prevalent:
  - 47% of LGBT national survey respondents reported experiencing employment discrimination (HRC survey 2015)
  - 21% nationally reported being treated unfairly by an employer in hiring, pay, or promotions (Pew Research 2013)
- Average man in a same-sex Louisiana couple earns $32,611, which is less than the average of $43,865 for all married men (Williams Institute 2008 study)

Transgender Employment Statistics

- National statistics:
  - Estimated 1.4 million adults in U.S. identify as transgender (0.6% of the population)
  - 78% of transgender respondents reported harassment or mistreatment at work
  - 47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity

Unsuccessful Legislative Proposals

- Federal Level: Equality Act
  - Formerly the Employment Nondiscrimination Act (ENDA)
  - Introduced in every Congress since 1990's
  - Cleared Senate in 2013 but no House vote
  - Cleared House in 2019, pending in Senate
- Louisiana Level: LANA, Louisiana Nondiscrimination Act
  - Would have prohibited employment discrimination on basis of sexual orientation or gender identity

Is Sexual Orientation Discrimination a Form of Sex Discrimination?

Prowel v. Wise Business Forms, Inc. 579 F.3d 285 (3d Cir. 2009)

SEX OR SEXUAL ORIENTATION DISCRIMINATION?

- High voice; didn't curse
- Well-groomed; wore dressy clothing
- Neat; filed nails instead of ripping them off with a utility knife
- Crossed legs
- Effeminate manner
- Clean car with rainbow decal
- Talked about art, music, décor
- Pushed buttons on work machine "with pizzazz."
- Coworkers called him "princess" "rosebud" and "f—"
- Message written on bathroom wall claiming plaintiff had AIDS and engaged in gay sex
- Coworkers left a feather tiara on work machine

Prowel

- Court found that discrimination on the basis of *sex* occurred:
  - Plaintiff was harassed because he did not conform to his employer's vision of how a man should look, speak, and act – rather than harassment based solely on his sexual orientation.
  - No basis to find that an effeminate heterosexual man can bring a gender stereotyping claim but than a homosexual man may not.

Dawson v. Bumble & Bumble 398 F.3d 211 (2d Cir. 2005)

- Claim dismissed on summary judgment
  - Plaintiff openly lesbian
  - Alleged harassment about her appearance
  - Told that she should act in a manner less like a man and more like a woman.
  - Referred to as "Donald"
  - Accused of "wearing her sexuality like a costume"
  - Another stylist "loudly proclaimed to [her], in extremely vulgar and threatening terms, that he thought she 'needed to have sex with a man.'"
  - Averred that employer to fire her because of her "[lesbian] attitude."
  - Employer allegedly stated that she could not send her to New Jersey or any place outside New York City. "People won't understand you ... you'll frighten them."

Dawson: "Bootstrapping"

- Court found that the Plaintiff has "conflated her claims" – court could not discern if she alleged discrimination based on "her gender, her appearance, her sexual orientation, or some combination of these."
- "When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality. Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap' protection for sexual orientation into Title VII."

Gender Identity Discrimination as Sex Discrimination

- Whitaker v. Kenosha Unified School District No. 1 Board of Education, 858 F. 3d 1034 (7th Cir. 2017)
  - Claim under Title IX, but courts often look to Title VII cases when construing Title IX.
  - Plaintiff was a transgender boy who sought an injunction to permit use of the boys' restroom. The trial court granted the injunction.
  - Appellate court affirmed the finding that the plaintiff was likely to succeed on the merits based on a *Price Waterhouse*-based gender stereotyping theory.

Hively v. Ivy Tech Community College

- 853 F.3d 339 (7th Cir. 2017) (en banc)
- Plaintiff alleged that she was discriminated against because she was a lesbian.
- Majority offered two rationales:
  - Comparative Method
  - Associational Method
- Majority also noted that Title VII must be interpreted in light of Supreme Court cases finding discrimination against gays and lesbians unconstitutional: *Romer, Lawrence, Windsor,* and *Obergefell*.

Hively concurrence and dissent

- Judge Posner, concurring: the statutory meaning of "because of sex" should be updated to reflect modern values to include discrimination on the basis of sexual orientation.
- Judge Flaum, concurring: Sexual orientation cannot be understood without reference to sex, which need be only a factor in the employment decision.
- Judge Sykes, dissenting: Title VII should be interpreted as understood at the time of its enactment.

Zarda v. Altitude Express, Inc.

Photo by Kris Martin (CC BY 2.0)

Zarda

- Majority: "Sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."
  - Sex is necessarily a factor in sexual orientation.
  - Sex stereotyping: sexual orientation discrimination is predicated on assumptions of how persons of a certain sex should be
  - Associational discrimination: discrimination is based in part on the employee's sex

Zarda: *Per Se* Rationale

"Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex."

Zarda: Gender Stereotyping

When an employer acts on the basis of a belief that men cannot be attracted to men, or that they must not be, but takes no such action against women who are attracted to men, the employer has acted on the basis of gender.

Zarda: Associational Discrimination

"[W]e now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex."

Zarda dissent

"I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII.... I am confident that one day...I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago [but] we all know that Congress did no such thing."

Bostock (11th Cir.)

- Relies on Fifth Circuit's *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936

R.G. & G.R. Harris Funeral Home v. EEOC & Stephens

Stephens

- Defendant Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets.
- Trial court held that application of Title VII significantly burdened the religious freedom of the funeral home's owners
- Court of appeal reversed

Stephens

- "Discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping."
- Funeral home could not use fears of customers' biases as a basis for justifying discrimination.
- Ministerial exception did not apply; RFRA defense failed (to be discussed in a few minutes!)

Textualism or Originalism?

Is the statute to be interpreted based on its literal text?

Or, is the Court to apply the statute as it perceives Congress may have intended in 1964?

Religious Objections: *Masterpiece Cakeshop*

Masterpiece Cakeshop v. Colorado Civil Rights Commission

- Does Colorado law the prohibits discrimination on the basis of sexual orientation require a baker to bake a wedding cake for a same-sex couple?
- Petitioners' argument:
  - Compelling a Baker to Create Artistic Expression that Celebrates Same-Sex Marriage Violates the Free Speech Clause
  - Compelling a Baker to Design Custom Wedding Cakes that Celebrate Same-Sex Marriage Violates the Free Exercise Clause
  - Respondents Cannot Satisfy Strict Scrutiny

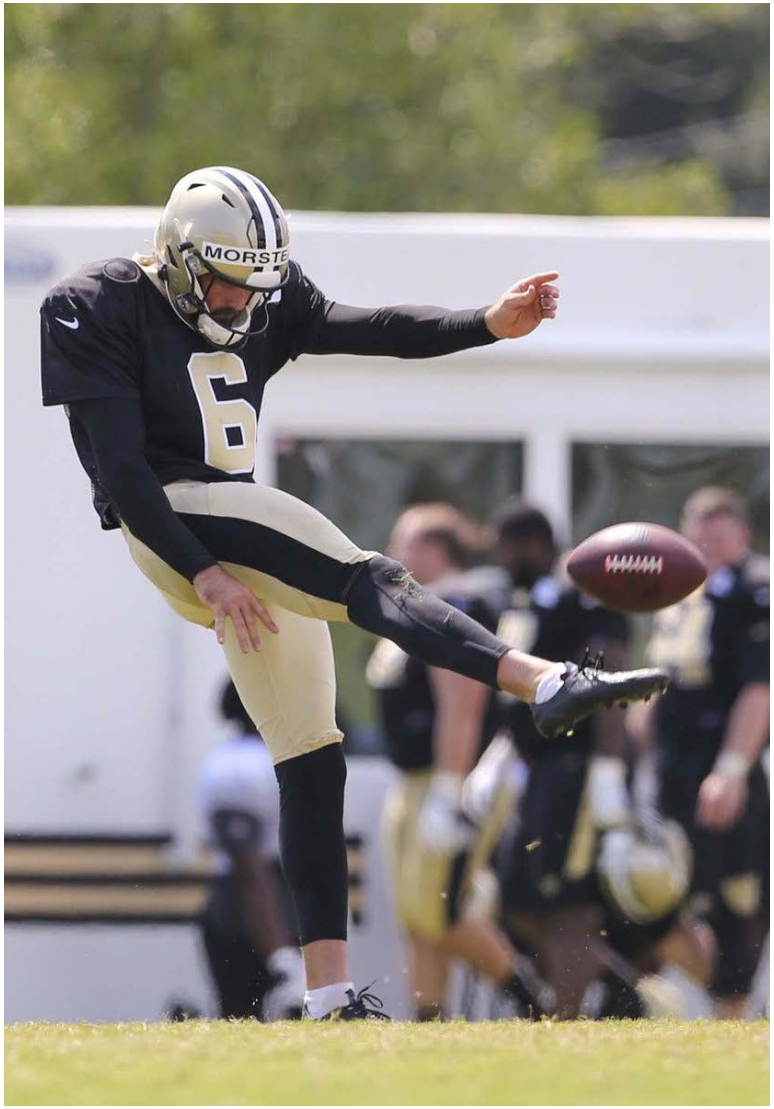
Masterpiece Cakeshop

- Respondents' Argument
  - This case involves a straightforward application of an anti-discrimination law to commercial sales.
  - The Free Speech Clause does not authorize a business to engage in discrimination prohibited by a regulation of conduct that incidentally affects expression.
  - The Free Exercise Clause does not permit a business to engage in discrimination prohibited by a neutral and generally applicable law.

Masterpiece Cakeshop

- Justice Kagan identified three potential axes where the Court may need to draw lines:
  1. Speech v. non-speech: Is baking a cake a form of artistic expression?
  2. Race v. sex v. sexual orientation: Could commercial actors discriminate on the basis of a sincere religious objection to race?
  3. Weddings v. other celebrations: What about funerals?

Masterpiece Cakeshop Decision



Questions for Title VII

- Is the Court going in the direction of constitutionalizing the ability to discriminate based on a sincere religious objection?
- How would courts define "sincere"?
- Would those rights be extended to other protected classes (e.g., religion?)

Questions?