

The Supreme Court's LGBTQ Decisions: What Do They Mean for Employers?

Presented by Robert E. Rigrish
Bodker, Ramsey, Andrews, Winograd & Wildstein, P.C.



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bodker » ramsey » andrews
winograd » wildstein

Learning Objectives

- What did Federal Law do before the Supreme Court's June 15, 2020 decisions, and what does it now provide to protect LGBTQ status in the workplace?
- What other protections are there for the LGBTQ community in the workplace?
- How might the Supreme Court's recent religious rights decisions impact the 'reach' of the new Federal LGBTQ protections?
- Given all this, how should Georgia employers address LGBTQ concerns in the workplace?

Title VII Language

- Title VII Unlawful employment practices
 - Employer Practices
 - It shall be an unlawful employment practice for an employer –
 - To fail or refuse to hire or to discharge...or otherwise discriminate...because of such individual's...sex....”
- § 703(a), P.L. 88-352 (July 2, 1964)
 - Definitions
 - (k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical “conditions....”
- § 701, P.L. 88-352, as amended by P.L. 95-555 (1978)(the “PDA”)

For more than four decades, Title VII did not protect LGBTQ Status

- The Federal Courts of Appeal consistently held that Title VII of the 1964 Civil Rights Act did not protect sexual orientation, homosexuality, or transgender status.
- Until 2004 (6th Circuit, transgender status) and 2017 (2nd, 6th and 7th Circuits), when courts first construed the prohibition against discrimination ‘because of sex’ as prohibiting discrimination because of transgender status or sexual orientation.
- As one Circuit Court noted:
- “If the first forty years of uniform circuit precedent somehow got the original understanding of Title VII wrong, no one has explained how.”

On June 15, 2020 the Supreme Court decided three cases that raised the issue of Title VII LGBTQ Protection

The cases:

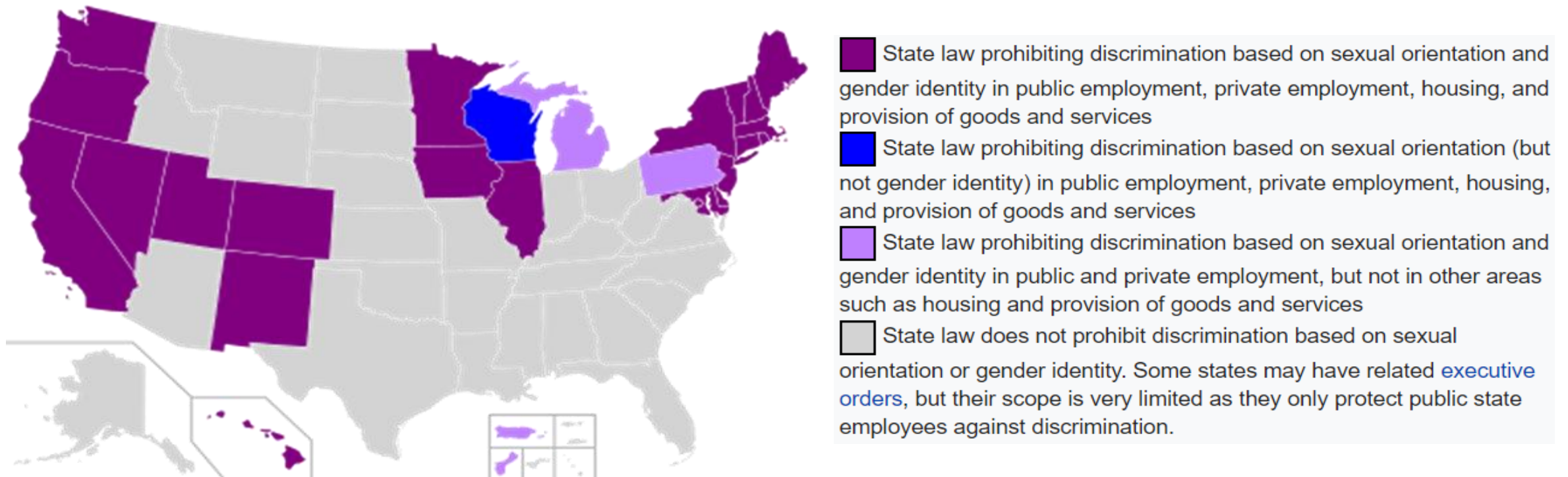
Bostock v. Clayton County, Georgia: Child welfare coordinator who believes his employment was terminated because he was gay.

Altitude Express v. Zarda: Skydiving Instructor who believed he lost his job because he was gay.

Harris Funeral Homes v. EEOC: Funeral director Anthony Stephens presented as a man when hired, then dressed and appeared at work as a man. Six years later, as Aimee, she wrote her employer that she planned to “live and work full time as a woman” when she returned from an upcoming vacation. Her Christian employer’s response was “this is not going to work out . . . she “was no longer going to represent himself as a man. He wanted to dress as a woman,” which the owner believed would violate “God’s commands.” *Religious Freedom [RFRA] defense not raised at the Supreme Court*

States

Twenty three states [**not** Georgia] and numerous municipalities have laws protecting those in the LGBTQ communities from discrimination.



City of Atlanta

- **Unlawful employment practices:**
- (a) Employer practices. It shall be an unlawful employment practice for an employer:
 - (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's...sexual orientation...gender identity....
- Atlanta Code of Ordinances § 94-112 (2000)
- **BUT:** Limited remedies and procedures!

Federal Legislation?

- “Just a Bill” Do you remember? <https://www.youtube.com/watch?v=tyeJ55o3EI0>
- Since 1974, and as late as last year, progressives in Congress have introduced ‘The Equality Act’ Bill that would expand Title VII protections to sexual orientation and gender identity.
- Last year’s Bill:
- H.R.5: An Act:
“To prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes.”
- It passed in the House, referred to Committee in Senate – *i.e., dead on arrival*

Given the existence of State laws (23) and City Ordinances; the history of decisions since 1964 finding no Title VII coverage; and the opportunity to pursue legislation, why is it important that the Supreme Court has now decided that Federal law [Title VII] protects homosexuals and transsexuals from employment discrimination?

- a. Proponents see it as a moral and ethical issue of equality
- b. Results-oriented litigation: get proponents' view into comprehensive Federal law, even though that result could not be obtained through legislation
- c. Proof? Was sex (i.e., homosexuality or transsexual status) a 'motivating factor' in the adverse employment decision? (1991 amendment to Title VII, 42 U.S.C. 2000e-2(m))
- d. Title VII remedies [damages, injunctions, backpay and attorney fees]
- e. But: Religious Freedom [RFRA] defense?

The Supreme Court's Decisions

- The three cases presented at oral argument on October 8, 2019
- Decided on June 15, 2020
- Decision: a 6-3 vote, with Trump appointee Justice Gorsuch delivering the Opinion for the Court:
- “Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or action it would not have questioned in members of a different sex.”
- In dissent, Justice Alito responded: “There is only one word for what the Court has done today: legislation . . . [T]he arrogance of this argument is breathtaking.” Justice Kavanaugh’ dissent: “Who decides? The responsibility to amend Title VII belongs to Congress
- Let’s look at how the case was argued to the Court:

Stanford Law Professor Karlan on behalf of the LGBTQ employee

Questions by Justice Alito answered by Professor Karlan, arguing for the Employee



**Stanford Law Professor
Pamela S. Karlan**



**Supreme Court Justice
Samuel Alito**

What earlier cases was Professor Karlan describing?

- **Price Waterhouse v. Hopkins:** “Sex Stereotyping” prohibited under Title VII: Female accountant denied promotion, allegedly for presenting insufficiently feminine image
- **Oncale:** Male on Male harassment, if ‘because of sex,’ protected against by Title VII. Offshore oil rig worker harassed by male coworkers on the rig
- **Newport News Shipbuilding:** After the PDA passed, providing less extensive pregnancy benefits to wives of male workers than provided to female employees discriminated ‘on the basis of sex’ against male employees.

The Pregnancy Discrimination Act Example

In General Electric v. Gilbert, the Supreme Court held that providing benefits for illness and disability, but not those related to pregnancy, did not violate Title VII.

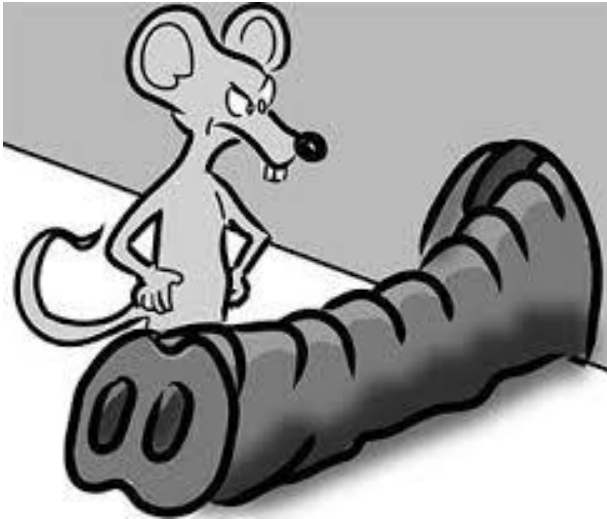
Congress then passed, and the President signed into law, the amendment to Title VII in the 'definitions' you see on the third slide.

Newport News, referenced by Professor Karlan, was decided after the PDA amendments

An Example of Congress, Not the Supreme Court, legislating a change

“The Elephant and the Mousehole”

- “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”



**The late Supreme Court Justice
Antonin Scalia**

The Elephant and the Mousehole at Oral Argument of the LGBTQ Cases



**Supreme Court Justice
Sonia Sotomayor**



**Supreme Court Justice
Elena Kagan**



**Solicitor General
Noel Francisco**

So what happened?

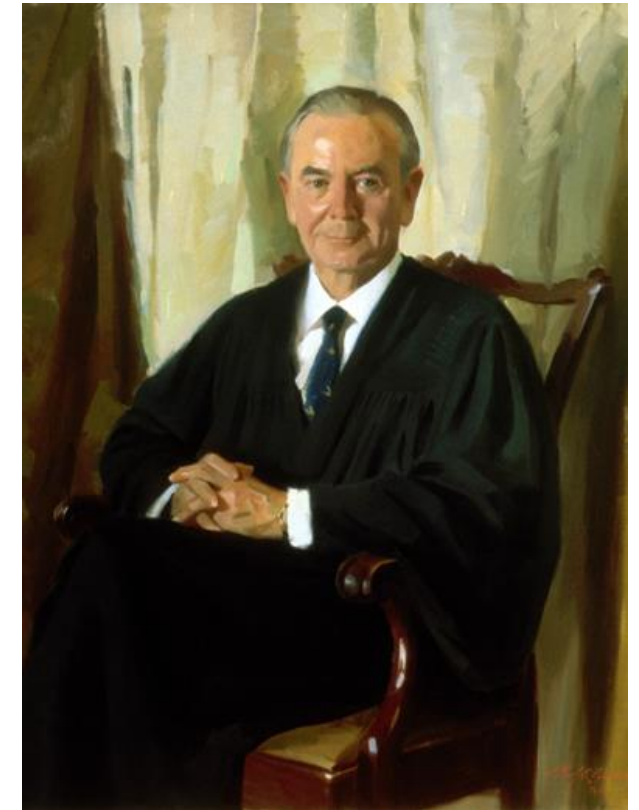
The late **Justice Brennan** used to say, the first rule of the Supreme Court is that you have to be able to "**count to five**."

"The most important thing to know about the Court is the number five — that with five votes, anything is possible."

Here, the decision got six votes – probably as a result of the Chief Justice, John Roberts, voting with the four liberal justices and Justice Gorsuch so that Justice Gorsuch, and not one of the liberal justices, would write the opinion: Hoping that would make the decision more palatable in politically divisive times . . .

Justice Gorsuch found the 'elephant in the mousehole'

Justice Alito in dissent: "the Court's opinion is like a pirate ship. It sails under a "textualist" flag . . . but instead of reading Title VII as written, "updates" Title VII to reflect the values of LGBTQ proponents which could not be obtained through legislation.



Supreme Court Justice
William J. Brennan Jr.

So what does this mean for employers?

Title VII protections for homosexuals and transsexuals: They can bring Title VII claims that adverse employment actions were motivated, at least in part, by protected LGBTQ characteristics.

How proven? Direct Evidence [employer admission, like Harris Funeral Homes]

Comparators? In Georgia, the Lewis example: “similarly situated in all material respects”

Claims that employment benefits are denied based on protected LGBTQ characteristics.

Hostile Environment or Harassment claims based on protected LGBTQ characteristics.

Examples? Coworker hostility? Mendoza test. Use of Restroom facilities?

Remedies? Back and Front Pay; damages; attorney fees; injunctive relief

Continued Protections for LGBTQ employees and applicants in 23 states, and many cities, including Atlanta

So how deal with LGBTQ employees in the workplace?

- a. LGBTQ status: As with race, origin, age or gender, homosexuality and gender transition should be irrelevant: job performance, not preference, identity or orientation, rules; LGBTQ should not suffer harassment.
- b. Not a consideration [as with race, gender, age] in employment decisions; employers face risk, under Title VII and existing state and local laws, or 'stereotyping') if allowed to motivate employment decisions
- c. Likely issues: restroom facilities – an issue raised, but not answered, by the Court's decision
- d. Employers' and Coworkers First Amendment and religious accommodation rights

The Supreme Court's Religious Rights Decisions

- **Our Lady of Guadalupe School**: July 8, 2020 Decision, 7-2, Opinion by Justice Alito
- Held: Parochial School employment decisions protected from discrimination claims by employees involved in religious activities.
- Facts: Catholic school teachers' age and disability [ADA] claims barred by the First Amendment's religious freedom protections
- Impact? No discrimination claims by LGBTQ [and others, too] against religious institutions by employees involved in religious activities – ***not just ministers***.
- **Little Sisters of the Poor**: July 8, 2020 Decision, 7-2, Opinion by Justice Thomas
- Challenges to agency decision exempting the Little Sisters from Obamacare contraceptive mandate. A technical administrative law decision.
- Held: permissible regulatory exemption, consistent with RFRA and Hobby Lobby decision
- Possible Impact? RFRA defense to Title VII LGBTQ claims: least restrictive/substantial burden? Note issue at trial court in Harris Funeral Homes

Questions or Comments?

- I would love to connect with you and answer any questions you may have. Look for the Speaker Q&A Schedule (on the main conference page) to find my availability.
- If you would like to share your thoughts about today's presentation OR if you have questions - please use the **Live Discussion panel** on the right side of your screen. To share thoughts and chat with other participants, use the Chat Tab. If you have a question specifically for me, please type it into the Questions Tab. I will do my best to address all of your questions.

Thank You!

Robert E. Rigrish
3490 Piedmont Road, NE, Suite 1400
Atlanta, Georgia 30305



(404) 564-7485



rrigrish@brawwlaw.com



bodker » ramsey » andrews
winograd » wildstein