MEMORANDUM

To: NOW Foundation Board Members
From: Bonnie Grabenhofer, Vice President, and Jan Erickson, Director of Programs
Date: February 10, 2017

NOW Foundation Joins Amicus Briefs in Supreme Court Cases

Transgender Equality

G.G. v. Gloucester County School Board

Docket Number: (16-273)
Argument: March 28, 2017
Opinion: TBD

(LISTEN IN: The Supreme Court posts an audio recording of the arguments on their website at the end of the week during which the arguments have been heard, http://www.supremecourt.gov/oral_arguments/argument_audio.aspx)

The Supreme Court will hear a case that seeks to establish whether or not a transgender student in a public school has the right to use the restroom that corresponds with his gender, and whether or not transgender identity is protected under the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972.

Gavin Grimm is a transgender high school student at Gloucester High School, Va. After notifying the school that Grimm would begin his gender transition, his school administrators allowed him to use the boys' restroom for two months without incident. However, after parents at the school complained, the school adopted a new policy that prohibited Grimm from using the restroom that corresponded with his lived gender.

The precedent established in *Price Waterhouse v. Hopkins* established that discrimination based on sex stereotyping is sex-based discrimination under Title VII of the Civil Rights Act, which is the employment equivalent of Title IX. In *Macy v. Holder*, the EEOC followed this precedent, and established that discrimination against transgender individuals is sex discrimination. The expectation that transgender women or men must posses certain biological characteristics is sex stereotyping and is therefore prohibited under this interpretation. The Department of Education issued regulations that affirm the *Macy* holding in Title IX, stating that public schools must recognize the gender identity of their students and prohibiting discrimination against students because of their lived or perceived gender.

Using this framework, the U.S. Court of Appeals for the Fourth Circuit ruled that the school's policy infringed upon Grimm's Title IX rights. The court asserted that transgender discrimination constituted sex discrimination on the basis of sex stereotyping. The court also

established that their interpretation should stand independent of the Department of Education's guidelines.

This is the first case regarding transgender discrimination that is going to the Supreme Court. It is a monumentally important case for transgender advocacy, as it could establish that transgender discrimination is sex discrimination, even if the administration revokes the Department of Education's guidelines (which may now happen with the very conservative Betsy DeVos as the new Secretary of Education).

A number of states led by a Texas-based coalition, adopted laws in recent years to prevent schools from allowing transgender students to use the restroom that corresponded with her/his gender identity. Some laws specified that only the gender designation reported on the student's birth certificate could be recognized; a few of these restrictive laws have been knocked down by state courts. The Texans challenged the U.S. Department of Education's Title IX guidance (and concurring position by the U.S. Department of Justice) which said that transgender students should be allowed to use the restrooms that correlate with their gender identity. An injunction against the federal government enforcing the guidance was issued in August, 2016.

We hope that the Supreme Court will uphold the Fourth Circuit's ruling and set legal precedent in accordance with the Department of Education's guidelines, asserting that discrimination against a transgender individual is sex discrimination and violates both the Fourteenth Amendment and Title IX.

Whitaker v. Kenosha Unified School District

Argument: TBA
Opinion: TBA

http://law.justia.com/cases/federal/district-courts/wisconsin/wiedce/2:2016cv00943/74171/36/

The Supreme Court will hear a case that seeks to establish whether or not a transgender student in a public school has the right to use the bathroom that corresponds with his gender, and whether or not transgender identity is protected under Title IX of the Education Amendments Act of 1972.

Ashton Whitaker is a transgender boy who attends high school in the Kenosha Unified School District of Wisconsin. He has been expressly prohibited from using the same restroom facilities as the other boy students. His teachers have also consistently misgendered him and refused to address him by his chosen name. The school even requested that Whitaker wear a green wristband so that teachers could more clearly identify him as transgender and alert them when he was using the boy's restroom. Whitaker has been threatened with disciplinary action and official reprimands on his school transcript if he continues to use the boy's restroom.

The Supreme Court will consider whether discrimination based on gender identity or gender expression is sex-based discrimination, as prohibited by Title IX, and whether or not the school

district's claimed interest is reasonable justification for discriminating against transgender students.

The defendant will assert that the discriminatory measures are necessary to protect female students in restrooms and other gendered spaces. However, this concept of "protective" laws have historically been used to justify excluding women from certain places and occupations, as well as excluding minorities from certain spaces, and should therefore be rejected as a false pretext.

We hope that the Court will give appropriate deference to the Department of Education's guidelines and the precedents in *Price* and *Macy*, and provide legal precedent prohibiting discrimination against transgender individuals under Title IX.

The distinction between these two cases involving transgender restroom use is that the plaintiff in G.G. v. Gloucester County School Board is suing under the Fourteenth Amendment and Title IX, whereas the plaintiff in Whitaker v. Kenosha Unified School District is suing under Title IX alone.

NOTE: Early last year, a U.S. District Judge in Texas issued a temporary injunction blocking the Department of Education's guidelines for transgender students from taking effect. On February 10, 2017, the Justice Department, under new Attorney General Jeff Sessions, submitted a legal brief formally withdrawing its objections to the injunction. This action suggests that the new administration does not view gender identity discrimination as sex-based discrimination under Title IX, and may dismantle the transgender equality protections created under President Obama. This development could also potentially undermine the deference that the Court gives to Macy v. Holder and the Department of Education guidelines in both G.G. v. Gloucester County School Board and Whitaker v. Kenosha Unified School District.

Pregnancy Discrimination

Luke v. CPlace Forest Park SNF, LLC

Argument: TBA
Opinion: TBA

http://law.justia.com/cases/federal/appellate-courts/ca5/14-31347/14-31347-2015-06-22.html

The U.S. Court of Appeals for the Fifth Circuit will hear an appeal in which a pregnant woman was terminated from her place of employment after requesting and being denied appropriate accommodations. Eryon Luke worked as a certified nursing assistant (CNA) as CPlace Forest Park, a nursing and rehabilitation facility. Luke became pregnant with twins, and was given a weight-lifting restriction from her physician. She requested "light duty" from her supervisor, and was informed that they could not accommodate her request. She was subsequently put on leave.

After her allotted four-month leave expired, she was told that her request could still not be accommodated and she was fired.

The Pregnancy Discrimination Act (PDA) was enacted in 1978 to ensure that pregnant women were able to work without discrimination. The law requires that employers treat pregnant women the same as other employees on the basis of their ability or inability to work. However, there has been confusion about the extent to which employers must accommodate pregnant workers and the number of lawsuits around this confusion has grown. The Supreme Court sought to clarify this requirement in *Young v. United Parcel Service, Inc*. in 2015, brought by Peggy Young who was advised by her doctor to limit the amount of weight that she should lift. Young requested light-duty assignment but was denied and ultimately had to take an unpaid, extended leave of absence.

Without going into further detail on this case, the outcome was that the Supreme Court established a path for pregnant employees to secure workplace accommodations. The Court said that a commonly-used balancing test (known as the McDonald Douglas burden shift) should be used to determine whether a pregnant employee has suffered employment discrimination as a result of her pregnancy. But first, she must clear a hurdle (known as the prima facie case) by showing that: (1). She belongs to a protected class (being or having been pregnant; (2). She must demonstrate that she reached out to her employer for appropriate accommodations; (3). She must demonstrate that the employer denied her request; and (4). She must demonstrate that the employer provided accommodations to other similarly-abled individuals. The Court also established that the prima facie standard established in *Young* should be flexible, and should not place increased burdens on establishing discrimination in pregnancy cases. A settlement in *Young* was reached, so further clarifications have been reach by the courts.

To further clarify conditions under which pregnant women should be afforded an accommodation, legislation was introduced in the 114th Congress, the Pregnant Workers' Fairness Act (S. 1512/H.R. 2654) which would make it unlawful for an employer to not make reasonable accommodation to known limitations related to the pregnancy, childbirth or related conditions of job applicants or employees, unless the accommodation would impose an undue burden on the employer's business operation. Unfortunately, Congress failed to pass the bill.

In *Luke*, the district court failed to appropriately apply the standards established in *Young* and interpreted the prima facie standard in a rigid way that placed a substantial burden upon pregnant women. The district court misinterpreted the *Young* precedent and claimed that Luke did not meet the prima facie requirements, because she did not establish that the discrimination was based on a measure illegal under the PDA. However, Luke offered adequate evidence that her employer failed to accommodate her in comparison to workers on temporary disability and other pregnant employees who did not have the same restrictions. The district court accepted the employer's claimed reasoning for failing to accommodate Luke without considering the evidence that Luke provided. The district court ruled that because Luke only sought out one form of

accommodation, “light duty”, the defendant did not discriminate against her. In other words, the district court felt that the burden of finding appropriate accommodations should fall on the pregnant employee rather than the employer. But this is an overly rigid and incorrect interpretation of the *Young* precedent. The employer to should be compelled to invite a dialogue with the employee about potential accommodations if the accommodation suggested is not viable.

We hope that the U.S. Court of Appeals for the Fifth Circuit will clarify the questions raised in *Young* and establish a more flexible interpretation of the prima facie standard. The *Young* precedent should make it easier for pregnant women to bring discrimination claims when their employer fails to accommodate them, not more difficult.

LGBTQIA Discrimination

Cargian v. Breitling USA, Inc.

Argument: TBA
Opinion: TBD

The U.S. Court of Appeals for the Second Circuit will consider a case in which a gay man was terminated from his employment because of his sexual orientation. The plaintiff, Frederick Cargian, is a 54 year-old gay man, who was hired by Breitling USA, Inc. in 1990 as training manager. Over the next 20 years, Cargian became one of the leading sales representatives for Breitling and greatly increased the brand’s American presence, and was awarded excellent reviews and bonuses to that effect. Theirry Prissert became the new president of Breitling USA in October 2010. As President, Prissert demeaned, harassed, and treated Cargian differently than other male staff members because he was gay. Prissert felt that Breitling was a “man’s brand” and that only stereotypically straight male behavior and identities were representative of the brand. Prissert began privileging other male salespeople over Cargian, especially those who were interested in sports. Both Cargian and female sales representatives were excluded from events, business opportunities, and social opportunities, while straight male employees were not. In December 17, 2013, Cargian was terminated from his position, after his job duties had been reallocated to a young, athletic straight man with no prior sales experience.

This case seeks to address whether or not Breitling USA, Inc., violated Title VII of the Civil Rights Act of 1964 by discriminating against Cargian on the basis of sex. Furthermore, it seeks to address whether or not sexual orientation discrimination in employment is prohibited under Title VII’s provision prohibiting discrimination based on sex.

In *Baldwin v. Foxx*, the U.S. Equal Employment Opportunity Commission ruled that sexual orientation discrimination is sex-based discrimination, and issued guidelines that Title VII should be interpreted to that effect. District courts have given deference to these guidelines, however, there is still no Supreme Court precedent establishing that sexual orientation discrimination is sex discrimination prohibited under Title VII. This case represents an opportunity for this precedent to be established.

In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that discrimination based on sex-stereotyping constitutes sex-based discrimination. In other words, an employer cannot discriminate against an employee based on whether or not they conform to gender stereotypes in terms of appearance, behavior, and lifestyle. This protection against sex-stereotyping should protect LGBTQIA individuals from employment discrimination as well, because heteronormativity is sex-stereotyping (men are stereotypically attracted to women, and visa versa).

Discrimination based on sexual orientation should be prohibited as sex discrimination, but as the EEOC has established in *Baldwin*, "consideration of an employee's sexual orientation necessarily involves consideration of the employee's sex" and is therefore sex-based discrimination.

We hope that the U.S. Court of Appeals for the Second Circuit will give deference to the EEOC's interpretation of Title VII and will establish official precedent for protecting LGBTQIA individuals under Title VII.