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Supreme Court Nominee Judge Sonia Sotomayor: Record on LGBT Issues

Introduction

HRC has thoroughly researched the judicial record of Judge Sonia Sotomayor regarding issues of concern to the LGBT community. Although she has not considered many cases related to lesbian, gay, bisexual and transgender (“LGBT”) rights, we are encouraged by Judge Sotomayor’s record of fair-minded decisions.

Several of Judge Sotomayor’s decisions have recognized the constitutional right to privacy, first articulated in *Griswold*, which lays the foundation for acknowledging fundamental rights for LGBT people.¹ Judge Sotomayor has also demonstrated an understanding of the discrimination faced by the LGBT community and has shown a willingness to use existing law to prohibit discrimination. Her judicial opinions evince an understanding that discrimination on the basis of sexual orientation triggers Equal Protection rights.

HRC encourages the Senate Judiciary Committee to thoroughly probe Judge Sotomayor’s views on liberty and privacy rights, articulated in cases such as *Griswold*, *Roe*, and *Lawrence*. We also encourage a robust exploration of Judge Sotomayor’s views on Equal Protection, Due Process, and employment discrimination as well as her ability to support full equality under the law for LGBT citizens and their right to marry. In particular and discussed in detail below, Judge Sotomayor’s decision in two cases directly related to LGBT issues, *Holmes v. Artuz*² and *Miller v. City of New York*,³ deserve further scrutiny by the Committee.

Employment Discrimination

The right to earn a living is a fundamental and an integral part of the LGBT community’s struggle for equality. Although federal nondiscrimination laws protect people from employment discrimination based on race, color, sex, religion, and national origin, the LGBT community is not explicitly protected by federal law.

¹ See *Haybeck v. Prodigy Services Company*, 944 F. Supp 326 (S.D. N.Y. 1996). (Holding that an employer cannot be held liable for HIV-positive employee’s failure to disclose HIV-positive status with customer with which he had consensual, unprotected sex. Sotomayor cites *Griswold* as recognizing a right of privacy, particularly in matters of sexuality) and *N.G. v. State of Connecticut*, 382 F.3d. 225 (2d. Cir. 2004), (Sotomayor dissenting in part from the majority opinion holding some strip searches of the minor children plaintiff’s reasonable. Sotomayor finds that the majority opinion too greatly expands existing exceptions to the Fourth Amendment right to privacy).

² *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926, 1-2, (S.D.N.Y. 1995)

³ *Miller v. City of New York*, 2006 U.S. App. LEXIS 10730 (2d. Cir. April 26, 2006).

In *Miller v. City of New York*,⁴ Sotomayor was part of a three judge panel on the United States Court of Appeals for the Second Circuit which overturned the dismissal of a man's employment discrimination claim by summary order. The man, Gregory Miller, sued the City of New York under a variety of theories, including that he was subject to an impermissible hostile work environment under Title VII.

The Second Circuit order points to Miller's sexual orientation as a gay man. According to Miller, his supervisor claimed Miller was not a "real man" and tried to "toughen him up" by assigning Miller work involving heavy lifting. The district court dismissed Miller's claim, finding that Miller did not offer sufficient evidence that he suffered discrimination on the basis of sex, as opposed to sexual orientation.

The Second Circuit disagreed. The Court vacated the district court's dismissal of Miller's hostile work environment claim. While they agreed discrimination on the basis of sexual orientation is not actionable under Title VII, they held that sex stereotyping is actionable as discrimination on the basis of sex. The Court found that Miller had presented enough evidence that he was discriminated against because of his failure to conform to gender norms to proceed with his case.

The ability of the LGBT community to present discrimination claims based on failure to conform to gender norms is crucial to the advancement of federal non-discrimination law. The Court's, and by association, Sotomayor's, ruling continued a line of positive decisions regarding sex stereotyping as a form of sex discrimination. Her decision indicates that she is sensitive to the discrimination faced by the LGBT community and respects the constitutional authority of Congress to provide statutory remedies for discrimination. As such, this case and the theory of sex stereotyping should be included in any line of questioning related to federal non-discrimination law.

Equal Protection and Due Process

In *Holmes v. Artuz*,⁵ a gay prisoner who was employed by the prison to serve food sued the prison *pro se* after they removed him from his position because of his sexual orientation. Despite Judge Sotomayor's acknowledgement that a prison inmate has no constitutional right to a specific prison job or to keep that job, Sotomayor denied defendants' motion to dismiss and directed the Pro Se Office to advertise the case for six months to members of the Court's Pro Bono Panel. Sotomayor therefore provided the plaintiff prisoner with another opportunity to make his case, recognizing that the ability of the plaintiff to retain counsel would significantly improve the quality of the legal arguments advanced.

Sotomayor also said, "this interval will also allow the Court to await potential guidance from the Supreme Court in *Evans v. Romer* which may elucidate further the equal protection rights of persons with homosexual, lesbian or bisexual orientation."⁶ Finally, Sotomayor notes in dicta that the plaintiff's allegation that he was removed from his job because of his sexual orientation may state a federal civil rights claim under Section 1983⁷ for violation of his Equal Protection rights.

Her statement regarding Equal Protection rights is all the more telling because of the timing of

⁴ *Id.*

⁵ *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926, 1-2, (S.D.N.Y. 1995)

⁶ *Id.*

⁷ 42 U.S.C. §1983 (LEXIS 2009).

the case. At the time, *Romer* was before the U.S. Supreme Court. Sotomayor adopts the holding of several other circuits in what eventually becomes the holding in *Romer*; that bare animus directed toward gay individuals is not a legitimate state interest. This case illustrates that Sotomayor has a demonstrated understanding that discrimination on the basis of sexual orientation implicates Equal Protection rights.

Her decision is cited in three district court opinions. In one opinion, *Vega v. Artus*,⁸ the District Court for the Northern District of New York cites Sotomayor's opinion and order for the proposition that "sexual orientation has been held to be a basis for an equal protection claim under Section 1983."⁹

The *Holmes* case was the subject of a line of questioning by Senator Ashcroft during her confirmation hearing for the Second Circuit in 1997. Sotomayor gives a response to Senator Ashcroft's loaded question regarding the creation of "special" constitutional rights that reflects her theory of judicial restraint and the proper deference to the role of a District Court judge. Senator Ashcroft presses her to admit she is in favor of "special" rights for "homosexuals." Sotomayor refuses to engage with him. She states that "homosexuals have the same constitutional rights as every citizen of the United States which is not to have government action taken against them arbitrarily and capriciously." She says the Constitution should only be amended sparingly.

Although this is not the strongest statement for LGBT equality, we are aware that it would not have been appropriate for her in a congressional confirmation hearing for a Court of Appeals position to talk about recognizing constitutional rights not yet addressed by the Supreme Court. Her opinion in *Holmes* indicates she does recognize that under the Equal Protection Clause, sexual orientation discrimination cannot be based on pure animus but must be rationally related to a legitimate government purpose. Again, her opinion in *Holmes* is telling because *Romer* had not yet been decided by the Supreme Court.

Senator Sessions later questions her about the fact that she allowed the plaintiff prisoner a chance to find pro bono counsel for his case. She defends her decision and refers again to *Romer*. She reiterates that the Supreme Court was considering an Equal Protection claim that might "elucidate this area." Again, here she is showing deference to the proper role of a District Court judge vis à vis the Supreme Court.

Although her responses were measured, Sotomayor's confirmation testimony deserves further probing. Her testimony underscores the need for the Senate Judiciary Committee to conduct a thorough examination of Sotomayor's record, including her understanding of constitutional rights and the LGBT community.

Conclusion

Sotomayor record on issues of concern to the LGBT community is thin. We are pleased that overall, she has shown a willingness to follow precedent and exercise judicial restraint while using the power of the law to address discrimination. She has ensured that claims of discrimination in both employment and public accommodation cases are fully and fairly adjudicated. Importantly, she recognizes the role that courts play in the lives of every American.

⁸ 2009 U.S. Dist. LEXIS 24860 (Mar. 26, 2009).

⁹ *Id.* at 209.

However, her lack of public statements and judicial opinions on issues of vital concern to the LGBT community make it vital that the Senate Judiciary Committee carefully probe Sotomayor' views on Equal Protection and fundamental rights. The Committee must conduct a robust exploration of Sotomayor's judicial philosophy to ensure that she can preside over LGBT rights cases fairly.