

# CHEW ON IT WITH CRISTAL ROBINSON

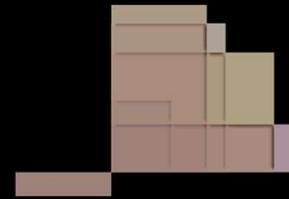
LGBTQ Supreme Court cases – Because of Sex

# WHAT DO THESE ALL HAVE IN COMMON?

Blacks To Go Only



Walk more femininely



pwc

Male only harassment



# PAST AMENDMENTS, ACTS, ETC

- Bill of Rights Amendment 14 (1868) - **Section 1**. All persons born or naturalized in the United States....; **nor deny to any person within its jurisdiction the equal protection of the laws.**
- Civil Rights Act of 1964 - **EMPLOYER PRACTICES** - It shall be an unlawful employment practice for an employer— hire or to discharge .... limit, segregate, or classify ..., **because of such individual's race, color, religion, sex, or national origin**

# BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ)

Allows for an employer to discriminate against employees and potential employees

"on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a **bona fide occupational qualification** reasonably necessary to the normal operation of that particular business or enterprise."

It is important to note that this exemption from employment discrimination liability does not allow the employer to discriminate on the basis of race.

# EXECUTIVE ORDERS

**Clinton:** Executive Order 13087 (1998)

- Prohibit discrimination based on **sexual orientation** in the competitive service of the federal civilian workforce

**Obama:** Executive Order 13672 (2014)

- Prohibited discrimination in the civilian federal workforce on the basis of **gender identity** and in hiring by federal contractors on the basis of both **sexual orientation** and **gender identity**

# OCTOBER 8 SUPREME COURT CASES

**BOSTOCK V. CLAYTON  
COUNTY, GA**



**ALTITUDE EXPRESS, INC. V.  
ZARDA**



**R.G. & G.R. HARRIS FUNERAL  
HOMES INC. V. EEOC**



## BOSTOCK V. CLAYTON COUNTY, GA

- 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.

## ALTITUDE EXPRESS, INC. V. ZARDA

- Whether the prohibition in *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e-2(a) (1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's **sexual orientation**.

# ATTORNEYS ON SEXUAL ORIENTATION



## Petitioner: Pamela Kaplan

Professor at Stanford Law School

“snarky, bisexual, Jewish women“

Board Member of American Constitution Society

She was mentioned as a potential candidate to replace Supreme Court Justice David Souter when he retired in 2009.

Blackmun revealed that his dissent in *Bowers v. Hardwick* had been written primarily by Karlan.



## Respondent: Jeffery Harris

Attorney at Consovoy McCarthy, a law firm of Trump attorney who is trying to prevent his tax returns from being disclosed

Harris joined the litigation boutique Consovoy McCarthy as a partner in 2018 after working for President Donald Trump.

Member of Federalist Society

Attorney General of GEORGIA just hired him to be the attorney for Georgia on the Georgia Abortion Ban

# R.G. & G.R. HARRIS FUNERAL HOMES INC. V. EEOC

- 1. Whether the word "sex" in *Title VII's* prohibition on discrimination "because of ... sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.
- 2. Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

# ATTORNEYS ON GENDER IDENTITY



## Respondent: David Cole

Legal Director of ACLU

Worked at Center for Constitutional Rights

Past professor at Georgetown

Argued 3 Supreme Court cases



## Petitioner: John Bursch

Board member of Alliance Defending Freedom

Past Solicitor General of Michigan

Argued and LOST Obergefell v. Hodges

Argued 11 cases in front of Supreme Court

# ATTORNEYS FOR THE GOVERNMENT

## Solicitor General (2 cases)

Represents the federal government of the United States before the Supreme Court of the United States.

Determines the legal position that the United States will take in the Supreme Court.

Files *amicus curiae* briefs in cases in which the federal government has a significant interest in the legal issue

## EEOC (Gender Identity only)

A federal agency that administers and enforces civil rights laws against workplace discrimination.

Investigates discrimination complaints based on an individual's race, children, national origin, religion, sex, age, disability, **sexual orientation**, gender identity, genetic information, and retaliation for reporting, participating in, and/or opposing a discriminatory practice.

**Parts of the government are arguing against each other**



# JUSTICE KAGAN – SEXUAL ORIENTATION

- You talked about the history of --of Title VII .... And the text of the statute appears to be pretty firmly in Ms. Karlan's corner.
- Did you discriminate against somebody, against her client, because of sex?
- Yes, you did.
- Because you fired the person because this was a man who loved other men. And part of that --and it only has to be part, we've made very clear there's no search for sole cause in Title VII --part of that is you fired the person because he was a man.
- If he were a woman, he wouldn't have been fired.



## JUSTICE GINSBURG – GENDER IDENTITY

No one ever thought sexual harassment was encompassed by discrimination on the basis of sex back in '64. It wasn't until a book was written in the middle '70s bringing that out.

And now we say, of course, harassing someone, subjecting her to terms and conditions of employment she would not encounter if she were a male, that is sex discrimination but it wasn't recognized.



# FEARS OF THE UNKNOWN SHOULD CONGRESS SHOULD DO IT

## **Bathroom**

## **Showers and Shelters**

## **Sports**

there are transgender male lawyers in this courtroom following the male dress code and going to the men's room and the --the --the --the Court's dress code and sex-segregated restrooms have not fallen. So the notion that somehow this is going to be a huge upheaval, we haven't seen that upheaval for 20 years, there's no reason you --you would see that upheaval. Transgender people follow the rule that's associated with their gender identity. It's not disruptive.

# WHAT NEEDS TO HAPPEN?

- Congress must pass the Equality Act or at least The Employment Non-Discrimination Act, which was introduced in 1994.
- One more state needs to ratify The Equal Rights Amendment which was passed in 1972.
- Watch for the opinions of the October 8 Supreme Court Cases – The opinions will be out in 2020.