Pendulum To Swing Back As SCOTUS Prepares For Exciting 2019-2020 Term

Insights
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Taking a three-year look back at the Supreme Court's workplace law decisions gives you the sense that the exciting cases only come down every other year. In the ho-hum term that ended in 2017, the Court handled relatively low-impact cases involving EEOC subpoena power, the Federal Vacancies Reform Act of 1998, and the impact of bankruptcy in WARN situations, while sidestepping a significant gender identity case involving Title VII.

The Court's docket heated up in the term ending in June 2018 when the Court issued rulings in blockbuster cases involving class action waivers (*Epic Systems*), the ability of public sector unions to collect agency shop fees (*Janus)*, the FLSA's overtime pay requirements as they relate to sales in the auto dealership industry (*Encino Motorcars*), retaliation law (*Digital Realty Trust*), same-sex marriage wedding cakes (*Masterpiece Cakeshop*), and the president's travel ban.

Last term's decisions returned to the mind-numbing variety, for the most part, as the Court handed employers decisions involving the application of age discrimination laws to small public sector employers, whether Title VII's administrative exhaustion requirement is jurisdictional or merely a claim-processing rule, and whether the Outer Continental Shelf Lands Act renders state wage and hour law inapplicable to offshore drilling operations.

This history can only mean that we have exciting things in store for the coming 2019-2020 term, which kicks off on October 7. A sneak peek at the early docket confirms that you can expect to see fireworks over the next nine months, as the Supreme Court has loaded its term with interesting and impactful cases. The highlight? A trio of cases that will determine whether the nation's most prominent workplace discrimination statute prohibits employment discrimination against LGBT workers.

Sexual Orientation And Gender Identity Take Center Stage
Without a doubt, the centerpiece of the Supreme Court's 2019-2020 workplace docket are the three cases that will determine whether Title VII's ban against discrimination "because of sex" covers claims involving sexual orientation and gender identity. They will all be argued on October 8, right as the Supreme Court kicks off the new term.

Sexual Orientation Discrimination

Two of the cases cover the issue of sexual orientation discrimination. In February 2018, the 2nd Circuit Court of Appeals became the second federal appeals court in the country to hold that sexual orientation was covered by Title VII's protections (*Zarda v. Altitude Express, Inc.*). The case began when Donald Zarda, who worked as a sky-diving instructor for Altitude Express on New York's Long Island over the summer of 2010, was fired by his employer. He had often participated in tandem skydives, where he would be strapped hip-to-hip with clients. Zarda said he found it best to inform his female clients that he was gay in order to ease any concerns that they might have had about being strapped in close physical proximity to a man.

During one jump, he attempted to lightheartedly comfort his female client by telling her that he was gay "and had an ex-husband to prove it." The client claimed that Zarda inappropriately touched her and only later disclosed his sexual orientation to excuse his behavior. She complained to the company, which in turn fired Zarda for violating company policy. Zarda, however, believed his termination was motivated by his sexual orientation and brought suit against his former employer, including a claim for gender discrimination under Title VII in his lawsuit.

The case eventually made its way to the 2nd Circuit Court of Appeals, which had several years before rejected just such a claim on the grounds that Title VII did not explicitly include protections for LGBT workers. But this time around, an *en banc* panel of judges acknowledged that times change and courts must change with the times. The full panel concluded that if sexual orientation bias is motivated at least in part by sex (as opposed to simply gender), then it is a subset of sex discrimination. And because Title VII explicitly outlaws sex discrimination, the court said, it naturally followed that sexual orientation discrimination should be outlawed under the statute.

Other federal Courts of Appeals, however, did not see things the same way. In May 2018, the 11th Circuit Court of Appeals rejected a very similar argument and concluded that Title VII's prohibition against employment discrimination based on sex does not cover sexual orientation discrimination (*Bostock v. Clayton County, Georgia*). Gerald Bostock worked as a child welfare services coordinator for Clayton County's Juvenile Court System before being fired for purported irregularities discovered during an internal audit of the funds he managed. He filed suit under Title VII claiming that the real reason he was let go involved sexual orientation bias. Bostock cited disparaging comments made to him at work after it was alleged that his employer discovered that he was playing in a gay recreational softball league.

While his case was being litigated, the 11th Circuit Court of Appeals (with jurisdiction over federal cases arising out of Georgia) concluded in another case that Title VII does not protect gay and lesbian employees in claims of employment discrimination (*Evans v. Georgia Regional Hospital*). Following this same line of reasoning, the court of appeals rejected Bostock's claim. However, the Supreme Court accepted this case as well and will have the final say on the matter.

Gender Identity Discrimination

Meanwhile, in March 2018, the 6th Circuit Court of Appeals became the first appellate court in the

land to extend the nation's main federal employment discrimination statute to cover transgender and transitioning employees. In *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*, the court ruled that employers cannot discriminate against such employees without violating Title VII.

The facts of the case are fairly straightforward. Aimee Stephens, a transgender woman who was born biologically male, began work as a funeral director for R.G. & G.R. Harris Funeral Homes in Detroit, Michigan in 2007. At the time, she presented as a man and used her then-legal name, William Stephens.

After six years of employment, Stephens presented the owner of the funeral home a letter indicating that she had struggled with a gender identity disorder her entire life. "I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness," the letter said. "With the support of my loving wife, I have decided to become the person that my mind already is. … Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation, I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire."

The owner of the funeral home, Thomas Rost, fired Stephens in response to the letter. He indicated that he did not think things would "work out." He later justified his decision by saying he has a sincere belief that the Bible teaches that a person's sex is an immutable God-given gift, and that he would be violating God's commands if he were to permit his male-born funeral director to wear women's clothes. He also said that he believed that his customers would be unnecessarily distracted and upset by the situation.

Stephens filed a Title VII gender discrimination claim against the funeral home alleging that she was discriminated against on account of her "sex," but the lower court dismissed Stephens's claim. It ruled that transgender status is not a protected trait under Title VII, and that the Religious Freedom Restoration Act (RFRA) barred the claim because of Rost's Christian beliefs. Stephens filed an appeal with the 6th Circuit Court of Appeals, which overturned the decision and ruled in Stephens' favor.

"Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex," the court said, meaning that such adverse employment actions would violate Title VII. Although the funeral home argued that, for the purposes of Title VII, "sex" refers to a "binary characteristic for which there are only two classifications, male and female," the court rejected this argument. "It is analytically impossible," the court said, "to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

The Supreme Court also accepted this case for review and will hear arguments on the same day as the two sexual orientation discrimination cases. The rulings in all three cases could forever reshape the nation's primary antidiscrimination statute. And while almost half of the states in the country and many local governments already have laws prohibiting sexual orientation and gender identity discrimination in employment, millions of employers and workers in the other half of the country

discrimination in employment, millions of employers and workers in the other half of the country will need to pay close attention to these rulings. They may require you to adjust your policies and practices, revise your handbooks, amend your training and orientation materials, and alter your overall approach to workplace relations to mirror current standards.

What Else Is On The Horizon?

Beyond these three cases, the Court has added a variety of other interesting cases that could impact a large number of employers across the country. Among the other cases we'll be tracking:

- *Comcast Corp. v. National Association of African American-Owned Media*: Whether a Section 1981 race discrimination claim fails absent "but for" causation.
- *Trump v. NAACP*: Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable and lawful.
- *Babb v. Wilkie*: Determining the correct standard when assessing ADEA age discrimination cases for federal sector workers.
- *Intel Corp. Investment Policy Committee v. Sulyma*: Whether the three-year statute of limitations period in ERISA, which begins on "the earliest on which the plaintiff had actual knowledge of the breach or violation," bars claims brought more than three years after the information was disclosed to the plaintiff, but the plaintiff chose not to read and could not recall having read such information.

And of course, as in all years, we expect that the Court may fill its docket with additional workplace law decisions as the term gets off and running. As we always do, we will monitor all Supreme Court cases this term and issue a same-day summary of the cases you care about once decided. You should ensure you are subscribed to Fisher Phillips' alert system to receive the most up-to-date information.

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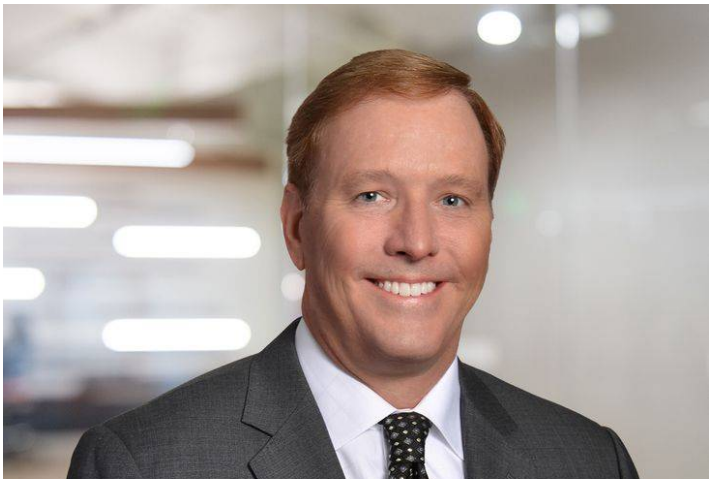

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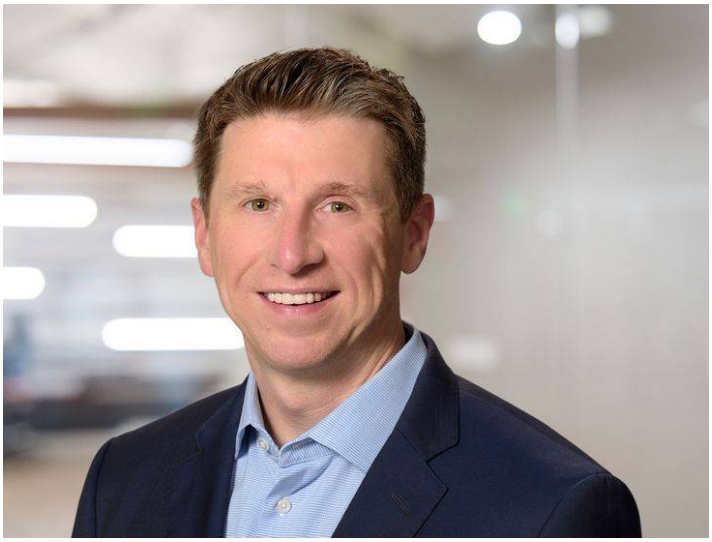

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