Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Decade Of Work Pays Off In Landmark LGBTQ Rights Ruling

By **Braden Campbell**

Law360 (June 15, 2020, 11:29 PM EDT) -- The U.S. Supreme Court's declaration Monday that federal law forbids discrimination against gay and transgender workers was a momentous win for LBGTQ people made possible by a decadelong battle by a small army of lawyers.

"This has been a very long journey," said former EEOC commissioner Chai Feldblum, who now advises employers on workplace culture for Morgan Lewis & Bockius LLP.

Here, Law360 talks to some of the key players about the long road to the blockbuster 6-3 opinion.

Setting the Stage

By the time Feldblum joined the U.S. Equal Employment Opportunity Commission in 2010, some circuit courts had recognized a roundabout protection for transgender workers under the Supreme Court's 1989 PriceWaterhouse v. Hopkins decision, which said employers violate Title VII when they mistreat workers who don't adhere to gender stereotypes. Meanwhile, every circuit court to consider the question had said Title VII's ban on discrimination "based on ... sex" did not extend to gay workers.

It was against this backdrop that Feldblum and others set out to pose the question of Title VII's scope to the Supreme Court.

Feldblum came to the EEOC from academia, where she had pushed a theory that Title VII's plain language covered gay and transgender workers. The new appointment allowed her to turn that theory into official policy through the commission's role deciding appeals from decisions in job bias cases against federal employers.

"My first year I just asked to see every single decision dealing with sex that came out of the federal sector," Feldblum said. "I was just doing my job, from my perspective, as commissioner. But then I realized that this was an important avenue in which the EEOC could speak."

The agency spoke in an April 2012 decision called Macy v. Holder, in a dispute between a transgender job applicant and the Bureau of Alcohol, Tobacco, Firearms and Explosives, saying Title VII bars gender identity discrimination. Three years later, the commission said the law likewise protects gay workers in a Federal Aviation Administration case known as Baldwin v. Foxx.

Moving Through the Circuits

When the EEOC released the Macy decision, its litigation arm was already looking for vehicles to test the new theory in the courts.

"We wanted to find the best case in the right circuits to get a positive, potentially, Supreme Court decision," said Rutgers Law School co-dean David Lopez, who was the EEOC's general counsel from 2010 to 2016.

His office found two: A Florida case that quickly settled, and a Michigan complaint by funeral director Aimee Stephens, who claimed she was fired after announcing her gender transition. That latter case, EEOC v. R.G. & G.R. Harris Funeral Homes, saw the Sixth Circuit say that Title VII directly protects transgender workers, and brought the gender identity question to the high court.

The agency also enlisted the help of LGBTQ legal rights group Lambda Legal to develop more worker-friendly case law on the sexual orientation issue. Senior counsel Greg Nevins had spent years pushing courts to say Title VII protects trans workers, and the EEOC "allowed me to kind of pivot" by putting its might behind the gender identity component, he said.

Nevins and Lambda Legal filed a series of amicus briefs in LGBTQ bias cases before linking up with fired college professor Kimberly Hively in 2015. Hively, who is a lesbian, was at the Seventh Circuit challenging an Indiana federal court ruling that she did not have an unfair firing case against Ivy Tech Community College.

In April 2017, the en banc court in Hively v. Ivy Tech Community College reversed longstanding precedent and held 8-3 that Title VII bars sexual orientation discrimination, in the first ever such ruling by a federal appeals court. The court's three Democratic appointees were in the majority, as were five Republican appointees.

"That meant a lot to me," Nevins said. "I thought it meant a lot for the prognosis of the effort."

Ivy Tech did not petition the Supreme Court for review, but by this point two cases brought by the private plaintiffs bar were well on their way.

Manhattan plaintiffs attorney Gregory Antollino was nearly seven years into litigation in a sex bias case against skydiving company Altitude Express Inc. when the Seventh Circuit decided Hively. Antollino represented Donald Zarda, a gay skydiving instructor who alleged he was let go after disclosing his sexuality to a client. Zarda died in 2014, and his family continued the suit.

"I thought he definitely had a claim under the New York state law," Antollino said. "We also thought we would try to break into Title VII, because this claim has been floating along for years."

The en banc Second Circuit ruled for the Zarda estate in February 2018. A few months later, the Eleventh Circuit rejected worker Gerald Bostock's sexual orientation discrimination claim against Clayton County, Georgia, freshening up the circuit split for Supreme Court review.

Seeking Certiorari

The effort to expand the court's view of Title VII suffered an apparent setback when Justice Anthony Kennedy announced his retirement in June 2018, shortly after Bostock and Altitude Express petitioned for Supreme Court review and days before Harris Funeral Homes challenged its loss.

Kennedy had been a reliable vote for LGBTQ rights on the majority-conservative court, most notably casting the deciding vote and writing the opinion in Obergefell v. Hodges, which made same-sex marriage legal nationwide. His replacement, Justice Brett Kavanaugh, was seen as a less likely vote for a broad reading of Title VII.

"This was going to be a litigation [where] you're betting the farm," said Littler Mendelson PC attorney Jim Paretti, former chief of staff to EEOC member Victoria Lipnic. "I know folks [at the EEOC] were concerned when Justice Kennedy stepped down, and what that would mean, because he'd been fairly supportive."

The dispute's pendency at the high court also saw the federal government switch sides: The U.S. Department of Justice, which represents federal agencies in Supreme Court disputes, argued against the EEOC's theory in its brief on the agency's behalf.

The development was a tough blow to staffers who had bought into the case, Lopez said. "But I think we all knew it was on," said Lopez, who recalled a 20-deep line of agency staffers waiting outside the Supreme Court in the early morning on argument day.

A Landmark Ruling

The insiders recalled feeling cautiously optimistic after the early October arguments, where Justice Neil Gorsuch told an American Civil Liberties Union attorney representing Stephens he was "with you" on the so-called textualist case for a broad reading of Title VII.

"Textualism" refers to a school of judicial interpretation whose practitioners seek to construe the plain meaning of statutory language, rather than lawmakers' intent or other non-text evidence. In this case, the LGBTQ advocates had argued sex is inherent to sexual orientation and gender identity.

"He really seemed to get it, and the argument was very much pitched to him," Nevins said. Lambda and others with their hands in the case had honed this argument with Justice Antonin Scalia in mind, but reframed it toward his successor as the court's textualist-in-chief.

Lopez pegged his hopes on a different judge: Chief Justice John Roberts. The chief justice said little to give away his mind at oral arguments. But his interest in protecting the court from charges of partisan bias put him in play, he said.

"The weight of history was moving in one very clear direction on this issue, and I thought that [Justice Roberts] would be sensitive to that," Lopez said.

Both Justices Gorsuch and Roberts ending up joining their liberal colleagues in the 6-3 ruling, which Justice Gorsuch wrote.

The ruling won't mean a policy change for many employers, Feldblum told Law360. In her year advising employers with Morgan Lewis, every client she's encountered already had a policy barring

discrimination against gay and transgender workers, she said. But the ruling means such workers can make their case when they're wronged, she said.

"It doesn't mean they'll win every case, but it takes away any doubt that they can't enter the courtroom door and have their case heard," she said.

--Editing by Brian Baresch and Emily Kokoll.