

Let's Talk About Sex (With Apologies to Salt-n-Pepa)

October 21, 2019

During the Monica Lewinsky mess, Bill Clinton and, it seemed, most of the legal world, wrangled over the definition of the three-letter word “sex.”

Here we go again.

Two cases before the United States Supreme Court right now focus on the meaning, application, and impact of the very same word. On October 8, the Court heard oral arguments in **Gerald Lynn Bostock v. Clayton County, Georgia** and **R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission**. Either case, or both, could have a massive impact on the interpretation and application of federal civil rights law on employment.

At issue is Title VII of the Civil Rights Act of 1964, which expressly prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin”. The question for the high court is whether sex, as defined by a law drafted over fifty years ago, covers both LGBTQ individuals in general, and transgender employees.

In Bostock, a gay man from Georgia claims that he was fired from his job as a child welfare services coordinator after his bosses learned that he was gay and served on a gay recreational softball league. In Harris, the plaintiff, Aimee Stephens, underwent sex-reassignment surgery, and was subsequently fired.

The issue before the Supreme Court is likely to be determined on the canons of construction, which guide statutory interpretation. The originalists on the bench—who believe the law should be interpreted based on the original understanding and intent of the authors—will likely take the position that the word “sex” cannot possibly have applied to either homosexuality or transgenderism since, in 1964, the authors of the legislation could not have intended for that result.

Whichever side of the question the Court comes down on, the decision will have a major impact on civil rights law, employment law, and employers. And one way or another, the decision will provide some clarity to a topic that’s both universal and hotly debated – what we really mean when we talk about sex.