

## Chew on It by Cristal Robinson

September 2019 Seminar

Current Federal Employment Discrimination Laws for LGBTQ & Women

**Bill of Rights Amendment 14 (1868)** ... nor deny to any person within its jurisdiction the equal protection of the laws.

**Civil Rights Act of 1964** - because of such individual's race, color, religion, sex, or national origin

**Enforcement of the civil rights act** – Courts, Attorney General, Commission of Civil Rights, EEOC

### How did sex get into the Act?

"[would] do some good for the minority sex." "If [the employer] does not employ th[e] colored woman . . . that employer will say "Well now, if I hire the colored woman I will not be in any trouble, but if I . . . hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit. That will happen as surely as we are here this afternoon. You all know it."

OPPOSITION: [i]magine the upheaval that would result from adoption of blanket language requiring total equality"

### Cases on Race

**Katzbach v. McClung**, 379 U.S. 294 (1964) - "Where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

**Griggs v. Duke Power Co.**, 401 U.S. 424 (1971) - "The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

### Cases over the 55 years

**LA Dept of Water & Power v. Manhart**, 435 U.S. 702 (1978) - "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

**Price Waterhouse v. Hopkins**, 490 U.S. 228 (1989) - ... "gender play[ing] a motivating part in an employment decision", saying that it meant that if, at the moment the decision was made, one of the reasons for making the decision was that the applicant or employee was a woman, then that decision was motivated by gender discrimination.

This definition includes stereotypes based on sex, which previous definitions had not.

**Oncale v. Sundowner Offshore Services**, 523 U.S. 75 (1998) - "Male-on-male sexual harassment was assuredly not the principal evil Congress was concerned with. But 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."

### Cases and Actions That are not Good

**Ulane v. Eastern Airlines**, 7<sup>th</sup> Circuit (1984) - "not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals."

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**Vickers V Fairfield Medical Center**, 6<sup>th</sup> Circuit (2006) - "... a gender stereotyping claim should not be used to bootstrap protection for **sexual orientation** into Title VII." "...the gender non-conforming behavior ... not behavior observed at work or affecting his job performance.... Rather, ... perceived homosexuality, rather than based on gender non-conformity."

### 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**

### EEOC Actions

**Macy v. Holder (2012)** - "A **transgender person** who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

**EEOC v. Bojangles (2017)** - "All employees have the right to work in an environment free from sexual harassment and gender stereotypes,: "Federal law provides **transgender employees** protection from sex discrimination in the workplace."

### October 8 Supreme Court Cases

**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**.

**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**.

### 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 the October 8 Supreme Court Cases – The opinions will be out in 2020.