CORPORATE COUNSEL INSIGHT

U.S. Supreme Court Rules on LGBT Employment Discrimination Cases

Attorneys say historic decision won't have a huge impact on employers in states with existing LGBT protections

JESSICA FOLKER
LAW WEEK COLORADO

The U.S. Supreme Court on June 15, handed down a historic ruling in a trio of cases in which workers had been fired for their sexual orientation or gender identity. The question before the justices was whether an employee can fire someone simply for being gay or transgender, and the answer the court gave, in a 6-3 decision, was "no."

"The answer is clear," wrote Justice Neil Gorsuch in the majority opinion. "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Title VII doesn't explicitly mention sexual orientation or transgender status as protected characteristics. But the statute does prohibit employers from taking certain actions against employees "because of sex" and, the court concluded, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

For example, if an employer fires a male worker because he is attracted to men, the employer is discriminating against him for traits that are tolerated in a female coworker, the court said. Likewise, if an employer fires a transgender employee who was identified as male at birth, but who now identifies as a woman, for traits or actions that would be tolerated in a worker who was identified as female at birth, the majority wrote, "the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

TEA LEAVES, TROJAN HORSES

Many had speculated Gorsuch, a staunch textualist, would join his more liberal counterparts in ruling that Title VII protects LGBT workers.

"There was definitely some sense, both from the oral argument that I was able to attend as well as from the tea leaves that people were reading, that Justice Gorsuch was heavily persuaded by the textualist argument," said Craig Konnoth, associate professor at the University of Colorado Law School. The bigger surprise was that Chief Justice John Roberts was also swayed to side with the majority, said Konnoth, who filed an amicus brief in support of one of the plaintiffs, Aimee Stephens, who had been fired for being transgender.

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TITLE VII
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Brownstein Hyatt Farber Schreck shareholder Lisa Hogan agreed the 6-3 split was unexpected. "I thought all along that if we were going to prevail, it would be either Justice Gorsuch or Chief Justice Roberts who would come on over. The fact that both of them did was a pleasant surprise," said Hogan, who filed an amicus brief on behalf of several philosophy professors in support of the LGBT employees.

Gorsuch noted that both the First Amendment and the Religious Freedom Restoration Act of 1993 could allow for religious exemptions for certain employers, but "how these doctrines... interact with Title VII are questions for future cases."

"I'm not sure that exemption is going to be sweeping," said Brett Painter, a partner in the employment and labor group at Davis Graham and Stubbs. "I think it's going to be pretty narrowly interpreted with respect to organizations that are faith-based, and it's not the case that any employer is going to be able to rely on that exception to get out from under the requirements."

According to Konnoth, last week's holding could help LGBT people gain protections in other areas, such as education, "because Title IX and Title VII have generally been read symmetrically," as well as housing and health care. But the added protections could be accompanied by new religious exemptions, he said.

"I think that religious advocates and others will use this as a wedge issue to introduce broad religious protections across numerous areas of law," Konnoth said. "As long as LGBT individuals were excluded from the law, it was hard for them to argue that religious protections were required. But now that [LGBT protections] are within the law, they are more likely to try and use this almost as a Trojan horse to get religious exemptions within the law."

PRACTICALLY SPEAKING

None of the employers in the three cases before the Supreme Court disputed the allegations they had fired their employees because of sexual orientation or gender identity, which made for "a very clean analysis," said Hogan. According to Konnoth, employers were often open about discriminating based on sexual orientation and gender identity, while they were reluctant to admit discrimination they knew to be illegal, such as firing someone because of their race. "I think that's likely to change now," he added.

But for employers in Colorado and other states that already have anti-discrimination laws protecting LGBT workers, the practical effects of the SCOTUS ruling are likely to be limited. "Employers, employees and employment lawyers are already sensitive to these protected characteristics," said Painter, who added that attorneys in Colorado have long been advising clients to include sexual orientation and gender identity in employee handbooks and training.

"I think in terms of this decision for Colorado employers, it's not really going to change the landscape all that much," he said. "But it's an opportunity for employers to send the message again and make sure that employees understand what the protections are in the workplace and how to conduct themselves."

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> — Craig Konnoth, CU Law professor

Hogan recommended employers with employees in states without state protections for LGBT workers "take a very good look at policies and practices" and implement training to make employees aware of discrimination and implicit bias.

Even in states that already prohibit discrimination against LGBT workers, an employee might want to bring claims under Title VII instead of — or on top of — claims under state law. While federal law used to provide more expansive remedies, Painter said, Colorado's discrimination law has been amended so the remedies available are more in line with those under Title VII. "Both state and federal civil rights agencies do a good job of enforcing the laws," Painter said. "I'm not sure that there's necessarily an advantage to one as opposed to another."

Hogan said that depending on the enforcement mechanisms, level of damages and proof required in each state, an employee might prefer state versus federal court, or vice versa.

"It's nice that there are these additional protections, and certainly just the level of recognition that the U.S. Supreme Court has settled this issue is a big, big development in the evolution of civil rights in this country," she said. •

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LEGAL DESERTS
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by the state legislature. The legislature eventually expanded the program to pay incentives to 32 attorneys with another $1 million between the three funding sources.

The incentive program's 32-spot capacity is rolling, meaning that each time an attorney completes the five-year commitment, the program can replace them with another attorney.

Hannah Haksgaard, a professor at the University of South Dakota School of Law, said she believes the state succeeded in passing concrete policies to improve rural access to lawyers because people in influential positions, including state bar leadership and the Supreme Court's chief justice, prioritized the issue and pushed it until lawmakers acted.

"It just has to be at the top of the agenda. Otherwise it's another one of these things where for decades you can keep saying we have a rural lawyer shortage and do nothing about it," she said. Haksgaard co-authored the 2018 study in the Harvard Law & Policy Review on legal deserts, including South Dakota. She added because the state's prevalence of rural areas means their issues don't get swept to the bottom of policymakers' priority lists the way they tend to in states with major urban centers.

"The rural voice is really heard in state politics," Haksgaard said. "You're able to garner respect as a rural legislator, and agriculture is such a big deal here that everybody understands ... that we have to support agriculture in order to collect taxes and have a successful state."

Goetzinger acknowledged the bar association's relationships in the legislature and the governor's office helped the policy to implement South Dakota's incentive program get traction. The governor at the time, Dennis Daugaard, also has a background as a lawyer.

"But a very conservative lawyer, and he said, 'Don't even talk to me until you've got a way to pay for it,'" Goetzinger said. "Well, we found a way to pay for it and got him on board."

In April, the New York State Bar Association's Task Force on Rural Justice published a report with recommendations for improving access to legal services in the state's rural regions.

The report suggests establishing a direct payment pilot program similar to South Dakota's model. It recommends five years of payments of $22,148, equal to a year of in-state tuition averaged between New York's law schools.

According to the recommendation, the program would target counties with fewer than 100 people per square mile or less than two lawyers per 1,000 people.

Taier Perlman is a co-chair of the task force. Among the task force's recommendations, she said repealing a state law that requires practicing attorneys to have a physical address in New York could help them serve clients remotely.

"We're trying to get rid of that as a threshold for a New York-licensed attorney to offer legal services in New York," she said. But Perlman added broadband and other technology infrastructure needs to expand for attorneys based in urban centers to effectively serve rural clients. She said a lot of courts in rural communities don't have e-filing, and areas without broadband or reliable cell phone service require traveling to a town center to send and receive files.

"It makes it difficult for [clients] to utilize technology that might get them access to a lawyer," she said. •

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TOWN HALL
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a divorce or end up in probate court after someone has died.

"And that is why it is so important that we continue being activists, being anti-racists in terms of trying to make sure that the judiciary reflects the demographics of the citizens of Colorado," he said. He urged the audience to speak out on the importance of a diverse judiciary and the critical need for more black and Latino judges and encouraged participants to serve on judicial nominating commissions.

During her closing remarks, Scott asked participants to think of nine things they could do to create change – a number chosen to recognize George Floyd, who was killed when a police officer knelt on his neck for nearly nine minutes.

"It doesn't have to be too complicated," she said. "It could be getting nine people registered to vote. Sign up nine more mentees to your list. Help nine people fill out the Census."

The town hall was sponsored by the Symposium on Race, and all six of Colorado's diversity bar associations partnered with CLI to put on the event. CLI will be hosting a follow-up to last week's event during its Virtual Annual Summit Aug. 10-14. •

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