

Sexual Orientation and Gender Identity Discrimination, and Navigating *Obergefell*

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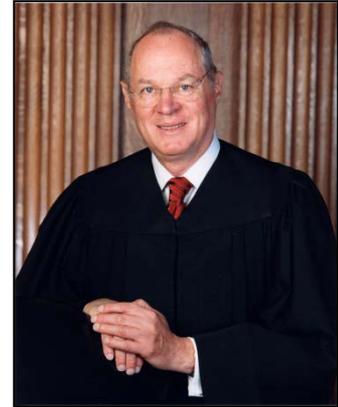
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Obergefell v. Hodges

- ▶ U.S. Supreme Court, June 2015
- ▶ 5–4 decision
- ▶ Majority (Kennedy)
 - Same–sex couples “ask for equal dignity in the eyes of the law. The Constitution grants them that right.”
- ▶ The Roberts Dissent (one of four)
 - Celebrate if you agree but “do not celebrate the Constitution. It had nothing to do with it.”



Obergefell v. Hodges

- ▶ States must allow same-sex couples to marry
- ▶ States must recognize same-sex marriages performed in other jurisdictions



- ▶ Thin on equal protection analysis
 - Does not provide level of scrutiny
 - Impact on employment claims yet untested

Sexual Orientation Discrimination

– EEOC’s take

- ▶ EEOC says protected under Title VII
 - *Baldwin v. Dep’t of Transportation*, (EEOC App. 7/15/2015)
 - Air traffic controller passed over for permanent job
 - Supervisor made repeated comments regarding his sexual orientation
 - Discussion of attending Mardi Gras. Supervisor said: “We don’t need to hear about that gay stuff”
 - Supervisor: mention of gay partner was “a distraction in the radar room”
 - EEOC: “‘sexual orientation’ as a concept cannot be defined or understood without reference to sex”

How did EEOC get there?

- ▶ *Price Waterhouse v. Hopkins* (1989, SCOTUS)
 - Ann Hopkins was a senior management consultant passed over for partner
 - Told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”
 - Overly aggressive
 - “Needs a course in charm school”



Photo by Nina Leen for Life Magazine, 1956

Other EEOC cases

- ▶ *Veretto v. U.S. Postal Service* (2011, EEOC)
 - Valid claim of coworker harassment for marrying a man
- ▶ *Castello v. U.S. Postal Service* (2011, EEOC) and *Complainant v. Dep't of Energy* (2013, EEOC)
 - Hostile environment sexual harassment for derogatory comments about same-sex relationships. Motivated by attitudes about stereotypical gender roles in relationships.

EEOC's four-year plan



- ▶ EEOC Strategic Enforcement Plan 2013–2016
- ▶ Priority No. 3 of 6 is “Emerging and Developing Issues”
 - Specifically, “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”

Sexual Orientation Discrimination

– Courts

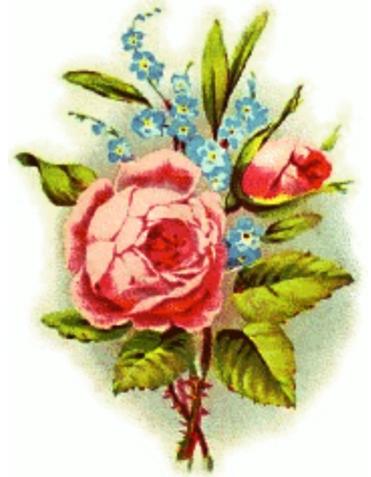
- ▶ The U.S. Supreme Court has *not* held sexual orientation discrimination is prohibited:
 - Under Title VII
 - Under Equal Protection clause
 - Under any other law
- ▶ BUT plaintiffs are having success in some federal courts
 - Gender–stereotyping analysis
 - Sexually hostile work environment

Sexual Orientation Discrimination

– Courts

- ▶ *Prowel v. Wise Bus. Forms* (2008 3d Cir.)
 - Coworkers teased self-described effeminate male
 - Made fun of way he walked, talked, sat
 - Called him Princess and Rosebud
 - Gender discrimination – did not conform to expectations of how man should act

- ▶ Now 5th Cir. 2013 *EEOC v. Boh Bros. Constr.*
 - Explicit harassment based on effeminate perception
 - Because of sex? Divided court: yes



Sexual Orientation Discrimination

– Congress and Texas

- ▶ For employment purposes, still legal to discriminate
 - No statutory protection for “sexual orientation”
- ▶ Employment Non-Discrimination Act (ENDA)
 - Failed to pass Congress for 20 years
- ▶ Texas has no statutory protections

Transgender Discrimination

- ▶ EEOC: protection under Title VII
- ▶ *Macy v. Dep't of Justice*, (EEOC, 2012)
 - While presenting as a man, ballistics investigator Mia Macy sought transfer from Phoenix to San Fran lab
 - Assured for months the job was hers
 - After she said she would present as a woman, offer was withdrawn within 10 days
 - Agency said position eliminated
 - Agency gave different reason to EEOC counselor
 - Held: discrimination based on transgender status is sex stereotyping and therefore discrimination “based on sex” in violation of Title VII.

Transgender Discrimination

- ▶ EEOC cases for transgender protection
- ▶ *Complainant v. USPS* (EEOC, 2013)
 - Supervisor refused to refer to a transgender employee as “she” or by her new female first name;
- ▶ *Lusardi v. Dep’t of the Army* (EEOC, 2013)
 - Banning transgender female from common female restroom was disparate treatment based on sex
 - Coworker discomfort, confusion, anxiety did not justify denial of access



Transgender Discrimination – Courts

- ▶ Courts have not gone as far as EEOC
- ▶ *Eure v. The Sage Corp.* (W.D. Texas, 2014)
 - Truck driving instructor born female, presented as male
 - Subjected to pervasive sarcasm and innuendos
 - “Who is that and who hired that?”
 - “Please don’t tell me that is a Sage instructor.”
 - Held: Employee failed to establish discrimination based on failure to act like a woman, only on transgender status.
 - Court stopped short of making new law protecting employee
 - Preferring to leave to higher courts

Same-Sex Couple Benefits

- ▶ After USSC decided *US v. Windsor* in June 2013, most impediments to same-sex couples receiving federal workplace benefits began to fall
 - Held unconstitutional definition of “spouse” in DOMA.
 - Soon after *Windsor*.
 - DOL directed by secretary to implement *Windsor* to provide “maximum protection for workers and their families.”
 - IRS: “Spouse” includes same-sex for tax purposes
 - DOL: “Spouse” includes same-sex for FMLA purposes
 - DOL: “Spouse” include same-sex for ERISA benefits purposes
 - Slower transition for TX public employers, but Obergefell has resolved those questions.

Questions?

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