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PERSPECTIVE

What is discrimination because of 'sex'?

By Rex S. Heinke and Jenna M. Nalchajian

Cases to watch this term at the U.S. Supreme Court undoubtedly include the Title VII trilogy: *Bostock v. Clayton County, Georgia*; *Altitude Express, Inc. v. Zarda*; and *R.G. & G.R. Harris Funeral Homes v. EEOC*. Together, these cases will determine the scope of employment protections for LGBTQ+ employees under Title VII.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an individual "because of ... sex." The question presented in these three cases is whether this language prohibits employment discrimination on the basis of sexual orientation and gender identity. This question is of critical importance to millions of LGBTQ+ Americans for whom Title VII would be the only legal prohibition of such employment discrimination.

Currently, 21 states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation and gender identity by statue or regulation, and a few more states provide similar protections through agency interpretations or court rulings. For the employees in other states — including Alabama, Florida, Georgia and Indiana — Title VII would be the only law prohibiting such discrimination.

The Title VII Trilogy

In *Bostock* and *Altitude Express*, the plaintiffs are gay men who were allegedly fired from their jobs — child welfare services coordinator and sky diving instructor, respectively — because of their sexual orientation. In *Funeral Homes*, the plaintiff is a transgender woman who was fired from her employment shortly after she informed *Homes*, the plaintiff is a transgender woman who was fired from her employment shortly after she informed her employer of her intent to transition from male to female.

The Plaintiffs' Arguments

Something that makes these cases unique is that the plaintiffs — adopting an expansive interpretation of Title VII – are relying on plain meaning arguments, rather than simply urging reform based on public policy.

Their main argument is that the concept of "sex" is inherent in both sexual orientation and gender identity. For example, an individual attracted to men is only "gay" if his sex is male. An individual is only transgender when their assigned sex at birth is not the gender with which they identify. Therefore, a reading of the plain text of Title VII would naturally include discrimination based on sexual orientation and gender identity. In other words, employees cannot be discriminated against based on their sexual orientation or gender identity "but for" their sex.

Next, they argue that "sex-plus" discrimination is prohibited. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). "Sex-plus" means an individual's sex, "plus" some other factor. For example, the "plus" factor might be "attraction to men." The plaintiffs argue that this characteristic is not discriminated against in women (i.e., heterosexual female), and therefore cannot be discriminated against in men. Similarly, the "plus" factor might be "identifying as a woman," which would not be discriminated against an individual whose birthsex was female (i.e., cisgender female), and therefore cannot be discriminated against in individuals whose birthsex was male.

The main case the plaintiffs rely on is *Price Waterhouse v. Hopkins*, which they argue stands for the proposition that employment discrimination based on sex-based stereotypes and normative beliefs about how a person of a particular sex *should* behave is prohibited under Title VII. 490 U.S. 228 (1989). They argue that the notions that men should be attracted only to women and that individuals should identify with the sex assigned to them at birth are both sex-based stereotypes, and therefore any employment discrimination based upon them is unlawful. They also argue that these stereotypes are particularly unjustifiable as the basis for an adverse employment action because they are completely unrelated to job performance.

Finally, the plaintiffs argue that discrimination against gay individuals is prohibited "associational discrimination" (i.e., discriminating against an individual on the basis of who they associate with) similar to that in *Loving v. Virginia*, which held that a statute prohibiting interracial marriage amounted to unconstitutional discrimination on the basis of race. 388 U.S. 1, 11 (1967). They point out that all five circuits to consider the issue have held that the *Loving* rationale is equally applicable in the Title VII context.

New York Times News Service

Gerald Bostock, who said he lost his job after joining a gay softball league, at his home in Atlanta, Sept. 19, 2019. Bostock is one of the plaintiffs in a case in which the U.S. Supreme Court will consider whether Title VII of the Civil Rights Act of 1964 guarantees nationwide protection from workplace discrimination to gay and transgender people.

The Employers' Response

The employers' arguments are principally based on canons of statutory interpretation. First, they rely on "original public meaning," which requires that terms that otherwise are not defined in a statute should be given their ordinary, contemporary, common meaning at the time the statute was enacted. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). Title VII was enacted in 1964.

The employers argue that, in 1964, members of Congress only meant "male" and "female" when they referred to "sex." It is unlikely that members of Congress in 1964 consciously sought to protect sexual orientation and/or gender identity, when neither term was in common usage and homosexual conduct was still criminal.

The employers rely on another canon of statutory interpretation: Congress does not bring about seismic legal changes in a cryptic fashion. If Congress wanted Title VII to cover sexual orientation and gender identity, it would have said so. Indeed, other later statutes written by Congress separately enumerate pro-

tections for "sex," "sexual orientation," and "gender identity" but neither Title VII itself nor its amendments included those additional protections. *See, e.g.*, 18 U.S.C. 249(a)(2)(A); 20 U.S.C. 1092(f)(1)(F)(ii); 34 U.S.C. 30503(a)(1)(C); 34 U.S.C. 12291(b)(13)(A). Moreover, Congress has introduced more than 50 bills — one currently before the Senate (the Equality Act) — to add "sexual orientation" and/or "gender identity" alongside "sex" in Title VII. This suggests, argue the employers, that Congress recognizes that there is at least ambiguity in Title VII as currently written.

Rebutting the plaintiffs' arguments, the employers argue that "sex" does not inherently include sexual orientation or gender identity, because the Supreme Court has previously held that national origin does not include alienage (though alienage is a function of one's national origin). *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-91 (1973). They argue that Title VII merely prohibits employers from treating one sex worse than the other, but it does not prohibit all distinctions based on sex.

Regarding "sex-plus" discrimination, the employers argue that by calling the "plus" factor (for example) "attraction to men," instead of "attraction to the same sex," the plaintiffs beg the question. By comparing a gay man to a heterosexual woman, the plaintiffs change both the sex and the sexual orientation of the comparator. To isolate sex, instead, one must call the plus factor "attraction to the same sex," which the employers would have discriminated against regardless of whether the individual was male or female. Therefore, the employers argue, because neither sex is favored, no Title VII violation exists. They further argue that an extension of the analysis to bisexual individuals confirms their view. In that case, "attraction to the both sexes" is discriminated against equally in both men and women, and neither is favored.

The employers argue that *Price Waterhouse* does not stand for the proposition on which the plaintiffs rely. *Price Waterhouse* decided the burden that each party bears in a mixed-motive case; it merely assumed (or affirmed in passing) the trial court's finding that the plaintiff proved sex discrimination through evidence that her employer relied on sex-stereotyping and treated her worse than her male coworkers. Therefore, the employers argue, *Price Waterhouse* did not create a cause of action under Title VII for sex stereotyping.

Rebutting the "associational discrimination" argument, the employers argue that sexual orientation discrimination is not sex-based discrimination. And in any case, they argue, sex-based discrimination is treated differently than race-based discrimination and therefore *Loving* does not apply. For example, different treatment of men and women with respect to grooming, dress, physical fitness standards and privacy spaces (such as overnight facilities, locker rooms, restrooms and showers) is acceptable, whereas no such differences based on race would be tolerated.

The employers' policy arguments contend that, should the cases be decided for the plaintiffs, this would also prohibit all sex-specific differences in the workplace (e.g., restrooms, fitness tests, and dress codes). Moreover, they argue, the decision would imperil religious freedom and upend the hiring practices of faith-based organizations because of their beliefs about same-sex relationships.

The Plaintiffs' Rebuttal

Responding to the employers' reference to what was in the minds of members of Congress in 1964 when they prohibited discrimination "because of ... sex," the plaintiffs point out that there is nearly no legislative history to which to refer because of the circumstances under which "sex" was added to protected traits -under Title VII. "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986). The legislation "quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.' " *Id.* at 64.

Further, the plaintiffs argue that Supreme Court has already interpreted Title VII to expand beyond what was likely on the minds of the legislators in 1964. In *Oncale v. Sundowner Offshore Servs., Inc.*, for example, a unanimous Supreme Court held that male-on-male harassment was prohibited by Title VII because "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." 523 U.S. 75, 79 (1998).

The plaintiffs further argue that Congress' failure to enumerate all three of "sex," "sexual orientation," and "gender identity" in Title VII is not an issue, even in light of a "belts and suspenders" approach taken on writing other statutes that enumerate all three. Moreover, they argue that Congress' later *inaction* in adding the other two enumerated characteristics cannot be considered when determining what Congress actually meant in the first instance. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").

Returning to their "sex-plus" arguments, the plaintiffs argue that the employers' discrimination against both sexes based on their sexual orientation and gender identity results in two types of discrimination, not none.

Finally, the plaintiffs argue that, while the majority of American employees are covered by Title VII, the majority of American *employers* are not (e.g., those with fewer than 15 employees, religious employers), so the policy concerns raised by the employers are weak.

Conclusion

These cases present a dilemma for the conservatives on the Supreme Court: Do you rely on the plain meaning of the statutory text or what the Legislature was thinking? They also present a dilemma for the liberals: Do you simply rely on plain meaning? Chief Justice John Roberts seems likely to be the deciding vote. ■

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