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The Women's Legal Defense and Education Fund™

Price Waterhouse Revisited

Three decades ago, Legal Momentum was part of a landmark Title VII victory. Tomorrow, October 8, 2019, the case will be center stage in a critical LGBTQ case before the Supreme Court.

Title VII of the Civil Rights Act of 1964 is the federal law that bars discrimination in employment “because of [an] individual’s race, color, religion, sex, or national origin.” Tomorrow, on Tuesday, October 8, 2019, the U.S. Supreme Court will hear arguments in three consolidated cases which ask whether the phrase “because of... sex” in Title VII encompasses discrimination based on sexual orientation and gender identity. The foundational case in this litigation is *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989), in which Legal Momentum (then called NOW Legal Defense and Education Fund) was closely involved.

In the 1980s, [Ann Hopkins](#) was a star rainmaker at the national accounting firm Price Waterhouse, bringing in vastly more business than any of the 87 men in her class. When she was denied a partnership, her mentor at the firm told her that she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” She was criticized for being aggressive and occasionally using “foul language.” Her Title VII law suit produced a landmark ruling from the Supreme Court, holding that employment decisions based on sex stereotypes violate Title VII. Justice William Brennan wrote, “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they don't.”¹

The introduction of social science research on sex stereotyping into this case at the trial level was an unprecedented move, which played a key role in the court’s decision in favor of Hopkins. The trial court heard testimony about sex-based stereotyping in the workplace from Dr. Susan Fiske, an expert in social cognition and organizational behavior. She was brought into the case by Sally Burns, a Washington, D.C. lawyer with a background in sociology who later became Legal Momentum’s Legal Director. When the case reached the Supreme Court, Legal Director Burns worked with the Director of Legal Momentum’s National Judicial Education Program, Lynn Hecht Schafran, and colleagues from two other women’s rights organizations to draft an amicus brief on behalf of nineteen women’s rights organizations. The brief offered specifics on how sex stereotyping was impacting women in the workplace, from resume bias against female applicants to the double-bind that persists today—if a woman seems strong, she is

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criticized as “tough,” but if she doesn't seem strong enough, she's considered unable to handle a high level job in a crunch.

During the trial of Ann Hopkins' case the district court judge was very surprised by Dr. Fiske's testimony, questioning her closely about whether professionals such as lawyers and accountants engaged in the kind of stereotyped thinking she described. When the case reached the Supreme Court in 1988, Legal Momentum recognized the need to make the Court aware that the expert testimony offered at trial was supported by decades of social science research which had achieved general acceptance in the scientific community. We secured a companion amicus brief from the American Psychological Association which detailed that history, and worked closely with the APA in developing these complementary briefs. ***Price Waterhouse v. Hopkins* became the first Supreme Court case to utilize psychological research on sex stereotyping.**

In the three cases now before the Supreme Court, Gerald Bostock claims he was fired when he joined a gay softball league and his employer realized he was gay. Aimee Stephens, who planned to transition from male to female, sought to prepare her co-workers for her arrival at work dressed as a woman by sending them a letter explaining that she suffered from gender dysphoria and was required to live as a woman for a year before any surgery. She was immediately fired. Donald Zarda was a sky diving instructor who told a woman strapped closely to him for a tandem jump something like, “Don't worry. I'm gay.” She complained. He was fired.

And so, these three cases require a revisit to *Price Waterhouse v. Hopkins* to decide the reach of the phrase “because... of sex” in Title VII. Does it cover only a strictly binary approach; men and women according to the sex on an individual's birth certificate? Or does it cover LGBTQ individuals as well? For this revisit to *Price Waterhouse*, Legal Momentum joined other women's rights organizations to submit an amicus brief in these consolidated cases, drafted by the National Women's Law Center and Cohen & Gresser LLP. And like Legal Momentum's amicus brief in *Price Waterhouse* thirty years ago, the brief in the conjoined cases before the court today utilizes social science research to explain why workplace discrimination against LGBTQ individuals is sex stereotyping that should be barred under Title VII.

While the focus of many of the myriad briefs in these cases is sex stereotyping, the Supreme Court may also decide on other grounds. When Donald Zarda's case was considered by the Second Circuit Court of Appeal, Judge Jose Cabranes, a leading conservative judge on that court wrote, “This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination ‘because of sex.’ Zarda's sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore is discrimination because of his sex, and is prohibited by Title VII. That should be the end of the analysis.”