News



Activists and supporters block the street outside the U.S. Supreme Court in Washington Oct. 8, 2019, as it hears arguments in three major employment discrimination cases on whether federal civil rights law prohibiting workplace discrimination on the "basis of sex" covers gay and transgender employees. (CNS/Reuters/Jonathan Ernst)



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On the second day of the Supreme Court's new term, a divided court Oct. 8 heard oral arguments from three cases concerning protections for gay, lesbian and transgender employees under Title VII of the Civil Rights Acts.

At the end of the two hours, for two consolidated cases about fired gay employees and a separate case concerning a fired transgender worker, it was not clear how the court would lean, absent the previous swing vote of now-retired Justice Anthony Kennedy.

But questions and comments by Justice Neil Gorsuch seemed to bridge the divide with remarks in support of the employees but also a concern about the potential of "massive social upheaval" if the court ruled in favor of these employee protections and wondered if it might be something Congress should instead address.

Gorsuch commented that what the court had to determine was a "really close" case on the law, but Solicitor General Noel Francisco, arguing for the Trump administration on the side of the employers, disagreed.

"I don't think it's that close. Sex and gender identity, like sex and sexual orientation, are different traits," he said, but then he also agreed in part with Gorsuch saying it is "an issue better left to Congress."

Chief Justice John Roberts asked about the impact that added worker protections would have on employers with religious objections to hiring LGBT employees.

Francisco said extended protections "would expand the scope of liability without giving any consideration to those religious liberty interests on the other side of the balance."

Stanford law professor Pamela Karlan, who argued on behalf of the two men who said they were fired from their jobs because they were gay, said the court has already "created an exemption for sincere religious belief for a large category of employers through the ministerial exception" and Congress also has "balanced these issues and has rebalanced them several times in the co-religionist exception."

She also said that to "understand this in context" means realizing that 85 percent of American employers are not covered by Title VII "so as to those employers, if they have religious objections to hiring someone who is gay, they're free to continue doing that."

The argument's focus on the landmark 1964 law was whether it meant more than simply ensuring that women were protected from being denied jobs or promotions that would normally go to men and if it also applied to sexual orientation and gender identity.

"Sex means whether you're male or female, not whether you're gay or straight," Francisco argued.

Justice Sonia Sotomayor said the issue of people being fired for their sexual identity has to be examined, noting: "We can't deny that homosexuals are being fired merely for being who they are."

"They may have power in some regions, but they are still being beaten, they are still being ostracized from certain things," she added.

A number of religious groups including the U.S. Conference of Catholic Bishops weighed in with friend-of-the court briefs in favor of the employers. The USCCB brief said the added employee protection could impact faith-based schools, health care providers and homeless shelters that operate by "religious and moral convictions."

Dozens of companies and advocacy groups filed briefs in support of the employees.

Currently, more than 20 states and the District of Columbia have laws in place to protect against employment discrimination based on sexual orientation and gender

identity with exceptions for religious employers.

Luke Goodrich, vice president and senior counsel of Becket, a nonprofit religious liberty law firm, told reporters before the Supreme Court's term began that if the court views these employee cases as discrimination, there will likely be new lawsuits and "massive liabilities with churches, schools and religious organizations" that expect their employees to follow certain standards.

He said there are exceptions for those in ministerial roles with a religious function. But no matter how these exemptions are interpreted, there is likely to be a lot of confusion, he added.

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