Sexual Discrimination And Orientation

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Background

"Remember the ladies," stated Abigail Adams to her husband John in 1776 while he was helping to draft the Declaration of Independence. Unfortunately, throughout most of American history, the ladies were not remembered when it came to laws, as women were treated at best as second-class citizens and at worst as the virtual property of their husbands. The past 40 years in U. S. law have witnessed a gender revolution, starting with the passage of the Equal Pay Act in 1963. In the process, areas of the law that had never existed before, such as SEXUAL HARASSMENT LITIGATION, were articulated and applied.

Six years after the Equal Pay Act was passed, riots at the Stonewall Inn in New York City began the gay rights movement. Legally, homosexuals were barely recognized by the law except in anti-sodomy rules virtually every state possessed. Today, gay rights are at the cutting edge of sexual DISCRIMINATION law, an area both unsettled and controversial. Sexual discrimination law advanced a long way in the latter half of the twentieth century. How much more it will advance remains an interesting question.

Gender Discrimination

Discrimination on the basis of sex was first addressed in federal law in the Equal Pay Act of 1963. Since that act was passed, several other laws affecting the rights of women have been enacted. They include:

- Title VII of the **C**IVIL **R**IGHTS Act of 1964
- The Civil Rights Act of 1991, which expanded some of the protections granted by Title VII
- Title IX of the Education Amendments of 1972 (Title IX)
- The Pregnancy Discrimination Act of 1978
- The Family and Medical Leave Act of 1993

The Equal Pay Act

The Equal Pay Act, passed in 1963, was the first law to address gender inequality in the workplace and one of the first laws to benefit women explicitly since they gained the right to vote earlier in the century. The Equal Pay Act guaranteed equal pay for equal work for men and women. For the act to take effect, men and women must be employed under similar working conditions, and equal is defined as "equal skill, effort and responsibility." Overtime and travel are included among the provisions of the act.

The Equal Pay Act is part of the **F**AIR **L**ABOR **S**TANDARDS **A**CT, although it is unlike the other parts of the act in that there are no exceptions for executive, administrative, professional employees, or outside salespeople. But the Equal Pay Act contains the same business exceptions as the Fair Labor Standards Act and covers only employees "engaged in commerce." In practice, this law applies to vast majority of businesses in the country.

There are four affirmative defenses to the Equal Pay Act: merit, production, seniority, and "factor other than sex." The most litigated of these defenses is the "factor other than sex" because of the ambiguous nature of the clause. For example, prior wages, profitability of the company, and evaluation of a personal interview have all been held to be a factor other than sex justifying pay discrepancies between men and women under the Equal Pay Act.

Title VII of the Civil Rights Act

Title VII, passed in 1964, is arguably the most important legislation protecting the equality of women in the workplace. Title VII, which was originally proposed as an anti-racial discrimination bill, included sex as a protected class largely as an afterthought. The amendment adding the term sex was proposed by a conservative legislator from Virginia, probably as a way of scuttling the whole bill. Despite this, Title VII passed with its protections against sexual discrimination intact.

Title VII prohibits discrimination by employers, employment agencies, and labor organizations with 15 or more full-time employees on the basis of race, color, religion, sex, or national origin. It applies to pre-interview advertising, interviewing, hiring, dis- charge, compensation, promotion, classification, training, apprenticeships, referrals for employment, union membership, terms, working conditions, working atmosphere, seniority, reassignment, and all other "privileges of employment."

The operative question in a Title VII SEX DISCRIMINATION case is whether the litigant has suffered unequal treatment because of his or her sex. Courts look at whether the disparate treatment of the employee was sex-related. If it was, it is actionable under Title VII unless the employer uses an affirmative defense; if not, it is not actionable.

Affirmative defenses under Title VII include all of the affirmative defenses under the Equal Pay Act. In addition, defenses include situations in which sex is a bona fide occupational requirement (BFOQ) for the job; when sex discrimination occurs as a result of adhering to a bona fide seniority system (unless the system perpetuates past effects of sex discrimination); or when sex discrimination is justified by "business necessity."

When employers assert a mixed motive under Title VII, that is, the action taken against the employee has both an discriminatory and non- discriminatory reason, the employer must prove by a preponderance of the EVIDENCE the employment decision would have been made absent the discriminatory factors.

Plaintiffs can also sue under Title VII using a theory of "disparate impact" that is, showing that while an employment decision or policy is not discriminatory on its face, it has resulted in discrimination on the basis of sex. The intent of discrimination can be inferred by the impact of the policy.

AFFIRMATIVE ACTION for women is allowed under Title VII. In the decision of Johnson v. Transportation Agency, Santa Clara County, the Supreme Court determined an affirmative action program that promoted a woman over a more qualified man was legal under Title VII as long as her sex was just one factor in the decision, and the affirmative action plan was carefully drafted to remedy the effects of past discrimination.

Title VII: Sexual Harassment

Title VII prohibits acts of sexual harassment when such harassment becomes a "term or condition" of employment, when rejection of the harassment could be used as the basis for an employment decision or when such conduct creates an intimidating "hostile" work environment. The types of sexual harassment prohibited by Title VII are grouped into two categories: QUID PRO QUO sexual harassment, when the harassment is directly linked to the grant or denial of an employee's economic benefits, and hostile environment harassment, when the harassment creates a difficult working environment for an employee. Because the first type of harassment is relatively straightforward, the second type has been the subject of more litigation.

The Supreme Court has ruled that a hostile working environment is created when a workplace is permeated with "discriminatory intimidation, ridicule, and insult" which is widespread enough to change the conditions of employment for the person being harassed. Hostile work environments have been held by courts to be created when female employees are subjected to pornographic pictures, to unsolicited love letters and request for dates, and sexual innuendos and crude remarks where those remarks were pervasive.

Employees can sue for sexual harassment even when they have suffered no TANGIBLE financial problems as a result of such harassment. They can sue even though they have not experienced concrete psychological injury because of the harassment. However, such conduct must do more than offend the employee. Moreover, the harassment does not have to be cross-gender in nature. The Supreme Court in 1998 held that same-sex harassment, e.g. male sexual harassment of another male, is actionable under Title VII.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 enhanced the protections granted in Title VII. It added compensatory (i.e., pain and suffering) damages and PUNITIVE DAMAGES, sometimes known as exemplary damages, for all victims of intentional discrimination. (Previously these had only been available for victims of racial discrimination.) These damages are capped from $50,000 for employers with 100 or fewer employees to $300,000 for employers with more than 500 employees. It also added a right to a jury trial. Previously, sex discrimination plaintiffs had to file an Equal Pay Act or COMMON LAW FRAUD claim to get a jury trial.

The Act also made it easier to file disparate impact cases by reversing a 1989 Supreme Court decision and establishing that to disprove a disparate impact charge, employers must show that the practice is job related for the position in question and consistent with business necessity. In addition, the Act allows employees to file a discrimination charge at the time they are affected by the discrimination, rather than when they are first notified of the discriminatory act and the Act applies Title VII to American citizens living overseas.

Title IX

Title IX addresses sexual discrimination in the area of education. It applies to all federally funded educational institutions, including any college or university "any part of which is extended federal financial assistance." It provides that no person shall be excluded from participation in or be subjected to discrimination on the basis of sex in any educational activity. Title IX has wrought an enormous change on American schools and universities since its enactment in 1972. It has forced schools to equalize sports programs between men and women, resulting in a boom for women's athletics. It has caused the Supreme Court to hold single sex public colleges to be unconstitutional, most famously in the case of the Virginia Military Institute. Many hold Title IX responsible for the tremendous increase in women in postsecondary graduate schools since 1970, to the point where women now make up half of all law and medical students in the country.

The Pregnancy Discrimination Act and Family and Medical Leave Act

The Pregnancy Discrimination Act of 1978 protects pregnant women by stating that employers must treat pregnancy as a temporary DISABILITY, and they may not refuse to hire a woman or fire her because she is pregnant or compel her to take maternity leave.

The Family and Medical Leave Act of 1993 built upon the rights granted under the Pregnancy Discrimination Act. This act applies to employers of 50 or more employees, and permits up to 12 weeks of unpaid leave for the birth, ADOPTION, or foster care placement of a child; the serious medical condition of a parent, spouse, or child; and the worker's own serious medical condition that prevents the worker from performing the essential functions of his or her job.

Except for highly paid positions, individuals must be given back their former positions or one fully equivalent. Employees are eligible for family or medical leave after working for 12 months or at least 1,250 hours. Part-time employees are eligible for such leaves as these numbers average 24 hours a week.

Supreme Court Standards for Gender Discrimination

The Supreme Court has dealt with a variety of gender discrimination cases over the years. Until 1976, it used a rational basis test to determine whether the discrimination it was reviewing was constitutional. Since 1976, beginning with the case of Craig v. Boren, the court has used what is referred to as "intermediate" scrutiny in regard to gender discrimination cases. This standard states that a classification based on gender must be reasonable, not arbitrary, and must serve important governmental objectives and be substantially related to the achievement of those objectives.

This scrutiny is less of standard than the court uses in racial discrimination cases, which are subject to strict scrutiny. A classification based on race must serve a compelling government interest and be strict- ly tailored to the achievement of the purpose. This standard makes courts more willing to uphold a classification based on sex than to uphold one based on racial classification.

Sexual Orientation Discrimination

In contrast to women over the last 40 years, homosexuals have seen slow progress in their attempts for equal rights. In areas ranging from marriage and family to job discrimination to organizations such as the military and boy scouts, discrimination against homosexuals is still sanctioned in a variety of ways. The military, for example, currently has a policy of "don't ask, don't tell" implemented in 1993, which allows a serviceman or woman to be discharged if he or she publicly admits to being homosexual.

One of the biggest ways sexual orientation differs from other suspect classifications such as race or sex is there is no nationwide law dealing with discrimination against homosexuals. For example, Title VII has been consistently held not to apply to discrimination against homosexuals. Nevertheless, many states and municipalities have adopted sexual orientation anti- discrimination laws. As the twenty-first century begins, there is clear movement toward gay rights in the United States, at least in some regions and areas.

The Supreme Court and Gay Rights

In the absence of any national law on sexual orientation discrimination, the Supreme Court decisions on these issues have assumed a great importance. The Supreme Court's record on gay rights issues has been mixed. The Court has issued three comparatively landmark decisions on gay rights since it first tackled the issue in

1985, and several other less important holdings. The results are somewhat contradictory.

Bowers v. Hardwick

In this 1986 case, the Court reviewed an anti- sodomy STATUTE in Georgia. The plaintiff was arrested in his bedroom for having sex with another man. The court ruled on a 5-4 vote that the constitutional right to privacy did not apply to conduct between members of the same sex. In handing down this ruling, the court made a distinction between homosexual behavior and actions such as BIRTH CONTROL, ABORTION, and interracial marriage. While the court had previously found that all of these were covered by the right to privacy in the due process clause of the Fourteenth Amendment, homosexual acts were not covered by this clause, according to the Court. Bowers v. Hardwick has never been overturned, and many states still have anti-sodomy laws on the books, although they are rarely enforced.

Romer v. Evans

In contrast to Bowers v. Hardwick, Romer v. Evans was considered a big victory for gay rights. In 1992, Colorado voters had approved Amendment 2, which prohibited or preempted any law or policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitled any person or class of persons to have or claim any minority status, quota preference, protected status or claim of discrimination" In other words, the law banned any Colorado municipality from passing an sexual orientation anti-discrimination law.

The Supreme Court ruled in a 6-3 decision in 1996 that Amendment 2 violated homosexuals EQUAL PROTECTION rights in Colorado. Applying the rational basis test, which requires that a policy or law discriminating against a specific non-protected class have a rational relationship to a legitimate PUBLIC INTEREST, the court determined that a "desire to harm a politically unpopular group cannot constitute a legitimate government interest." The Court noted that Amendment 2 identified homosexuals by name and denied them equal protection across the board. "[It's] shear breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," said the Court. The Court's decision in Evans seemed to indicate the Court would accept some equal protection rights for homosexuals, though it certainly did not offer the same protection to sexual orientation discrimination as it would to race or sex.

Boy Scouts of America v. Dale

The Supreme Court did another reversal in 2000 and ruled in the case of Boy Scouts of America v. Dale that a private organization had a right not allow in homosexuals under the theory of freedom of association. In this case, the Boy Scouts of America had dismissed a scout leader who was openly homosexual. The court determined that a New Jersey public accommodation law, which required organizations using public facilities in the state not to discriminate on the basis of sexual orientation, violated the scouts First Amendment rights. "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express," said the Court, which added that "the presence of Dale as an assistant scoutmaster would... interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." This decision was differentiated from the way the court had refused to apply freedom of association rights in the past when dealing with gender and racial discrimination. "Until today," Justice John Paul Stevens pointed out in a dissent, "we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's anti-discrimination law."

Other Supreme Court Decisions

Several other Supreme Court rulings were handed down in the 1990s on the issue of homosexual rights. These rulings did not have the impact of the above three, although they also yielded a mixed position on gay rights. Onacle v. Sundowner Offshore Services in 1998 found the Court unanimously ruling that same sex harassment was actionable under Title VII. The Court found even though same sex harassment was not contemplated by the statute, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evil." The 1998 case of Bragdon v. Abbott found a divided Supreme Court allowing persons with HIV to be considered disabled under the Americans With Disabilities Act, even when the disease had not progressed to a symptomatic stage. This action was considered a major gay rights victory. In summary, Supreme Court decisions on gay rights since Hardwick v. Bowers have not laid out a clear path either for or against sexual orientation discrimination. It remains to be seen whether the Supreme Court will clarify this more in the future.

State And Municipal Sexual Orientation Anti-Discrimination Laws

While the Supreme Court has failed to set a consistent national policy regarding sexual orientation discrimination, many states and municipalities have taken the lead in passing protections for homosexuals in areas such as employment and public accommodations. The first of these were passed in the early 1970s, subsequently hundreds of municipalities and many states have adopted anti-sexual orientation protections.

Probably the most famous anti-discrimination sexual orientation law was Vermont's Civil Union Law, passed in the year 2000, which permits same-sex couples to enter into "civil union" relationships. The law, while not using the language of marriage, gives same-sex couples virtually all of the 300 or so rights available to married couples.

No other state gives same-sex couples this sort of protection, but several other states currently have anti-discrimination laws and protection for homosexuals:

CALIFORNIA: Protections against discrimination in employment and public accommodations

CONNECTICUT: Protections against discrimination in employment, public accommodation, housing, and credit

DISTRICT OF COLUMBIA: Protections against discrimination in employment, public accommodation, housing, and credit, although religious educational institutions are exempt from protections

HAWAII: Protections against discrimination in employment

ILLINOIS: Protections against discrimination in public employment

MARYLAND: Protections against discrimination in employment

MASSACHUSETTS: Protections against discrimination in employment, public accommodation, housing, and credit

MINNESOTA: Protections against discrimination in employment, public accommodation, housing, and credit

NEVADA: Protections against discrimination in employment

NEW HAMPSHIRE: Protections against discrimination in employment, public accommodation, and housing

NEW JERSEY: Protections against discrimination in employment, public accommodation, housing, and credit

NEW YORK: Protections against discrimination in public employment

PENNSYLVANIA: Protections against discrimination in public employment

RHODE ISLAND: Protections against discrimination in employment, public accommodation, housing, and credit

VERMONT: Protections against discrimination in employment, public accommodation, housing, and credit, civil union law

WASHINGTON: Protections against discrimination in public employment

WISCONSIN: Protections against discrimination in employment, public accommodation, housing, and credit

Additional Resources

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Organizations

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