

Out At Work, Moment of Truth:

Sex discrimination law faces a pivotal moment at the United States Supreme Court, 2020 Term

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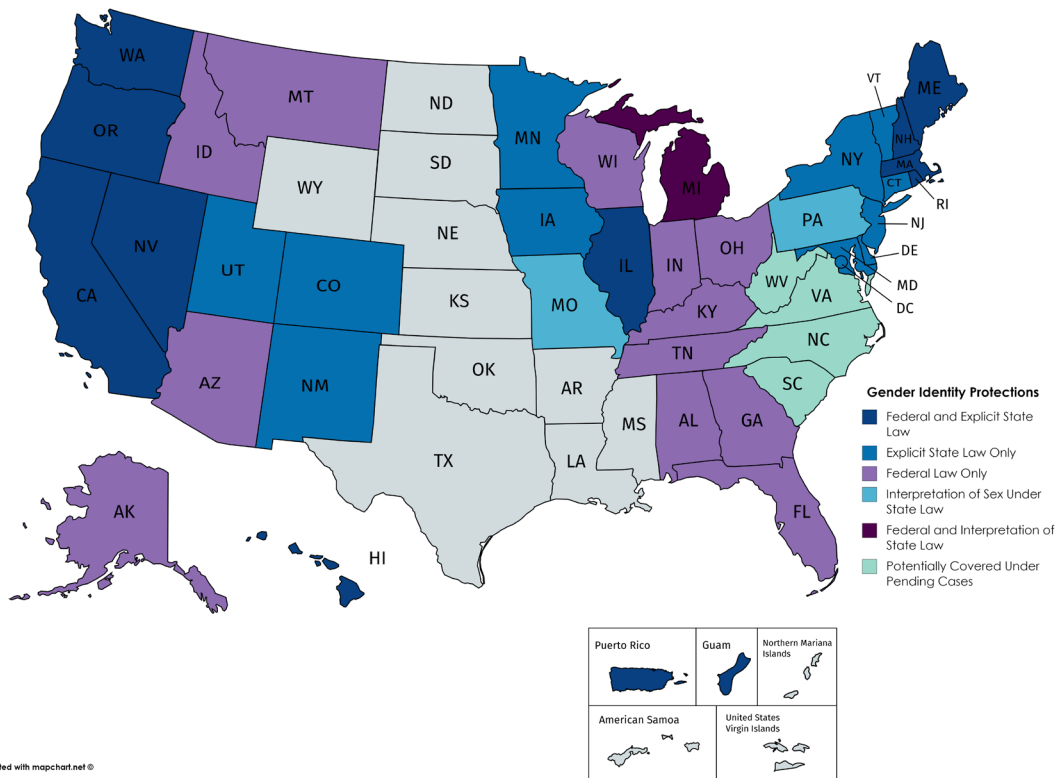
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The Legal Landscape: Gender Identity Employment Discrimination



- 21 states (plus DC, Puerto Rico, and Guam) explicitly prohibit employment discrimination on the basis of gender identity or transgender status
- State law sex discrimination prohibitions in MI, MO, and PA have been interpreted by agencies or courts to cover gender identity or transgender status
- An additional 12 states are covered under federal law under binding precedents from the courts of appeals
- Four additional states could be covered under pending cases

Intersection with other areas of sex discrimination work



- With regard to sex discrimination work, the precedents in one area of federal law apply to the others
- What are these areas?
 - Education/Title IX
 - Health Care/Section 1557 of the ACA
 - Housing/Fair Housing Act
 - Constitutional sex discrimination claims

Pending SCOTUS cases construing “Sex” in Title VII of the Civil Rights Act of 1964

- **Coverage of Sexual Orientation**

- *Zarda v. Altitude Express* (2d Cir.)
- *Bostock v. Clayton County* (11th Cir.)

QUESTION PRESENTED

Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of... sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42U.S.C. § 2000e-2.

Pending SCOTUS cases construing “Sex” in Title VII of the Civil Rights Act of 1964

- **Coverage of Gender Identity**

- *R.G. and G.R. Harris Funeral Homes v. EEOC* (6th Cir.)

QUESTION PRESENTED

Whether Title VII prohibits discrimination against transgender people based on

- (1) Their status as transgender or
- (2) Sex stereotyping theory under *PRICE WATERHOUSE v. HOPKINS*, 490 U. S. 228 (1989).

Pending SCOTUS cases construing “Sex” in Title VII of the Civil Rights Act of 1964

- ▶ **Oral argument October 8, 2019**
- ▶ **At least 49 *amicus* briefs** filed with SCOTUS arguing that Title VII covers sexual orientation and gender identity discrimination
- ▶ **One *amicus* is on behalf of 206 major corporations**

Zarda v. Altitude Express

(DISCRIMINATION AGAINST LGB PEOPLE)

- Donald Zarda, a skydiving instructor, was fired from his job because of his sexual orientation. A federal trial court rejected his discrimination claim, saying that the Title VII does not protect him from losing his job for being a gay man. Tragically, in October 2014, Don died unexpectedly, but the case continues on behalf of his estate.
- In February 2018, the full Second Circuit Court of Appeals ruled that discrimination based on sexual orientation is a form of discrimination based on sex that is prohibited under Title VII. The court recognized that when a lesbian, gay, or bisexual person is treated differently because of discomfort or disapproval that they are attracted to people of the same sex, that's discrimination based on sex.

Bostock v. Clayton County

(DISCRIMINATION AGAINST LGB PEOPLE)

- Gerald Lynn Bostock was fired from his job as a county child welfare services coordinator when his employer learned he is gay.
- In May 2018, the Eleventh Circuit Court of Appeals refused to reconsider a 1979 decision excluding sexual orientation discrimination from coverage under Title VII's ban on sex discrimination, and denied his appeal.

Zarda v. Altitude Express

- Following our historic win in *Hively v. Ivy Tech Community College*, Lambda Legal filed a friend-of-the-court brief in several cases pending before the Second Circuit.
- The one specific petition for rehearing en banc (as the Seventh Circuit had done) specifically recognized Lambda Legal for its “substantial contributions” to its preparation -- the Zarda petition that was granted.
- Lambda Legal was then invited to argue the case as friend-of-the-court.
- On February 26, 2018, establishing the SECOND pro-coverage decision by an appeals court in the country.



EEOC v. R.G. & G.R. Harris Funeral Homes

(DISCRIMINATION AGAINST TRANSGENDER PEOPLE)

- Aimee Stephens worked as a funeral director at R.G. & G.R. Harris Funeral Homes. When she informed the funeral home's owner that she is transgender, the business owner fired her.
- The Sixth Circuit Court of Appeals ruled in March 2018 that when the funeral home fired her for being transgender and departing from sex stereotypes, it violated Title VII. Aimee was the same capable employee she had always been, and she was fired because her employer wanted her to look and act "like a man." That's sex discrimination.

EEOC v. R.G. & G.R. Harris Funeral Homes

SCT true or false:

- Lawyers employed by the EEOC, after winning a complete victory in the Sixth Circuit, turned around in the Supreme Court and argued the opposite of the position they had been advancing all along in the litigation.
- False. But only because of the “employed by the EEOC.” The Solicitor General took over the government’s position and did exactly that.



Questions and Comments

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