

Alex Berg ([00:02](#)):

Hi, and welcome to Making the Case with Lambda Legal. A podcast from Lambda Legal highlighting impactful cases and policy work. I'm Alex Berg, a journalist and host, and I cover all things LGBTQ+ and the issues that impact us.

Alex Berg ([00:17](#)):

Today I'm joined by senior council, Karen Loewy to discuss the landmark case Bostock v. Clayton County. As part two of our discussions of employment discrimination cases, Karen and I will chat about the ways in which Lambda's work builds upon itself to help move the law in the right direction, case by case and court by court.

Alex Berg ([00:34](#)):

We will also discuss how amicus briefs, or friend of the court filings, support case work. The Bostock case, decided by SCOTUS in 2020, proved the analysis Lambda Legal has been advancing for more than 15 years, that discrimination based on gender identity or on sexual orientation is sex discrimination and violates the Civil Rights Act of 1964. Let's get into my conversation with Senior Counsel, Karen Loewy.

Alex Berg ([01:00](#)):

Welcome Karen. Thank you so much for joining me.

Karen Loewy ([01:02](#)):

Thanks so much for having me.

Alex Berg ([01:03](#)):

To start things off, what was the Bostock decision?

Karen Loewy ([01:07](#)):

Bostock v. Clayton County, Georgia, was a decision at the United States Supreme Court that addressed the scope of employment discrimination protections as they apply to LGBTQ people. It was actually three cases, all combined together. One on behalf of Gerald Bostock, one on behalf of Don Zarda, and one on behalf of Aimee Stephens, all of whom had been fired from their jobs for being either gay or trans.

Alex Berg ([01:34](#)):

Can you walk us through how you and the Lambda team got involved in this case?

Karen Loewy ([01:39](#)):

Sure. Lambda Legal had been doing employment non-discrimination work for years. It was a targeted strategy to reverse bad cases saying that there was no protection for discrimination based on sexual orientation, and to protect actually really good case law making clear that transgender people are protected from employment discrimination. We wanted to build on the constitutional victories that we had won in Lawrence v. Texas, the Windsor case, the Obergefell cases. The goal of all of this work in the long run was really a Supreme Court ruling, making clear that Title VII of the Civil Rights Act of 1964, protected all LGBTQ people from discrimination in the workplace.

Karen Loewy ([02:33](#)):

So this is work that Lambda Legal had been doing for decades, really led by my colleague, Greg Nevins. Both my colleague Omar Gonzalez-Pagan and I had worked really closely with Greg over the last several years, leading up to the trio of cases that resulted in Bostock making their way to the US Supreme Court.

Alex Berg ([02:53](#)):

You mentioned the trio of cases. There were approximately 50 amicus briefs in support of the employees, including two from Lambda. So what is an amicus brief, and how are they helpful in this case?

Karen Loewy ([03:06](#)):

Amicus briefs are friend of the court briefs, and they are briefs that are submitted by folks who are not actually parties to the case, but because of who they are, the work that they do, the constituencies they represent, they have something to offer to the court as the court considers the issues that are in front of it.

Karen Loewy ([03:25](#)):

In this particular case, there were, I think it was technically 49 briefs in support of the employees, and that represented over 2000 amici friends of the court, including 151 members of congress, about 60 civil rights organizations, 750 religious organizations and faith leaders, 22 state attorneys generals, 84 cities, counties and mayors, 206 major corporations, and countless professors, scholars, historians, philosophers, and statisticians, as well as two briefs from Lambda Legal. And I was one of the authors of those briefs.

Karen Loewy ([04:06](#)):

Our briefs really served two roles. In the context of Aimee Stephens' case, our brief really focused on the ways in which discrimination against transgender people is per se sex discrimination. That even assuming the ridiculous narrow definition of sex as tied to biology or anatomy that the employers were offering here, the discrimination would not have happened but for the employee's sex. Aimee was fired because the employer could not get past the male sex that she was assigned at birth. We really took on the attempt to really reframe the question under the statute and rejected the idea that what congress would've thought was covered in 1964 matters, because it doesn't, the text that the statute controls.

Karen Loewy ([04:55](#)):

In the context of the Bostock and Zarda cases, our job was to take on the opinions of more conservative judges in the courts of appeals below, and the reasons why those opinions were just wrong. That their opinions saying that there was no protection for LGBTQ people were really based on asking the wrong questions and adding requirements to the statute. It's really not whether the word "sex" means sexual orientation, but whether the discrimination that LGB people face is because of their sex.

Karen Loewy ([05:26](#)):

Our briefs were really part and parcel of an incredible coordination and strategy around what kinds of amicus briefs would be helpful to the court that was spearheaded by the folks at the ACLU who were on the case, our former legal director, Jon Davidson, who was at Freedom For All Americans, a handful of

Lambda Legal lawyers and folks from other LGBT, and particularly trans-led organizations across the country.

Alex Berg ([05:55](#)):

Now, you outlined how Lambda submitted two briefs and then really helped coordinate what sounds like just a huge effort and so many different people and parties submitting their briefs. Collaboration is a huge part of the move toward equality through the law. Can you speak to our partnerships and how we approach collaboration, whether with our supportive pro bono council or with other justice organizations?

Karen Loewy ([06:17](#)):

Absolutely. This was a particularly unique moment because, as with marriage equality, this was sort of an all hands on deck moment. As I said, this was the culmination of a couple of decades of work to try and make clear that the discrimination that LGBTQ people face is really at its root because of sex.

Karen Loewy ([06:39](#)):

So as these cases individually were making their way up through the courts of appeals, our colleagues at the ACLU had directly represented Aimee Stephens and then ended up joining the team on behalf of Don Zarda, but we too had been consulting with the private counsel for Mr. Zarda's estate, sadly, he had actually passed away, and who represented Mr. Bostock. We had actually had a case of our own that we had attempted to get the Supreme Court to review on behalf of Jameka Evans, who was discriminated against by a hospital because she's a lesbian.

Karen Loewy ([07:16](#)):

And so the process of working up the Evans case and the existing partnerships that we had with other organizations and private counsel, really put us in a great position to capitalize on our existing relationships and to build on the expertise that we had and the connections that we had as well as to develop additional relationships.

Karen Loewy ([08:05](#)):

When we do this kind of collaboration, the goal is, again, as I said, both about messenger and messages, it's about highlighting for the court the real stakes of who is affected by the court's opinions and the decisions that the judges are going to make, or the justices are going to make. It is designed to reflect to the intersectionality of the communities that we serve, and really shine a light on the ways in which discrimination uniquely impacts the most vulnerable members of our communities.

Karen Loewy ([08:34](#)):

So whenever we are working on a case, particularly at the US Supreme Court, it really is designed to maximize those relationships, increase those relationships, collaborations with organizations that focus on other civil rights movement, and that continues across our work, whether we're at the US Supreme Court or not.

Alex Berg ([08:53](#)):

Getting back into Bostock specifically; Trump appointed conservative Justice Neil Gorsuch wrote the decision. Was that a surprise?

Karen Loewy ([09:01](#)):

Honestly, it wasn't. We found out that the court was taking these cases. We knew that it would end up getting heard after Justice Kennedy's retirement. So we knew that on the whole, it was going to be a pretty conservative court that we were making the case to here.

Karen Loewy ([09:16](#)):

But here's the thing about Justice Gorsuch. Justice Gorsuch is a textualist through and through. And so, unlike in a constitutional case where the arguments are really founded in broad principles of liberty and inequality, we knew that this case was really about the meaning of the statutory text of Title VII. And making the case that the discrimination that LGBTQ people experience "because of sex", that's the language of the statute, we knew that in order to win this case, we were going to need to bring along a justice like Justice Gorsuch, who is so committed to the text. And so when the decision came down and he had drafted it, it was clear that our strategy was right on point, that framing this as narrowly as we did as really being around what Title VII means, what is words mean, was an effective strategy.

Speaker 3 ([10:15](#)):

Conservative Justice Neil Gorsuch wrote the six to three decision, joined by the court's four liberals and Chief Justice John Roberts. Gorsuch's writing "An employer who fires an individual merely for being gay or transgender defies the law."

Alex Berg ([10:30](#)):

Earlier, you mentioned Attorney Greg Nevins. In our episode on the Hively case, he mentioned Bostock and the work he did with the team leading up to this case many years prior to the ruling. Can you speak to the process here and how each set of case work builds upon other case work?

Karen Loewy ([10:46](#)):

Absolutely. Really I have to just laud Greg's really strategic leadership in leading this work. It is absolutely the case that you build from one victory to another victory. And in this context, as I said, there were sort of two streams of law. There was all really largely positive law in the context of recognizing protections for transgender people in the employment context, and there was actually quite bad law in protecting lesbian, gay, and bisexual people from employment discrimination.

Karen Loewy ([11:17](#)):

For some reason, even the most conservative of courts were really able to see that when you discriminate against a person because of transgender status, because of their trans identity, that that's clearly rooted in sex discrimination. And in the context of sexual orientation, these conservative courts just kept saying, "Well, that's just something different. It's just something different." And Greg's leadership, frankly, in pushing this work, culminated in the Hively case, in which in the Seventh Circuit Court of Appeals found plainly that the discrimination that Kim Hively faced was because of her sex. When the 11th Circuit Court of Appeals addressed Jameka Evans' case, they went the opposite way. And so that was why we were really looking forward to the US Supreme Court, taking one of these cases and bringing it to resolution.

Karen Loewy ([12:13](#)):

So case by case, circuit by circuit, it's a very deliberate strategy to try and build wins, build consensus in understanding of the law so that when it does finally reach the US Supreme Court, that sort of building understanding of the way the law is supposed to work, is there.

Alex Berg ([12:33](#)):

Yeah, you've really laid out just how that building process works. So how does the Bostock ruling impact future anti-discrimination cases?

Karen Loewy ([12:42](#)):

The Bostock decision has really huge ramifications for discrimination cases in a variety of contexts. Definitely in the context of employment discrimination, where it's now crystal clear that LGBTQ people are protected from employment discrimination by federal law. This applies across the country. No longer can people say, "Well, my state doesn't have these protections," because this is federal law, and in fact, your country has these protections.

Karen Loewy ([13:10](#)):

More broadly, the Bostock decision says that for purposes of federal civil rights law, the discrimination that LGBTQ people experience is sex discrimination. And Title VII is not the only statute that includes those kinds of sex discrimination protections. The Fair Housing Act, Section 1557 of the Affordable Care Act, Title IX. So we're talking about housing. We're talking about healthcare. We're talking about education. We're talking about broad protections in every aspect of people's public lives. So having a clear declaration from the Supreme Court that this is how sex discrimination protections are supposed to apply really has really incredible ramifications.

Alex Berg ([13:56](#)):

Absolutely. I'm just thinking back to the day when this decision came out and how momentous it all felt. Is there anything else that you want to add about this case or that people should know about it?

Karen Loewy ([14:07](#)):

Well, I guess what I would say, this case is a perfect example of the kind of long-term, big picture strategy that goes into this kind of victory and its far-reaching ramifications. This isn't something that happened overnight. This is something that required vision. It's something that required collaboration. It's something that required tenacity and figuring out ways to move forward, to borrow a phrase from my colleague, Evan Wilson. There's a way in which you take every loss and learn from it. There's a way in which you take every victory and build on it. This is in many ways the core of what I feel Lambda Legal does best, and has always done, in really being thoughtful and collaborative and strategic to really achieve civil rights victories for the communities that we serve.

Alex Berg ([15:09](#)):

Well, that is such a moving and well said note to leave our conversation on. Thank you so much for joining me, Karen.

Karen Loewy ([15:15](#)):

My pleasure. Thanks so much for having me.

Alex Berg ([15:19](#)):

Thank you for listening to this week's episode of Making the Case with Lambda Legal. Making the Case is hosted by me, Alex Berg, and written and produced by Erika Kramer for Lambda Legal. Our show is recorded and mixed by Erik Monical for Mouth Media Network. Original music was made for Making the Case by Meghan Rose.

Alex Berg ([15:38](#)):

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