It's not about Bathroom Policies, it's about Constitutional Principles

The First Transgender Rights Case Before the US Supreme Court

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The United States Supreme Court is expected to soon deliver its judgment in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, the first transgender rights case before it. In the absence of federal laws protecting transgender persons from discrimination, the case revolves around the question whether the prohibition of discrimination 'because of … sex' pursuant to Title VII of the 1964 Civil Rights Act covers transgender discrimination. The US Supreme Court appears to turn this into a question of political deliberation, bathroom policies and dress codes. The ECJ, on the other hand, instead of getting lost in policy discussions, has already in 1996 recognized the protection of transgender persons against discrimination based on the core constitutional principle of equality. The ECJ's approach does in fact have a foothold under US case law and the US Supreme Court could seize the opportunity to bring transgender persons closer to enjoying the same rights as the general population.

Claims, counterclaims and bathroom policy

Aimee Stephens' employment at the R.G & G.R. Harris Funeral Homes was terminated shortly after she had informed her boss that she intended to transition from male to female. She filed a complaint with the Equal Employment Opportunity Commission (EEOC), which conducted an investigation and subsequently brought a suit against the Funeral Home. It challenged the termination of Stephen's employment as a violation of Title VII of the Civil Rights Act of 1964 which states that

> *"It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."*

The case eventually found its way to the US Supreme Court, and the oral arguments were heard on October 8, 2019.

Aimee Stephens argues that her dismissal constitutes discrimination because of sex for three reasons: Firstly, by firing her for failing to conform to the company's owner's explicitly stated stereotypes about how men and women should behave. This discriminated against Stephens in the same way that Price Waterhouse discriminated against Ann Hopkins for failing to walk and talk more femininely as the US Supreme Court had decided in 1989 in *Price Waterhouse v. Hopkins*. Aimee Stephens argues that 'the objection to someone for being transgender is the ultimate sex stereotype' because it rests on the assumption that if someone is assigned a male sex at birth, that person must live and identify as a man for their entire life.

According to the second claim, which is closely linked to the first claim, the Funeral Homes engaged in disparate treatment on the basis of sex by firing Stephens for contravening a sex-specific expectation that applies only to people assigned a male sex at birth, namely that they live and identify as a man for their entire lives. Accordingly, she was fired for identifying as a woman only because she was assigned a male sex at birth; had she been assigned a female sex at birth, she would not have been fired.

Finally, Stephens claims that the Funeral Homes has committed sex discrimination for firing her for, in

her boss's words, 'changing her sex'. She argues that this constitutes discrimination in the same way that firing someone for changing their religion is religious discrimination.

The counterclaims in this case came not only from the petitioner, Harris Funeral Homes, but also from the Solicitor General, Noel J. Francisco, who represents the federal government before the Supreme Court. Harris Funeral Homes has asserted that sex and transgender status are different concepts, that the definition of sex is trying to be changed, that deciding in favor of Aimee Stephens would destroy all sex-specific work requirements. The most remarkable claim of the Solicitor General, on the other hand, was that if an employer treats a transgender man exactly the same as a transgender woman, there is no discrimination since they should be the appropriate comparators in such cases. Solicitor General Francisco bases his reasoning upon his interpretation of Price Waterhouse which, he says, states that treating an aggressive woman worse than an aggressive man would be a violation of Title VII because in that case one would be treating similarly situated people differently. This, so-called, 'equal misery' argument (claiming there is no discrimination if male and female transsexuals are treated alike) has been described by Aimee Stephens' counsel as constituting 'two acts of sex-discrimination'.

The judges' questions during the hearing reveal the two issues which will be crucial in deciding the case: the issue of judicial interpretation and the issue of sex-specific work requirements. Regarding interpretation, the inevitable discussion is whether including discrimination against transgender persons in the scope of Title VII would undermine the democratic legislative process. Aimee Stephens has underlined that she and the EEOC do not claim to redefine 'sex'. In fact, they take the narrowest definition of the word, basing their claims on 'sex assigned at birth' or 'biological sex'. This becomes clear with the second claim, namely that Stephens was fired for identifying as a woman only because she was assigned a male sex at birth. The judges have suggested during the oral arguments that affording a meaning to 'sex' which Congress had not clearly stated could create 'massive social upheaval'. The judges, however, seem to have ignored that the case law of Federal Courts of Appeals, which has already recognized that discrimination against transgender persons constitutes sex discrimination under Title VII, has not led to such massive social upheaval.

Regarding the issue of sex-specific work requirements, the judges have repeatedly expressed their concern about the possible implications of a positive judgment on bathroom policies and dress codes.

European and US approaches

In its 1996 landmark decision of *P. v S. and Cornwall County Council* (Case C-13/94), the questions referred to the ECJ were (1) whether the dismissal of a transsexual for a reason related to a gender reassignment constituted a breach of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, and (2) whether Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibited treatment of an employee on the grounds of the employee being transsexual. The ECJ's understanding of the prohibition of discrimination in relation to and as an expression of the principle of equality, was one of the most novel aspects of that judgment. The Court has anchored the prohibition of discrimination in a fundamental human right at the core of the EU which can be found in Article 2 TEU. The ECJ has thus placed the prohibition of discrimination hierarchically above other employment-related issues, such as sex-specific work requirements.

This approach does in fact have a foothold under the US case law as well. The US Supreme Court has drawn on the Equal Protection Clause in a number of LGBTI+-related cases, such as *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor* and *Obergefell v. Hodges*. Similarly, courts at other levels have ruled, for example in *Glenn v. Brumby*, that firing a transgender employee due to their gender non-conformity constituted a violation of the Equal Protection Clause. By making anti-discrimination a reflection of a constitutional principle, the Supreme Court would be answer-

ing the concerns regarding bathroom policies and dress codes.

Deciding that transgender discrimination is 'because of sex' within the meaning of Directive 76/207, the ECJ has acknowledged that discrimination on the ground of 'gender reassignment' constitutes discrimination based on 'sex'. Thereby, the ECJ has equated sex to gender. This is also in line with the Supreme Court's judgment in *Price Waterhouse v. Hopkins*, which has already been used in cases involving transgender discrimination at various levels of the US courts, such as in *Schwenk v. Hartford* and*Smith v. City of Salem*. This line of reasoning would disqualify the claims of the Harris Funeral Homes as well as the concerns of some judges regarding the issue of judicial interpretation. Indeed, this approach avoids the discussion as to whether the meaning of 'sex' is being changed.

Towards meaningful legal protection

At a time when we are experiencing backslide in (the enjoyment of) fundamental freedoms around the world, the progressive approach that the ECJ took decades ago could be an inspiration for the US Supreme Court. The US Supreme Court has been known to look towards Europe, especially in cases relating to LGBTI+ rights. For instance, in its landmark case *Lawrence and Garner v. Texas*of 2003, the Supreme Court has cited the 1981 decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, which had held that criminalizing homosexual acts violated the European Convention on Human Rights.

Focusing on the constitutional principle of equality has enabled the ECJ as early as 1996 to protect transgender persons from discrimination because it is their fundamental human right not to be discriminated against. There is enough foundation in the earlier US case law to follow the ECJ's example in focusing on equality instead of letting bathroom policies trump fundamental rights.

Transgender persons face a plethora of challenges, discrimination, stigmatization and hate crimes at their workplace. The Supreme Court's decision in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* could bring the entire transgender community in the US one step closer to meaningful legal protection against discrimination if it bases its reasoning on the principle of equality, and thus on the constitution. This would eliminate policy issues, such as bathroom policies, from hijacking the entire debate.

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