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TURKAN ERTUNA LAGRAND

Protection of Transgender Employees from
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Abstract

On June 15, 2020, in its landmark decision of *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, the United States Supreme Court held that an employer who fires an individual merely for being transgender violates existing US law. This judgment is significant not only for being the first case before the Supreme Court relating to the rights of transgender individuals, but also because in this judgment the Court breaks away from a number of settled approaches ingrained in the reasonings of US Courts of various levels. In building up on this case law and considering what its effects might be on the legal protection afforded by the European Union at first sight the two courts seem to be on the same page. Indeed, the Court of Justice of the European Union dealt with the same issue in 1996 in *P. v S. and Cornwall County Council*, which became the first case law in the world preventing discrimination because a person is transgender. This paper investigates the extent to which the reasonings leading up to these judgments converge and finds, next to clear parallels, a number of elements which diverge. By looking into these varying approaches, the courts, lawyers and activists can better contribute to advancing the rights of transgender persons by looking into these different approaches.

Il 15 giugno 2020, nella sua storica decisione in R.G. & G.R. Harris Funeral Homes Inc. contro Commissione per le pari opportunità, la Corte Suprema degli Stati Uniti ha ritenuto che un datore di lavoro che licenzia un individuo semplicemente per essere transgender viola la legge statunitense esistente. Tale sentenza è significativa non solo per essere stata la prima causa dinanzi alla Corte Suprema relativa ai diritti delle persone transgender, ma anche perché la Corte si discosta da una serie di approc-

* Senior Lecturer at Erasmus University Rotterdam.

ci consolidati radicati nelle argomentazioni dei tribunali statunitensi di vario ordine e grado. Basandosi su questa giurisprudenza e considerandone i relativi effetti sulla tutela giuridica offerta dall'Unione europea, a prima vista, le due giurisdizioni sembrano essere sulla stessa linea. Infatti, la Corte di giustizia dell'Unione europea ha affrontato la stessa questione nel 1996 in *P. contro S. e Cornwall County Council*, che è diventata la prima giurisprudenza al mondo a prevenire la discriminazione perché una persona è transgender. Questo articolo analizza fino a che punto le argomentazioni che portano a tali conclusioni convergano rispetto ad una serie di elementi di chiara divergenza. Esaminando questi diversi approcci, giudici, avvocati e attivisti possono contribuire meglio a far avanzare i diritti delle persone transgender.

1. Introduction

On June 15, 2020, in a landmark decision, the United States Supreme Court held that an employer who fires an individual merely for being transgender violates existing US law. The case, which was the first transgender rights case before the Supreme Court, concerned Aimee Stephens who was terminated from the *R.G & G.R. Harris Funeral Homes*, where she had been working for six years as a funeral director, shortly after informing her boss that she intended to transition from male to female and would represent herself and dress as a woman while at work¹. Stephens filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), which, after conducting an investigation, brought a suit against the Funeral Home for violating Title VII of the Civil Rights Act of 1964 by terminating Stephen’s employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes². The case came before the US Supreme Court with the question ‘whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)’³. Title VII of the 1964 Civil Rights Act reads:

“It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”⁴.

The question which the US Supreme Court had to answer can then be reformulated as ‘whether Title VII’s prohibition of discrimination on the basis of sex should include discrimination based on gender identity’.

The judgment confirming that ‘because of ... sex’ covers discrimination against transgender persons came only a few weeks after Aimee Stephens passed away and Donna Stephens, was granted the motion to substitute her as respondent in the proceedings.⁵ Despite this very sad circumstance, the judgment is cause for celebration as it is expected to pave the way for long overdue equality steps for the transgender community in the United States.

The Court of Justice of the European Union had already answered a comparable question in its 1996 landmark judgment for a preliminary ruling *P. v S. and Cornwall County Council*, which was the

1 Opinion United States Court of Appeals for the Sixth Circuit, No.16-2424, 07.03.2018.

2 *Ibid.*

3 QP Report, Cert. Granted 04.22.2019 <https://www.supremecourt.gov/qp/18-00107qp.pdf>.

4 Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964.

5 By Order of May 26, 2020.

first case law in the world preventing discrimination because a person is transgender.⁶ P., the applicant, was working as a manager in an educational establishment and was dismissed shortly after informing her boss of her intention to undergo gender reassignment⁷. The questions referred to the ECJ were (1) whether the dismissal of a transsexual for a reason related to a gender reassignment constituted a breach of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, and (2) whether Article 3 of the Directive, which refers to discrimination on grounds of sex, prohibited treatment of an employee on the grounds of the employee's transsexual state⁸.

The striking similarity of not only the facts of the cases before the two courts, but also the legal questions to be answered, namely whether dismissal due to gender reassignment could be considered as sex discrimination, as well as the affirmative answers given by the courts to this question could easily lead to the assumption that the two courts followed the same line of reasoning in reaching their conclusions. This paper will take a comparative approach with the aim of answering the question whether and to what extent do the reasonings of the US and EU Courts converge in reaching the same conclusion. It is important to understand the similarities and differences of the building blocks of these judgments for the future references and comparisons to be accurate. Also, by familiarizing with and learning from the different possible approaches, courts, lawyers and activists could better contribute to advancing the rights of transgender persons.

The judgment of the Supreme Court is likely to have effects transcending the jurisdiction of the court and reaching the European Union. There is indeed interaction between the courts on either side of the Atlantic when it comes to cases relating to LGBTI+ rights. The Supreme Court for instance, referred to the European Court of Human Rights in its landmark case *Lawrence and Garner v. Texas*⁹, while overruling *Bowers v. Hardwick*¹⁰, which had upheld the constitutionality of State Sodomy Laws criminalizing homosexuality. In displaying the Western civilization's approach towards homosexuality¹¹, the Supreme Court in *Lawrence v. Texas* cited the 1981 decision of the *European Court of Human Rights in Dudgeon v. United Kingdom*¹², which had held that criminalizing homosexual acts violated the European Convention on Human Rights. Likewise, in *P. v S. and Cornwall County Council*, the Advocate General made references to *Grossman v Bernards Township Board of Education*¹³, *Ulane v Eastern Airlines*¹⁴ and *Holloway v Arthur Anderson*¹⁵ in explaining the 'equal misery' argument. As these examples show, judges on both sides of the Atlantic refer to their counterparts' judgments in their argumentation when it comes to LGBTI+ rights making it highly relevant to understand whether concepts are approached and interpreted in the same way. This is what is aimed at providing for the readers.

6 S. Whittle, *Employment Discrimination and Transsexual People*, in *Gender Identity Research and Education Society (gires) Report*, 01.09.2014, <https://www.gires.org.uk/employment-discrimination-and-trans-people/>.

7 Case C-13/94 P v S and Cornwall County Council [1996].

8 *Ibid.*

9 539 U.S. 558 (2003).

10 478 U.S. 186 (1986).

11 In disproving Chief Justice Burger's separate opinion making references to the history of Western civilization and to Christian moral and ethical standards.

12 7525/76, 22.10.81.

13 157 N.J. Super. 165 (1978).

14 742 F.2d 1081.

15 566 F.2d 659.

This paper first of all takes stock of the US Supreme Court's case law on LGBTI+ rights in general, then the situation at different levels of the US court system regarding transgender discrimination is investigated. This is done to serve as a foundation to understanding the issues discussed in *R.G & G.R. Harris Funeral Homes* as well as to be able to establish in the following section the significance of the recent judgment of the Supreme Court insofar as it diverts from the earlier established principles of the US courts in cases regarding transgender discrimination. The paper then breaks down the issues debated before the Supreme Court in this case and analyses the judgment of the court concentrating on the novelties. Subsequently, following a brief overview of transgender protection at EU level, ECJ's analysis in the case *P. v S. and Cornwall County Council* is scrutinized, and the principles which were used to answer the questions referred to it are distilled. Finally a comparison is carried out between those and the Supreme Court's judgment in order to answer the question whether and to what extent do the reasonings of the US and EU Courts converge in reaching their landmark judgments.

2. US Supreme Court on LGBTI+ rights

The constitutional struggle for equality for the LGBTI+ in the United States builds up on the foundation laid by the movements that precede it. Following *Brown v. Board of Education*¹⁶ declaring racial segregation unconstitutional, the Supreme Court turned to issues such as contraceptive rights,¹⁷ mixed marriages¹⁸ and abortion¹⁹, developing 'a new category of constitution-based rights concerning the privacy of an individual'²⁰. Even though the Constitution does not directly refer to the right to privacy, by broad interpretation of the Bill of Rights issues, Judges created this right, mostly by referring to the Ninth Amendment of the U.S. Constitution,²¹ which states 'the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people'²². The US Supreme Court was not hasty in applying the right to privacy in cases involving LGBTI+ rights. In *Bowers v. Hardwick*²³ - the first case before it relating to sodomy laws - the Court did not extend the right to privacy to cover private sexual conduct of LGBTI+, and consequently upheld Georgia sodomy laws as mentioned above. After this denial, it took the Court 17 years to re-visit the right to privacy in relation to LGBTI+ cases with *Lawrence v. Texas* in 2003.

In the meanwhile, in 1996 came the 'first major victory of the homosexual community in the Supreme Court since the late 1950s'²⁴ with *Romer v. Evans*. The question before the Court was whether Amendment 2 of Colorado's State Constitution, forbidding the extension of official protections to

16 347 U.S. 483 (1954).

17 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

18 *Loving v. Virginia*, 388 U.S. 1 (1967).

19 *Roe v. Wade*, 410 U.S. 113 (1973).

20 P. Laidler, *Towards Equality and Justice: Challenges Faced by LGBTI Groups in Their Fight for Rights and Freedoms in the United States Supreme Court*, in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p. 111.

21 *Ibid*, p. 111.

22 Ninth Amendment to the U.S. Constitution of 1787, adopted in the Bill of Rights of 1791.

23 478 U.S. 186 (1986).

24 P. Laidler, *Towards Equality and Justice: Challenges Faced by LGBTI Groups in Their Fight for Rights and Freedoms in the United States Supreme Court*, cit., p. 117.

those who suffer discrimination due to their sexual orientation, violated the [Constitution's] Equal Protection Clause²⁵. Amendment 2 precluded any judicial, legislative, or executive action designed to protect persons from discrimination based on their homosexual, lesbian, or bisexual orientation, conduct, practices or relationships and led to a denial of equal protection. In establishing the violation of the Equal Protection Clause, Justice Anthony Kennedy in his opinion for the court stated: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest".²⁶

In the landmark case *Lawrence v. Texas*²⁷ the Supreme Court was asked to answer, among others, whether the Texas 'Homosexual Conduct' Law criminalizing same sex sexual relations violated the Constitutional guarantee of equal protection of laws, and whether criminal convictions for adult consensual sexual intimacy in the home violated the right to privacy. The Court concluded that the Texas statute furthered 'no legitimate state interest which can justify its intrusion into the personal and private life of the individual.' The Court thereby extended the protection of 'right to privacy' to same sex relations.

A decade later, in 2013, the Supreme Court was confronted in *United States v. Windsor* with the question of whether the Defense of Marriage Act (DOMA), enacted in 1996, defining the term "marriage" -for the purposes of federal law- as a "legal union between one man and one woman", deprived same-sex couples who are legally married under state laws of their Fifth Amendment rights to equal protection under federal law.²⁸ In its judgment overturning DOMA, the Court declared that the purpose and effect of DOMA was to impose a disadvantage, a separate status, and so a stigma on same-sex couples in violation of the Fifth Amendment's guarantee of equal protection. The next step came in *Obergefell v. Hodges*,²⁹ which made same-sex marriages legal across the United States by declaring that denying marriage rights to same-sex couples would violate the principles of due process and equal protection guaranteed in the Fourteenth Amendment to the United States Constitution.

3. Protection of transgender persons by US courts

The cases mentioned, display a slow yet promising trend of extending the protection afforded by important principles such as the equal protection of the laws and right to privacy to homosexuals and same-sex couples. Zooming in on discrimination cases concerning transgender persons, and more specifically to their right to employment, this trend has proven to be even slower. Even though, until the case which is the subject-matter of this paper, no case made it to the Supreme Court, often due to the Supreme Court denying certiorari³⁰ there were still notable cases regarding discrimination against transgender persons at different levels of the federal court system and at state level. Before passing on to examining the case before the Supreme Court, namely *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, a short account is taken of the arguments of the different courts in the most noteworthy discrimination cases relating to transgender persons. This account

25 517 US 620 (1996).

26 Accessed at: www.oyez.org/cases/1995/94-1039

27 539 U.S. 558 (2003).

28 570 US 744 (2013).

29 576 US _ (2015).

30 429 U.S. 897 (U.S. 1976), 471 U.S. 1017 (1985).

taking is important to show that the arguments which have been successful in cases involving gay persons and same-sex couples, as explained above, have not been successful in condemning discrimination against transgender persons. Instead, a concept used in a groundbreaking Supreme Court judgment, not relating to transgender persons, *Price Waterhouse v. Hopkins*, namely 'sex stereotyping' has been instrumental in turning the tide in discrimination cases regarding transgender persons. Since 'sex stereotyping' as developed in *Hopkins* was also at the heart of the arguments of both parties in the *Harris Funeral Homes* case, it is important to understand how this case has influenced the US Courts' decisions towards transgender persons. This section will first introduce the arguments of the courts in three notorious cases denying protection to transgender persons, *Grossman v. Bernards Township Board of Education*, *Holloway v. Arthur Andersen* and *Ulane v Eastern Airlines Inc.*; it will then present the "sex stereotyping" theory in *Price Waterhouse v. Hopkins*, and then establish the effects this case, and this theory, had in transgender protection.

In *Grossman v. Bernards Township Board of Education*³¹, the Superior Court of New Jersey found justified the discharge of Paula Grossman from teaching after undergoing sex reassignment surgery in 1971 due to potential psychological harm to her students who had previously known her as a male.³² Previously, in the case concerning the tenure hearing of Paula Grossman, the same court had also dismissed Grossman's argument that her Constitutional rights to equal protection of the laws were violated with her dismissal, stating that "it has not been demonstrated that the standard of unfitness based upon a teacher's adverse emotional effect upon students would not be applied to other teachers if the facts warranted such result"³³. The Court thus compared Grossman's situation not with teachers who did not undergo sex reassignment surgery, but to the hypothetical group of teachers who would - either by sex reassignment surgery or by other ways - supposedly adversely affect students, stating that it could not be demonstrated that they too would be dismissed.

In *Holloway v. Arthur Andersen*³⁴, in which Ramona Holloway who had been working for Arthur Andersen, an accounting firm, since 1969, was terminated in 1974 after starting a treatment in preparation for anatomical sex change surgery. The same way as Aimee Stephens evoked Title VII of the Civil Rights Act, Holloway argued that the term "sex" in Title VII is synonymous with "gender", and gender would encompass transsexual individuals³⁵. Giving the statute its plain meaning, the Court of Appeals concluded that the Congress only had the traditional notions of "sex" in mind, and it also rejected that excluding transsexual individuals from the protection of Title VII would violate the doctrines of due process and equal protection.

The Court of Appeals was faced with the same issue in *Ulane v Eastern Airlines Inc*³⁶, in which the plaintiff Karen Frances Ulane, who had been working at Eastern Airlines since 1968 as a pilot, was fired in 1981, after undergoing sex reassignment surgery. Ulane argued, that her dismissal was a violation of Title VII stating that it is an unlawful employment practice for an employer to discharge any individual because of such individual's sex. The US Court of Appeals categorically denied that Title VII prohibits discrimination against transsexual individuals, underlining that legislative history 'clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex'.³⁷ Asserting that only Congress can provide that transsexual

31 The case could not reach the Supreme Court since certiorari was denied by 429 U.S. 897 (U.S. 1976).

32 157 N.J. Super. 165 (1978).

33 127 N.J. Super. 13 (1974).

34 566 F.2d 659.

35 *Ibid.*

36 742 F.2d 1081. Similar to Grossman, the Supreme Court denied certiorari in this case 471 U.S. 1017 (1985).

37 742 F.2d 1081.

individuals should enjoy the protection of Title VII, the Court further stated that “until that time” they “decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation”³⁸. The Court of Appeals subsequently concluded that had Ulane been dismissed because she is female, she could have made use of Title VII³⁹, however, since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexual individuals, Ulane’s case did not fall under protection of the laws.

At this point in time came the US Supreme Court’s groundbreaking ruling in *Price Waterhouse v. Hopkins*⁴⁰, in which Ann Hopkins, a senior manager at Price Waterhouse, was denied partnership for being not feminine enough. She was described by the partners as “macho” and in order to improve her chances of partnership was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”⁴¹. The Court held that when an employer acts on the basis of a sex stereotype, it has acted on the basis of gender, which brings the issue to the scope of Title VII. The Court interpreted Title VII to mean that “gender must be irrelevant to employment decisions”, and construed the words “because of” to set off a hypothetical construct in which a certain factor is assumed to be present at the time of the event, and then questioned whether even if that factor had been absent, the event would have transpired in the same way⁴². The Supreme Court found that gender was a factor in the employment decision at the moment it was made⁴³ and indicated that the only situation this could be allowed is the existence of a bona fide occupational qualification (BFOQ) which would mean that gender is a reasonably necessary qualification to the normal operation of the particular business or enterprise.

Price Waterhouse v. Hopkins “opened the doors for the protection of transsexuals under federal anti-discrimination statutes in courts based upon the “sex stereotype” theory”⁴⁴. The Court has taken a two-step approach in order to conclude that there was a violation. First of all, it equated “sex-stereotyping” with “gender-based discrimination”; it then equated “gender” with “sex”. By equating “gender” and “sex”, the Court demonstrated that anti-discrimination statutes equally protect gender⁴⁵. This logic was used in *Schwenk v. Hartford*⁴⁶, in which it was decided that sexual assaults against a transgender inmate constituted discrimination on grounds of sex. In *Smith v. City of Salem*⁴⁷, regarding a firefighter who was dismissed after informing her superiors that she intended to

38 *Ibid.*

39 On this point the Court of Appeals refers to *Holloway v. Arthur Andersen* (566 F.2d at 664) which specified that although Title VII does not prohibit discrimination against transsexuals, ‘transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII’.

40 490 US 228 (1989).

41 From Justice William J. Brennan’s plurality opinion in 490 US 228 (1989).

42 The Court’s explanation of what it refers to as the “but-for causation”.

43 Indicating that the Congress specifically rejected an amendment that would have placed the word ‘solely’ in front of the words ‘because of’, the Supreme Court also points out that Title VII is meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.

44 B. Mestre, *Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts’ Case Law*, in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p. 195.

45 *Ibid*, p. 195.

46 *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

47 *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

undergo sex-reassignment surgery to live her life in full as female, the Court of Appeals ruled that ‘discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman’.

In *Schroer v. Billington*⁴⁸, a candidate who was first offered a job at the Library of Congress, and later was refused employment after she informed her future employer that she would be undergoing a sex-reassignment surgery. The District Court concluded that “in refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination”. In arguing that Diane Schroer was entitled to a *Price Waterhouse*-type claim for sex stereotyping, the Court stated that it did not matter “for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual”.

There were also discrimination cases regarding transgender persons in which the claims were not based on Title VII, yet the sex stereotyping theory was still used. One such case is *Glenn v. Brumby*⁴⁹ where the plaintiff claimed that her termination from work due to her transgender identity was a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court of Appeals concluded that the employer indeed violated the Equal Protection Clause's prohibition of sex-based discrimination when they fired a transgender employee because of her gender non-conformity.

It is against this background that the US Supreme Court judged the first transgender discrimination case before it, *R.G. & G.R. Harris Funeral Homes*. The section below breaks down the claims and arguments brought by the parties in this case and subsequently looks into the judgment and its significance.

4. ***R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission (EEOC)***

On June 15, 2020 the Supreme Court decided on three cases in which “an employer fired a long-time employee shortly after the employee revealed that he or she is homosexual⁵⁰ or transgender”. All of the cases related to whether Title VII of the Civil Rights Act of 1964 would be violated when an employer fires an individual merely for being gay or transgender.

The specific question before the Supreme Court in *R.G.&G.R. Harris Funeral Homes Inc. v. EEOC* was “whether Title VII [of the Civil Rights Act of 1964] prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. In the words of Aimee Stephens' counsel, the case is about ‘whether when someone fires someone because they are transgender or because they fail to conform to sex-based stereotypes, is that because of sex’?⁵¹

⁴⁸ *Schroer v. Billington*, 577 F. Supp. 2d 293 (District Court, DC 2008).

⁴⁹ *Glenn v. Brumby*, No. 10-14833 (11th Cir. 2011).

⁵⁰ *Bostock v. Clayton County, Georgia* (17–1618), *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623).

⁵¹ From the submissions of David D. Cole on behalf of Aimee Stephens during the oral arguments before the Supreme Court on October 8, 2019.

The oral arguments which were heard on October 8, 2019 depicted what the central issues were for both parties. Aimee Stephens argued that her dismissal constitutes discrimination because of sex for three reasons: According to the first claim, which is based on a Price Waterhouse-type claim for sex stereotyping, by firing her for failing to conform to the company's owner's explicitly stated stereotypes about how men and women should behave, the Funeral Homes discriminated against Stephens in the same way that Price Waterhouse discriminated against Ann Hopkins for failing to walk and talk more femininely. Aimee Stephens argued that "the objection to someone for being transgender is the ultimate sex stereotype"⁵² because it rests on the assumption that if someone is assigned a male sex at birth, that person must live and identify for their entire life as a man. According to the second claim, which is closely linked to the line in the first claim, the Funeral Homes engaged in disparate treatment on the basis of sex by firing Stephens for contravening a sex-specific expectation that applies only to people assigned a male sex at birth, namely that they live and identify as a man for their entire lives. Accordingly, she was fired for identifying as a woman only because she was assigned a male sex at birth; had she been assigned a female sex at birth, she would not have been fired. This point corresponds to a distinct problem, which anti-discrimination cases involving transgender persons encompass, namely that of identifying the appropriate comparator⁵³. In explaining this issue, the counsel of Aimee Stephens gave the hypothetical example in which an employer who had six Aimees, five of whom were assigned female at birth, and one who was assigned male at birth. If the employer fires the one who was assigned male at birth, that person would be fired because of her sex assigned at birth⁵⁴. Thus the comparison is between the person who has transitioned from male to female and with women who have not transitioned. The result reached is that discrimination against a transgender person is treating them differently from others who have the same gender identity, because of the transgender person's sex assigned at birth. Finally, it was claimed that the Funeral Homes committed sex discrimination for firing Stephens for, in her boss' words, "changing her sex". It is argued that this constitutes discrimination in the same way that firing someone for changing their religion is religious discrimination.

The counter claims in this case came not only from the petitioner, Harris Funeral Homes, but also from the Solicitor General, Noel J. Francisco, who represents the federal government before the Supreme Court. Harris Funeral Homes asserted that sex and transgender status are different concepts, that the definition of sex is trying to be changed, which would mean changing the law. Furthermore, they claimed that deciding in favor of Aimee Stephens would destroy all sex specific work requirements such as bathroom policies and dress codes of companies (also including BFOQs)⁵⁵. The Solicitor General further stated that it is up to the Congress to resolve these issues and "when the Congress wants to prohibit discrimination based on the traits of sexual orientation and gender identity, it lists them separately". The most remarkable claim of the Solicitor General, on the other hand, was that if an employer treats a transgender man exactly the same as you treat a transgender woman, there is no discrimination since they should be the appropriate comparators in such cases. Solicitor General Francisco based his reasoning upon his interpretation of Price Waterhouse which, he said, states that treating an aggressive woman worse than an aggressive man would be a violation of Title VII because in

52 *Ibid.*

53 B. Mestre, *Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law*, cit., p. 201.

54 From the submissions of David D. Cole on behalf of Aimee Stephens during the oral arguments before the Supreme Court on October 8, 2019.

55 From the submissions of John J. Bursch on behalf of Harris Funeral Homes during the oral arguments before the Supreme Court on October 8, 2019.

that case one would be treating similarly situated people differently. This is an example of the so-called, “equal misery” argument, which follows the logic that there is no discrimination if male and female transsexuals are treated alike.

5. The Judgment and Its Significance

In deciding that firing an individual merely for being gay or transgender violates Title VII, the Supreme Court has adopted a very clear and direct approach, namely the “straightforward application of Title VII’s terms interpreted in accord with their ordinary public meaning at the time of their enactment”⁵⁶. In its analysis reaching this point, the Court adopts the assumption that in 1964, “sex” referred only to biological distinctions between male and female, and asserts that this is just a starting point because the “question is not just what sex meant, but what Title VII says about it”⁵⁷. Evidently, “the statute prohibits employers from taking certain actions because of sex”⁵⁸. This “because of” test of Title VII incorporates the but-for causation meaning that if the outcome changes when that cause would have been absent, that cause directs us to the but-for causation. After having established this, the Court states that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”⁵⁹. The Court reaches this conclusion by using a hypothetical case where the employer fires the employee who is a transgender woman, while retaining the comparator who is a cisgender woman but otherwise an identical employee. In this hypothetical case, the employer “intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth”⁶⁰. This example is used to demonstrate that “transgender status is not related to sex in some vague sense”, but to the contrary, “to discriminate on grounds of being transgender requires an employer to intentionally treat individual employees differently because of their sex”⁶¹. Thus when an employee is fired for being a transgender individual “sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids”⁶².

This reasoning of the Court is groundbreaking in two ways. First of all, hereby, the Court breaks away from the “sex stereotyping” theory being utilized in cases involving discrimination against transgender individuals⁶³. This theory, developed in *Price Waterhouse v. Hopkins*, adopts a detour approach in order to bring discrimination within the scope of Title VII: a sex stereotype is identified in the actions of the employer, the employer is then deemed to have acted on the basis of gender, and ultimately, gender is equated with sex. The Court, in the present case has adopted a direct approach in bringing discrimination based on one’s transgender status into the scope of Title VII, without having to discuss stereotyping or gender.

⁵⁶ Opinion of the Court in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), p. 4.

⁵⁷ *Ibid.* p. 5.

⁵⁸ *Ibid.* p. 5.

⁵⁹ *Ibid.* p. 9.

⁶⁰ *Ibid.* p. 10.

⁶¹ *Ibid.* p. 10.

⁶² *Ibid.* p. 2.

⁶³ As in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Schroer v. Billington*, 577 F. Supp. 2d 293 (District Court, DC 2008).

Secondly, the Court hereby breaks away from the logic adopted by the Court of Appeals in cases involving discrimination against transgender individuals bringing forward the argument that considering the statute's plain meaning "the Congress only had the traditional notions of sex in mind"⁶⁴ as indicated by 'legislative history'⁶⁵. Using this logic, the Court of Appeals had come to the conclusion that protecting transgender individuals from discrimination utilizing Title VII would be "to judicially expand the definition of sex"⁶⁶ on behalf of the Congress. The Supreme Court makes it very clear that since in the present case no ambiguity exists about how Title VII's terms apply to the facts, legislative history has no bearing here⁶⁷. The rule that applies in this case is that when the Congress does not include any exceptions to a broad rule, courts apply the broad rule⁶⁸. The Supreme Court finds that the arguments of the employers aimed at excluding transgender persons from the protection of Title VII are all situated beyond the statute's text and deal with the legislature's purposes in enacting Title VII or with the consequences that might follow for the employees⁶⁹. The Court reminds that "only the written word is the law, and all persons are entitled to its benefit", so when the express terms of a statute give us one answer, it is irrelevant to discuss whether those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result, because the limits of the drafters' imagination supply no reason to ignore the law's demands⁷⁰. This line of thinking of the Supreme Court and once and for all responds to democratic legitimacy arguments which claim that the meaning of "sex" would be altered should transgender individuals be given protection under Title VII and that this would require Congress to act instead.

By rightfully placing beyond the statute's text the possible consequences for employers of involving transgender persons under the protection of Title VII, the Court also responds to the arguments of employers regarding policy considerations. Against the claims of the employers that a judgment affirming that the scope of Title VII protects transgender individuals from discrimination would prove unsustainable the policy of sex-segregated bathrooms, locker rooms and dress codes, the Court indicates that addressing unwanted consequences of old legislation lies in Congress and reminds that none of these issues are before the Court in this case.⁷¹

Finally, the Supreme Court counters the "equal misery" argument by pointing out that "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups"⁷². Thus, in a hypothetical case where the employer fires both male and female employees for being transgender, the Title VII liability is doubled instead of eliminated⁷³. This is because "Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the

64 *Holloway v. Arthur Andersen* (566 F.2d 659).

65 *Ulane v. Eastern Airlines Inc.* (742 F.2d 1081).

66 *Ulane v. Eastern Airlines Inc.* (742 F.2d 1081).

67 Syllabus in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), p. 4.

68 Opinion of the Court in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), p. 19. The Supreme Court points out that 'sexual harassment' as well as 'motherhood discrimination' fall under the scope of Title VII also by following the broad rule.

69 Opinion of the Court in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), pp. 15-16.

70 *Ibid.* p. 2.

71 *Ibid.* p. 31.

72 *Ibid.* p. 15.

73 *Ibid.* p. 11.

class of men differently than the class of women”⁷⁴. Instead, the law accepts each separate instance of discrimination against an individual employee because of that individual’s sex as an independent violation of Title VII⁷⁵.

6. The EU Approach for the Protection of Transgender Persons

Having assessed the US approach towards transgender protection and the judgment of the Supreme Court in the first transgender rights case before it, this paper now turns to the situation in the EU. Article 21(1) of the Charter of Fundamental Rights, which has the same status as the EU Treaties⁷⁶, yet which is binding on EU Member States only when they are implementing Union Law⁷⁷, states that “any discrimination based on any ground such as sex [...] or sexual orientation shall be prohibited”. This non-exhaustive list of discrimination grounds has left out any specific reference to gender identity. Among the Directives enacted in accordance with Article 19 TFEU⁷⁸, the one relating to employment conditions, namely the Framework Employment Directive 2000/78⁷⁹ also prohibits discrimination on the grounds of, among others, sexual orientation⁸⁰ in (access to) employment and working conditions, including dismissals and pay⁸¹. Despite the “impressive constitutional framework for EU anti-discrimination law”⁸² which currently does protect against some aspects of sexual orientation discrimination⁸³, transgender individuals are not explicitly protected under European Union legislation.

When, in 1996, the European Court of Justice was faced for the first time with a dismissal case involving a transgender person, EU law was not as developed as it is now regarding anti-discrimination. The only legislation at the Court’s disposal was Council Directive 76/207 on the equal treatment for men and women as regards employment⁸⁴. This Directive, which is since repealed⁸⁵, had as its purpose to put into effect the principle of equal treatment, for men and women as regards

⁷⁴ *Ibid.* p. 11.

⁷⁵ *Ibid.* p. 11.

⁷⁶ TEU Article 6(1).

⁷⁷ Charter of Fundamental Rights of the European Union, Article 51(1).

⁷⁸ TFEU Article 19(1): ‘Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

⁷⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁸⁰ Council Directive 2000/78 Article 1.

⁸¹ Council Directive 2000/78 Article 3(1).

⁸² P. Craig, Gráinne de Búrca, *EU Law: Texts, Cases, and Materials*, 2015, ISBN 978-0-19-871492-7, p. 893.

⁸³ Protection at EU level is incomplete due to the Horizontal Anti-Discrimination Directive being stuck in Council.

⁸⁴ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁸⁵ Repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

access to employment, including promotion and as regards working conditions⁸⁶. The Directive defines the principle of equal treatment to mean that there shall be no discrimination whatsoever on grounds of sex directly or indirectly by reference in particular to marital or family status⁸⁷. It was made clear that working conditions also include conditions governing dismissal and that men and women shall be guaranteed the same conditions without discrimination on grounds of sex⁸⁸.

At the time, English law contained even more limited provisions regarding discrimination at the workplace. The relevant piece of national legislation was the Sex Discrimination Act of 1975, which prohibited as direct sex discrimination, treating a woman less favorably than a man on the ground of her sex⁸⁹. So in 1993, when the case of dismissal of P. came before it, the Truro Industrial Tribunal considered that the English law provided no helpful answer in identifying discrimination, yet suspected that Directive 76/207 could allow a broader interpretation covering discrimination against transgender persons as well⁹⁰. It is against this background that the case of P. found its way to the ECJ for preliminary ruling. P. was dismissed from the educational establishment, operated by Cornwall County Council where she was working as a manager, on account of gender reassignment⁹¹.

7. *P. v S. and Cornwall County Council*

The questions referred to the court by the national tribunal⁹² were whether the dismissal of a transsexual person for a reason related to a gender reassignment constituted a breach of Directive 76/207; and whether Article 3 of this Directive, which referred to discrimination on grounds of sex, prohibited treatment of an employee on grounds of the employee's transsexual state. Below, the reasoning of the Advocate General as well as of the Judgment in this case, which was the first case law in the world preventing discrimination because a person is transgender⁹³ will be analyzed.

In his Opinion, Advocate General Tesauro identifies the core of the issue as determining whether the unfavorable treatment of transgender persons constituted discrimination on grounds of sex, while it was indisputable that the wording of the principle of equal treatment in Directive 76/207 refers to the traditional man/woman dichotomy⁹⁴. The Advocate General, then presents us with two alternate paths that could be followed in resolving this issue. The first one brings forth the questioning of the validity of the man/woman dichotomy in the face of scientific progress compelling us to go beyond the traditional classification, and reminds us that in addition to the man/woman dichotomy, there is a "range of characteristics, behavior and roles shared by men and women, so that sex itself ought rather be thought of as a continuum"⁹⁵. Tesauro identifies the inevitable consequence of this line of reason-

86 Council Directive 76/207 Article 1.

87 Council Directive 76/207 Article 2(1).

88 Council Directive 76/207 Article 5(1).

89 Sex Discrimination Act Section 1(a).

90 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 7.

91 *Ibidem*, paragraph 22.

92 The ECJ has considered the two questions together Case C-13/94, paragraph 13.

93 S. Whittle, *Employment Discrimination and Transsexual People*, in *Gender Identity Research and Education Society (gires) Report*, 01.09.2014, <https://www.gires.org.uk/employment-discrimination-and-trans-people/>

94 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 16.

95 *Ibid.* Paragraph 17.

ing as being the redefinition of sex, which he considers to merit a “deeper consideration in more appropriate circles”⁹⁶ and therefore proposes against taking this path. Even so, he firmly rejects an approach that would deny protection to those who are discriminated against merely because they fall outside the traditional man/woman classification. Thus, the path that Advocate General Tesauro proposes is one that builds on the premise that P. would not have been dismissed if she had remained a man. Thereby, he argues that “where unfavorable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex, or on grounds of sex”⁹⁷. By equating “change of sex” to “sex”, the Advocate General brings the dismissal into the realm of Directive 76/207. He strengthens his premise by asserting that “the prohibition of discrimination on grounds of sex is an aspect of the principle of equality”⁹⁸. By doing this, Advocate General Tesauro interprets the prohibition of discrimination in the light of the principle of equality, which is a fundamental human right whose observance the court ensures⁹⁹. So, Tesauro concludes on this point that maintaining “that the unfavorable treatment suffered by P. was not on grounds of sex because it was due to her change of sex or else because in such a case it is not possible to speak of discrimination between the two sexes would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality”¹⁰⁰. It is this reading together of prohibition of discrimination with the principle of equality that compels an interpretation of the Directive which precludes the dismissal of a transsexual person on account of a change of sex¹⁰¹.

Regarding concerns about judicial interpretation, Tesauro points out that the Directive dates from 1976, and took account of “what may be defined as normal reality at the time of its adoption”¹⁰². He therefore pleads for construing the Directive in a broader perspective, which would include all situations in which sex appears as a discriminatory factor.

Tesauro also dismisses the “equal misery” argument, which had been put forth on several occasions during the proceedings, namely that there can be no sex discrimination if trans women are not treated differently than trans men, since both are treated unfavorably. In explaining the “equal misery” argument, the Advocate General makes references to US Case law in which this argument was used to support the position that dismissing a transgender person was lawful.¹⁰³ He holds that the comparison should be between the person who has transitioned from male to female and a male person who has not made a transition and “remained a man”¹⁰⁴.

The “equal misery” argument, brought by the UK government in support of their argument as to the dismissal falling outside the Discrimination, is rejected by the ECJ in the judgment too. The ECJ does so by adopting the same comparator as Tesauro did across those who have been treated unfavorably due to gender reassignment, namely the “persons of the sex to which he or she was deemed

96 *Ibid.* Paragraph 17.

97 *Ibid.* Paragraph 18.

98 *Ibid.* Paragraph 19.

99 B. Mestre, *Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law*, in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p. 197.

100 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 20.

101 *Ibid.* Paragraph 25.

102 *Ibid.* Paragraph 23.

103 The Advocate General makes references to, among others, *Grossman v Bernards Township Board of Education*, *Ulane v Eastern Airlines* and *Holloway v Arthur Anderson* as introduced above.

104 Opinion of Advocate General Tesauro in the case *P. v S. and Cornwall County Council*, 14.12.1995, Paragraph 18.

to belong before undergoing gender reassignment"¹⁰⁵. The Court uses this argument to establish that dismissing a person on the ground that "he or she intends to undergo, or has undergone, gender reassignment" is a discrimination based on the sex of the person concerned. It follows that the Court "does not seem to distinguish between sex and gender"¹⁰⁶ since had a person not undergone gender reassignment, he or she would not have suffered discrimination.

Also following the lead of the Advocate General, the Court defined Directive 76/207 as simply being the expression of the principle of equality, which is one of the fundamental principles of Community law¹⁰⁷. The Court went one step further and in concluding that the dismissal of P. must be regarded as discrimination based on sex, it proclaimed that "to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard".

8. Convergence Between the Reasonings of the ECJ and the Supreme Court

The section above reveals that in the *P. v. S. case*, the ECJ dealt with a similar set of issues as those that were before the Supreme Court. As a result of their legal assessment, both courts afforded protection against discrimination to transgender individuals in the workplace. But did they follow the same logic? In this section, the focus is on whether and to what extent the reasonings of the US and EU Courts converge in reaching the same conclusion.

The ECJ's judgment is centered around the principle of equality as it takes the prohibition of discrimination as an expression of this principle. By doing so, the ECJ anchored the prohibition of discrimination on grounds of sex in Directive 76/207 to a fundamental human right at the core of the EU.¹⁰⁸ Doing so meant that the ECJ rendered the prohibition of discrimination a place which is hierarchically above other employment related issues, such as sex specific work requirements.

Even though this approach could also have been adopted by the Supreme Court, by reference to the earlier US court judgments on LGBTI+ rights in which the Equal Protection Clause has been used¹⁰⁹, the US Supreme Court chose a direct route which makes reference to any higher principle redundant. The Supreme Court asserts that the ordinary public meanings of the terms of the statute already brings the discrimination of transgender persons within the scope of Title VII. Thereby, the Court was not necessitated to interpret the terms in light of equality or any other higher principle. In fact, the judgment accepted with such clarity the location of transgender discrimination in the realm of Title VII that the only indirect reference to equality is to be found in the section where the Court underlines that the express terms of the statute already give us the answer to the question before it. Here, the Court declares: "only the written word is the law and all persons are entitled to its benefit"¹¹⁰.

¹⁰⁵ Case C-13/94, 30.04.1996, Judgment of the Court, paragraph 21.

¹⁰⁶ B. Mestre, *Transgender Discrimination as Sex Discrimination: A Contextual and Comparative Analysis of European and American Courts' Case Law*, in *Equality and Justice: Sexual Orientation and Gender Identity in the XXI Century*, 2011, ISBN 978-88-8420-702-9, p. 198.

¹⁰⁷ Case C-13/94, 30.04.1996, Judgment of the Court, paragraph 18.

¹⁰⁸ Article 2 TEU.

¹⁰⁹ *Romer v. Evans*; *Lawrence v. Texas*; *United States v. Windsor*; *Obergefell v. Hodges*, *Glenn v. Brumby*.

¹¹⁰ Opinion of the Court in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), p. 2.

In asserting that there is no ambiguity that the ordinary public meanings of the terms of the statute apply to the facts of the case, and that in the lack of exceptions, the broad rule will be applied, the Supreme Court dismissed the claims that the meaning of sex would be changed if the Court would confirm a violation. This approach is reminiscent of the ECJ's line which states that the Directive should be interpreted in a broader perspective which would include all situations in which sex appears as a discriminatory factor. This is how both courts refute allegations that it should be left up to the legislative branch to decide whether transgender employees are to be protected against discrimination.

In bringing the discrimination of a transgender employee into the scope of Directive 76/207, and thus deciding that the discrimination of a transgender person is "because of sex" the ECJ equated the discrimination grounds of "change of sex" to "sex", in the Advocate General's opinion, or the discrimination on the ground of 'gender reassignment' to discrimination based on "sex", in the ECJ's judgment. Thereby, the ECJ equated sex to gender to be able to bring firing transgender employees into the scope of Directive 76/207. Regarding this issue too, the Supreme Court adopts a much more direct approach in which firing an employee for being transgender is equated to discriminating against that individual in part because of sex¹¹¹. Since this is the condition of triggering Title VII application, no further discussion regarding the concept of "gender" was held. This approach offers a stronger foothold for protection against discrimination for transgender individuals as the link between the act of discrimination and Title VII is immediate and does not require debate regarding concepts which are outside the text of the statute just so the statute could be triggered.

Remaining in this context, it is also interesting to look at the comparators chosen by the two courts in analyzing discrimination against transgender persons. In reaching the outcome that discrimination based on gender reassignment falls under "sex", the ECJ looked at the situation of a person who intends to undergo, or has undergone, gender reassignment in comparison to the situation of persons of the sex to which that person was deemed to belong before undergoing gender reassignment. So, in the ECJ judgment, the comparison is between two men, one of whom transitioned while the other has not. This approach of the Court fundamentally disregarded claimant's self-identification as female by saying, in essence, that "P. was a man who was treated discriminatorily because he failed to satisfy society's expectations for men"¹¹². On the other hand, the US courts have traditionally compared the situation of female employees based on whether they have transitioned from male or born female. This approach was continued in the latest decision of the Supreme Court as the court compared a transgender woman to a cisgender woman in the hypothetical exercise whereby the Court explains that when an employer fires a transgender woman but tolerates an identical female employee who was identified as female at birth, the employer is intentionally penalizing the transgender employee. The distinction between these two approaches might not seem to be very central to the result when one remembers the court in *Schroer v. Billington* stating that it does not matter "for purposes of Title VII liability whether the [employer] withdrew its offer of employment because it perceived [the employee] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual". However, these are important distinctions in increasing awareness regarding transgender issues.

This being said, the choices of comparator of both legal systems easily refute the "equal misery" claims. These claims are based on a comparison between transgender men and transgender women; and they find no discrimination if these two groups would be treated the same. Since both courts have

111 *Ibid.* p. 14.

112 M. van den Brink, Peter Dunne, *Trans and Intersex Equality Rights in Europe – a Comparative Analysis*, (European Commission, 2018), ISBN 978-92-79-95766-6, p. 47.

approached the issue by comparing the transgender individuals either to those belonging to the declared sex of the claimant or to those who are of the claimant's birth sex, the "equal misery" argument is thereby rejected with not much effort. The Supreme Court was clearer on this matter explaining that the statute is not about the employer treating the class of men differently than the class of women. Instead, the statute takes each discriminating act against an individual employee as a separate violate of Title VII. To reinforce this point, the Supreme Court points out that if an employer would fire both a transgender man and a transgender woman, the employer would be doubling rather than eliminating Title VII liability¹¹³.

9. Conclusion

With its landmark decision in *R.G. & G.R. Harris Funeral Homes* asserting that Title VII protects transgender individuals from discrimination at the workplace, the US Supreme Court joins the European Court of Justice in bringing the transgender community one step closer to meaningful legal protection against discrimination. Yet, even though the results reached by the two courts are parallel, the technical legal foundations of these results do not entirely converge. First of all the centrality of the principle of equality in the ECJ's landmark decision in *P. v S. and Cornwall County Council* does not recur in the Supreme Court's reasoning. Instead, the Supreme Court hammers on the fact that the ordinary public meaning of the terms of the statute already are sufficient to confirm the violation of Title VII. This reason unambiguously brings the discrimination of transgender individuals under the scope of Title VII by identifying it as discrimination "because of ... sex". This direct link between the discriminating act and the scope of the statute meant that a direct reference to the Equal Protection Clause was not necessary. Thereby, the Supreme Court also avoids a route where it would have to link gender to sex, as the ECJ had done in its judgment of *P. v S. and Cornwall County Council*. This second point of divergence is an important one due to the sensitivities surrounding equating gender to sex. The Supreme Court's approach of setting aside this equation seems to be accurate. On the other hand, in interpreting the word of the legislation, both courts converge in declaring that they apply the broad rule, which would include all situations in which sex appears as a discriminatory factor. By opting for the broad rule, both courts respond to the arguments that it should be left to the legislature to determine whether transgender persons should be included under the protection of the law. However, the two courts diverge when it comes to picking the appropriate comparator in identifying discrimination. The ECJ compares the situation of the dismissed transgender woman to the situation of a hypothetical male employee who would not have been dismissed, while the Supreme Court compares the situation of two women employees, one cisgender and one transgender. The approach of the Supreme Court is clearly more respectful of the self-identification of the employee as a woman, and thus should be the preferred approach. This being said, the comparators chosen by both courts have clearly refuted the equal misery claims made by the employers. Here, the Supreme Court clearly stated that arguing that the employer would have dismissed a transgender man just like they have dismissed a transgender woman, and thereby claiming that there is no discrimination because of sex, cannot be used to eliminate liability, to the contrary, in such a situation the liability would be doubled.

As can be seen, the ECJ and the Supreme Court do not converge completely in their reasonings and the comparative studies should take the technical legal choices into consideration. Despite being a latecomer to the area of transgender protection US Supreme Court surpassed the ECJ in delivering a

¹¹³ Opinion of the Court in *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* (18-107) together with *Altitude Express, Inc., et al. v. Zarda et al.* (17-1623) and *Bostock v. Clayton County* (17-1618), p. 11.

judgment which is more in tune with the sensitivities, such as those relating to an appropriate comparator or the relation with gender. However, with the two judgments, which are the subject matters of this paper, both courts have contributed to the advancement of transgender rights. Transgender persons face a plethora of challenges, discrimination, stigmatization and hate crimes at their workplace¹¹⁴. Judgments such as those discussed in this paper are important milestones and should be celebrated. However, it should not be forgotten that it is now crucial to focus on the implementation of this judgment and to create a momentum

¹¹⁴ ILO, *Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work*, (ILO, 2015); K. Sidiropoulou, *Gender Identity Minorities and Workplace Legislation in Europe*, (Global Labor Organization Discussion Paper, 2019).