High Court Opts For Incremental Approach To LGBT Issues

By **Chad Eggspuehler** (July 1, 2019, 6:01 PM EDT)

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The 2017-2018 term's decision in Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission left many advocates for LGBT rights with mixed emotions: relief that the U.S. Supreme Court avoided a broad free speech ruling that would have been tantamount to a license to discriminate; concern that the court deemed it a close case; and uncertainty about the future of LGBT rights. The retirement of long-time LGBT rights ally Justice Anthony Kennedy soon thereafter led some to fear for the worst.

Yet, for all the consequential decisions of the 2018-2019 Supreme Court term — ranging from census questions to vulgar trademarks and gerrymandering — the court charted a rather restrained course on LGBT issues. To be sure, the forecast remains worrisome and challenging issues remain. But the court as a whole has not signaled hostility to the hard-earned progress of recent years, opting instead for an incremental approach.

Court Ducks Rerun of Bakery Free Speech Row, School Bathroom Access Case for Now

The court had ample opportunity to take an antagonistic posture on LGBT issues.

With regard to First Amendment issues, Klein v. Oregon Bureau of Labor and Industries, a bakery case out of Oregon, gave the court the opportunity to answer questions left unanswered by Masterpiece Cakeshop — namely, whether state public accommodations laws that require bakeries to provide wedding-cake services to same-sex couples, violate the First Amendment's free speech guarantee.

The Klein certiorari petition also asked the court to reconsider its 1990 free exercise ruling in Employment Division, Department of Human Resources of Oregon v. Smith[1] that generally applicable laws, which do not target religious practices, are presumptively valid — a standard some conservatives recently have argued provides insufficient protection for religious liberty. Social media reaction and emotional distress damages totaling $135,000 led many to think that the court's conservative wing would take this case to expand upon Masterpiece Cakeshop.

It didn't. Rather, the court issued a grant, vacate and remand order requiring the Oregon State Court of Appeals to reconsider its decision in light of Masterpiece Cakeshop. GVR orders do not provide instructions to the lower court regarding how it should rule in a particular case, but merely ask it to reassess its opinion in light of a recent U.S. Supreme Court decision. The court had previously GVR'd a similar denial-of-service case involving a Washington florist, Arlene's Flowers Inc. v. Washington, with instructions for the state Supreme Court to reconsider its decision in light of Masterpiece Cakeshop.

None of this means that the U.S. Supreme Court will continue to defer judgment on these First Amendment challenges to public accommodation protections for the LGBT community. But neither Klein nor Arlene's Flowers presents the same sort of religious-bias/disparate-

treatment issues as Masterpiece Cakeshop, where members of the state civil rights agency had made dismissive comments about the bakery owner's religious beliefs. Thus, if there are tea leaves to read, it appears that the court is in no hurry to address these issues again.

Both cases may return next term. Indeed, the Washington Supreme Court recently issued its post-remand decision, concluding that Masterpiece Cakeshop did not affect its conclusion that the state public accommodations law did not violate the First Amendment.[2]

The Supreme Court also declined to wade into the transgender bathroom-access debate when it denied certiorari in Doe v. Boyertown Area School District. Unlike the typical bathroom-access dispute, the school district had adopted a trans-inclusive policy, and nontransgender, or cisgender, students objected to the policy. Specifically, the Boyertown School District adopted a policy in 2016 that permitted transgender students, following individualized review, to use restrooms and locker rooms corresponding with their gender identity. Cisgender students sued to enjoin the policy, arguing that the policy violated their constitutional right to bodily privacy and Title IX.

The U.S. Court of Appeals for the Third Circuit summarily denied the cisgender students' objections to the policy, concluding that the school district "adopted a very thoughtful and carefully tailored policy in an attempt to address some very real issues while faithfully discharging its obligation to maintain a safe and respectful environment in which everyone can both learn and thrive."[3]

Though the denial of certiorari expresses no view on the underlying dispute, the practical effect of this certiorari denial is that school districts may continue to develop bathroom-access policies following the guidance of the Third Circuit's decision. The certiorari denial does not, however, suggest that the Supreme Court has become more receptive of statutory and/or constitutional arguments that school districts must provide gender-confirming bathroom access to transgender students.

Trans Military Ban Stays, but There May Be a Silver Lining

Sadly, the Supreme Court did not take a hands-off approach to the president's ban on transgender persons serving in the military. Multiple district courts had issued nationwide injunctions on the "trans military ban," which had been incorporated into a 2018 policy issued by the U.S. Department of Defense. On Jan. 22, the Supreme Court, by a 5-4 vote, stayed the injunction pending disposition of the appeal on the merits. That means that the ban can take effect while the constitutional challenges proceed through appeals — a process that can take months or years.

Though a stay vote, like a vote on certiorari, does not constitute a decision on the merits of a case, it does take account of the applicant's "likelihood of success on the merits." Thus, court watchers are right to suspect that a majority of the court is skeptical either about the constitutional claims raised, the standard applied to those claims, or at a minimum, the nationwide scope of the relief awarded. Still, transgender service members will have the opportunity to pursue their challenges to the policy on appeal.

The current version of the ban, adopted from the defense department policy, generally provides that "[t]ransgender persons with a history or diagnosis of gender dysphoria are disqualified from military service," with exceptions for those who "do not require a change of gender," and "[t]ransgender persons who require or have undergone gender transition are disqualified from military service." No doubt, the ban will have a devastating impact on

transgender service members and aspiring service members.

Yet, while we await appellate consideration of the challenges to the ban, there may be a small silver lining to the stay applications and related decisions. Following the Supreme Court's stay decision, the U.S. Court of Appeals for the Ninth Circuit, hearing a peculiar discovery dispute on mandamus review, ruled that claims of discrimination against transgender persons are subject to "heightened" or "intermediate scrutiny" under the 14th Amendment's equal protection and due process clauses.[4] That appears to be the same standard applied to gender discrimination claims,[5] and requires (1) an "exceedingly persuasive" justification for the discriminatory policy, that (2) is "substantially related to the achievement" of that objective.

By requiring the government to satisfy such ends-means testing, the Ninth Circuit's standard provides greater judicial oversight — and arguably constitutional protection — to transgender litigants challenging allegedly discriminatory policies, not just the military ban. That, in turn, could lead to positive developments in other cases within the Ninth Circuit.

Next Term: Court to Decide Whether Title VII Protects LGBT Employees

If this term merely preserved the status quo, next term promises at least one consequential decision: whether the Civil Rights Act's Title VII prohibition on workplace discrimination "because of ... sex" extends to discrimination against LGBT employees. The Supreme Court granted certiorari and consolidated three cases (Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda and R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission) where employees asserted that their employers fired them because of their sexual orientation or transgender identity.

Although conservatives have argued that Congress did not intend for Title VII protections to apply to claims of LGBT discrimination, the court must grapple with its 1989 plurality decision in Price Waterhouse v. Hopkins that Title VII encompasses claims asserting gender stereotyping — i.e., discrimination because an individual does not conform to preconceived gender expectations. Price Waterhouse permitted Title VII claims by a female employee who asserted that she was denied a promotion after her employer told her that she should walk, talk and dress more femininely.[6]

The employees argue that sexual orientation and gender identity are inextricably linked with sex. In their view, an employer who takes an adverse action against an LGBT employee because of their LGBT status necessarily discriminates against them "because of [their] sex," or at a minimum relies on improper gender stereotypes regarding how men and women should present themselves in public and form personal relationships.

It remains to be seen whether the court reaffirms and extends the gender-stereotyping rule adopted in Price Waterhouse to claims brought by LGBT employees, carves out LGBT claims from other forms of gender-stereotyping, or takes a case-specific middle ground. In light of this uncertainty, advocates for LGBT rights will continue to press Congress and state legislatures to pass express workplace protections for LGBT employees, such as those provided by the U.S. House of Representatives' proposed Equality Act.

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[1] Emp't Div. v. Smith, 494 U.S. 872, 877–90 (1990).

[2] State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

[3] Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 537 (3d Cir. 2018).

[4] Karnoski v. Trump, slip op. (9th Cir. June 14, 2019).

[5] See United States v. Virginia, 518 U.S. 515 (1996).

[6] See Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plurality).