

Boom! Lawyered:

[The Supreme Court Will Decide If an Employer Can Fire Someone for Being Gay or Trans](#)

Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is enjoying watching Donald J. Trump implode. I'm Imani Gandy.

Jessica Pieklo: I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. The Team Legal podcast is part of that mission. So, a big thanks to our subscribers and a welcome to our new listeners.

Imani Gandy: So Jess, I just started watching Pose which is about black trans culture in the 80s. It's an amazing show. I love it so much, and it got me thinking. LGBTQ people have suffered egregiously when it comes to equal rights in this country.

Jessica Pieklo: Yeah, that is totally true.

Imani Gandy: Which is why I'm so glad that it's 2019 and I can safely say that LGBTQ people have achieved full equality. We did it, everybody. We did it.

Jessica Pieklo: I'm sorry, what?

Imani Gandy: Well, you know. In Lawrence v. Texas, Anthony Kennedy said that gay people could have all the gay sex that they wanted, and that was pretty sweet.

Jessica Pieklo: Yeah, no.

Imani Gandy: Then in Obergefell v. Hodges, Kennedy said that gay people could marry each other which was like, hooray! Now queer people can get married and divorced just like the straights do.

Jessica Pieklo: Well, okay, and?

Imani Gandy: So, we did it. Jess, we did it. Sex and marriage, full equality.

Jessica Pieklo: Okay Imani, I know I have a cold and all, but are *you* okay? What's going on?

Imani Gandy: No Jess, I'm not okay! I am frustrated.

Jessica Pieklo: Because all of those things you just said about LGBTQ people finally achieving full equality aren't true. So, is that why you're frustrated?

Imani Gandy: Yes, exactly that. I feel like once again, you and I were yelling at the top of our lungs about how LGBTQ rights are not safe, especially when it comes to white Christian evangelical efforts to wield the first amendment and freedom of

religion as a weapon against LGBTQ people. Like for example, so that they can refuse to bake cakes for gay people, or refuse to let trans people use the bathrooms that align with their gender identity. We were screaming about this shit for years, and I felt like people were not listening. If I had a dollar for every time someone told me that “gay rights are safe because look, a lady can marry another lady now, isn't it grand?” I'm going to jump out a closed window.

Jessica Pieklo: No, no, no. Please. Stay here, stay here, but I here you. I do, because a lot of people really did get complacent and it did seem like the Obama Administration was moving LGBTQ equality in the right direction. I mean, there was the Dear Colleague letter that told schools that they had to let trans students use restroom and locker facilities that aligned with their gender identity if they wanted to keep their public funding. There was that. Then there was the EEOC rulings that employers who discriminate against gay and trans people, well, they're violating the Civil Rights Act. So, another good step. Even the notion that Christians could discriminate against LGBTQ people because their very existence is against their religious beliefs seemed at the time like this ridiculous prospect.

Imani Gandy: It did, and unfortunately during the Obama Administration, attempts to enact ENDA which is the Employment Non-Discrimination Act, those attempts stalled and that's a real shame because LGBTQ people sure could use that sort of protection, especially during the age of Trump.

Jessica Pieklo: God, is this true? Especially also with Justice Kennedy off the bench.

Imani Gandy: Tony, why? You broke my heart.

Jessica Pieklo: Seriously, and the first real week of the SCOTUS term and there is a trio of cases on the deck that will determine whether or not an employer can fire you just because you're gay or trans. So, those protections would have been really helpful.

Imani Gandy: Yep. That's what we're going to talk about in this episode. On Tuesday, the court is going to hear oral arguments in three cases that could determine whether or not your boss can fire you simply because you are gay or trans. In these cases, the court will have to decide whether or not Title VII's prohibition on employment discrimination, "Because of sex," includes sexual orientation and gender identity.

Jessica Pieklo: Okay, Imani. These cases are absolutely historic.

Imani Gandy: Indeed.

Jessica Pieklo: It's the first time the court is hearing a transgender rights case. It's also the first time the court will consider whether or not sexual orientation discrimination is a form of sex discrimination, and I mean let's be honest, basically Kennedy's entire gay rights legacy is on the line here.

[Music]

So, what are the cases?

Imani Gandy: Yeah, so the cases, there are three of them as we've said. One is called Altitude Express versus Zarda. The second is called Bostock versus Clayton County, Georgia, and then the trans rights case is called Harris Funeral Homes versus EEOC. Now together, these cases are going to ask whether or not Title VII's ban on discrimination, "Because of sex," includes banning discrimination on the basis of sexual orientation and/or gender identity. So, Altitude Express versus Zarda is the case out of New York and involves claims by a skydiving instructor, Donald Zarda, that he was fired because he was gay. He claimed that that firing was a violation of Title VII. Now, a trial court initially threw out Zarda's Title VII claims on the grounds that the law does not protect against discrimination claims on the basis of sexual orientation, but the entire Second Circuit Court of Appeals disagreed and ruled that Title VII does apply to discrimination claims like Zarda's because discrimination based on sexual orientation is a "subset of sex discrimination."

Jessica Pieklo: The court will hear that case at the same time it hears the Bostock case. That case involves Gerald Bostock, a child welfare services coordinator in Clayton County, Georgia. Now, Bostock claims that after his employer found out he was gay, he was falsely accused of mismanaging public money and fired. Bostock claims that reason was pretext, the legal way of saying bullshit, and that really they wanted to fire him because he's gay. Bostock sued and lost both at the trial court and the Eleventh Circuit Court of Appeals who said that Title VII did not cover sexual orientation discrimination claims.

Imani Gandy: That means we have one of my favorite things. I'm just going to just sit in this moment, just breathe in and out.

Jessica Pieklo: Breathe it in.

Imani Gandy: Hold it in. Circuit split! We have a circuit split.

Jessica Pieklo: It brings out jazz hands and spirit fingers for the circuit split.

Imani Gandy: I do. I do just inadvertent jazz hands. I didn't even know I was doing it until I looked down when you mentioned it, but we have a circuit split and the Roberts Court is going to have to settle that split.

Jessica Pieklo: Yep. Then there is the Harris Funeral Homes case. Now, this case was filed by Thomas Rost, who owns a small funeral home in Michigan. He describes himself as a devout Christian and claims to run his business according to his religious beliefs. In 2007, Rost hired Aimee Stephens, who at the time was living as a

man. Stephens was by all accounts a great employee, and six years into her employment told Ross she was trans. Now, you can probably guess what happened next.

Imani Gandy: I'm going to say that this devout Christian was really super understanding and said, "You know, Aimee, I respect you and I respect your choices, and I respect you as a transgender woman. It is perfect fine for you to present as a woman at work. We will make the accommodations. It's all wonderful." That's what happened, right?

Jessica Pieklo: Since the beginning of this episode, you are just off the rails. No. Ross probably fired Stephens on the grounds that if she transitioned at work, she would be in violation of the funeral home's gender dress code policy because she was, "Biologically male."

Imani Gandy: Except who cares, right? The fact that she's biologically male has no bearing on anything, because the fact of the matter is, she is a woman and therefore wanted to wear the women's dress code and this guy was like, "No, you can't wear the women's dress code because you're biologically male." Second, also, I really need to mention we talk about the Price Waterhouse case a lot, Price Waterhouse versus Hopkins about Ann Hopkins who was fired, or not fired, but rather not given a promotion because she was, "Too macho." We talk about how the Supreme Court said that gender stereotyping is a type of Title VII violation, so what is, "Refusing," to abide by societal expectations of what men and women are supposed to be, or supposed to look like, or are supposed to dress like? What is that, if not gender stereotyping?

Jessica Pieklo: Absolutely, and this case really gets to that nugget. Well, Rost also claims that he would be violating God's commandments by allowing Stephens to transition at work, Imani.

Imani Gandy: I don't recall. I mean look, I am not a Bible expert, I am not a theologian of any sort, but I'm pretty sure that the Bible doesn't have anything to say about trans people. Or especially doesn't have anything to say about whether or not trans people can transition at work, but that's just me. I don't know.

Jessica Pieklo: I guess we're going to find out.

Imani Gandy: Maybe some Bible scholar can hit me up on Twitter and correct me, find me chapter and verse where it says, "Thou shalt not transition at work."

Jessica Pieklo: Thou shalt not trans. Oh man. So, these are the cases. Now, the court consolidated the two sexual orientation cases, Zarda and Bostock, for oral arguments. That means that the court is going to hear those cases together. Those arguments will last an hour. Then there's going to be a separate argument for Harris, the transgender rights case, and that's also going to last an hour.

Imani Gandy: So, what's something that's on your radar when it comes to these arguments, Jess?

Jessica Pieklo: Great question. You know, we've covered these cases a lot on this show, and a lot over at Rewire.News, but one of the things that really stood out that I am going to be paying attention to very closely is just what exactly the Roberts Court is going to do about all of this misgendering of Aimee Stephens. So, Alliance Defending Freedom, the conservative litigation mill that is representing the folks pressing all of this, and the Trump Administration, frankly, they intentionally misgendered Stephens throughout their brief and throughout these entire proceedings. That is really significant, and it's significant not just because they're being big jerks about it when they do that. So, this is the first transgender rights case to come before the Supreme Court, ever. How the court deals with the issue of misgendering plaintiffs in this context is going to send us a lot of signals about what the conservatives on the court, in particular, think about this area.

I mean, we already have every reason to believe that they are going to be hostile to Stephens here, but also, how do the liberals on the court deal with this? This is absolutely going to tell us a lot. Not just about this case, but future cases too. It's not just that it's rude. It's not just that it is impolite. It's that it sets a legal frame for the case, too. So, what the court does with it and how they handle it, and in particular I would love to hear a justice correct someone from ADF during oral arguments on that, that would really send a strong signal, but that's something that's really front in my mind right now. What about you? What's something that you're thinking of?

Imani Gandy: I mean honestly, that quite a bit because I read one of the briefs filed by a group of Christian evangelical jerk faces essentially, and said, literally argued in their brief, that it was judicial error. It was prejudicial error to use Aimee Stephens's preferred pronoun and to refer to her as a woman. This is what the brief said. I read this and my jaw just dropped to the floor. The brief said, "Judges are not free to choose to respond with tolerance and understanding as if confused persons like Stephens are their patients on the proverbial psychiatric couch, instead of plaintiffs in a legal dispute at the bar of justice."

Jessica Pieklo: Oh my god.

Imani Gandy: Can you imagine? It's not-

Jessica Pieklo: I'm sorry, that's-

Imani Gandy: "It's prejudicial error to use a person's preferred pronouns, and judges are not free to respond with tolerance and understanding." What are you talking about?

Jessica Pieklo: Well in prejudicial error, let's talk about that for a second because what they're saying is, it is an error of law to do so. That is a huge claim to lob at the court, that you are making a fundamental legal error to identify someone correctly. That's just-

Imani Gandy: That's wild.

Jessica Pieklo: Garbage.

Imani Gandy: Another thing that really is going to be interesting to see as a result of this case is the framing of trans rights as special rights.

Jessica Pieklo: Oh, yes.

Imani Gandy: As additional rights.

Jessica Pieklo: Excellent, excellent point.

Imani Gandy: "Big Trans" is out there trying to get rights that other people don't have, that cis people don't have. That's just preposterous because frankly, the right to go to work and not be discriminated against is not a special right. It's a right that almost everyone has, but after these cases hit the Supreme Court and after we get a decision, LGBTQ people may be the only category of people who could be fired from a job simply because of who they are. It would be like going back and saying, "You know what? Black people can't work. So if you're black and you get fired, tough titties because you know what? That's just the way the law is." It is.

Jessica Pieklo: I think your point about the framing of special rights is really important in the way that the court is going to hear these cases, because Title VII's ban on sex discrimination covers sexual orientation and gender identity discrimination. It just logically flows. We've talked about that a lot on this and what we are hearing in the attacks from it is all sorts of twists, and turns, and perversions of that and it fits absolutely right into that special rights framing. The idea that this is outside the scope of the law, what the folks are asking for in these cases. So, yeah. That's a really excellent point.

Another thing that I think is going to be really interesting to watch is the scene outside the court. It's going to be bonkers.

Imani Gandy: It's going to be mayhem.

Jessica Pieklo: Good.

Imani Gandy: It's just going to be mayhem.

Jessica Pieklo: I mean, good, frankly. This is democracy in action. These cases matter to people, and they want the justices to know. So, there are going to be protests, civil

disobedience, people around the court, it's going to be loud, it's going to be rowdy, and I think it invites a conversation into, well, how fundamentally undemocratic the Supreme Court is. We have these lifetime appointments, and the public has barely the opportunity to have a say in it let alone participate in these cases. I mean, it raises questions like, why the hell isn't there at a minimum live streaming audio of these arguments? Let alone cameras in the court. So, it's a moment for our democracy too, and I think that that's how the court and how the press responds, and all of that, is something interesting I think.

Imani Gandy: I'm depressed. I'm just worried. I'm very, very worried about these cases, and I am really distraught that we let it get this far, that we didn't pass ENDA, that we haven't stood up more staunchly for the rights of LGBTQ people in areas outside of sex and marriage. I mean, obviously those are two very important aspects to peoples' lives in many cases, but holding down a job and not being discriminated against is pretty critical. We are on the precipice of saying that an entire category of people do not have that right, do not have the right to just go to work and earn a living, and not be discriminated against. I find that just profoundly depressing. On that note, we're going to close the show. On that really lovely note.

If you want to talk to us about these Title VII shenanigans, you can find me on Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy. You can follow Rewire.News @Rewire\_News and you can, and you should, join our Facebook Group. Answer the questions honestly, people. I don't know how many times I've got to tell you. Please answer the questions. We want you in our group, but you've got to answer the questions like Justice Keg Stand, Brad McBeer, Chugs McHaverton, Rapey McDumbface, there are all of these names. These are answers to one of the questions, once you get to that point on Facebook you'll understand.

Jessica Pieklo: There are a couple questions.

Imani Gandy: Yeah. Just, they're easy.

Jessica Pieklo: Very easy, though.

Imani Gandy: Easy peasy, and aside from that, we're going to see you on the tubes.

Jessica Pieklo: See you on the tubes, you all. Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer, and the Rewire.News editor in chief is Jodi Jacobson.