



# [Client Alert] Supreme Court to Decide Whether Title VII Prohibits Discrimination Against LGBT Employees

May 7, 2019

## **SUPREME COURT TO DECIDE WHETHER TITLE VII PROHIBITS DISCRIMINATION AGAINST LGBT EMPLOYEES**

On April 22, 2019, the Supreme Court of the United States granted certiorari in three cases involving the issue of whether Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination on the basis of an individual’s sexual orientation or gender identity. The Supreme Court’s decisions in these cases will resolve a long-standing split among U.S. appellate courts regarding whether federal law prohibits discrimination against gay, lesbian and bi-sexual employees.

### **Background**

There is currently no federal statute that expressly prohibits discrimination on the basis of sexual orientation or gender identity. Nearly every Congress since 1994 has introduced the Employment Non-Discrimination Act (“ENDA”), which would amend Title VII to prohibit such discrimination, but the statute has never been passed.

Traditionally, federal courts have held that as a matter of black letter law Title VII did not prohibit discrimination on the basis of sexual orientation. For example, in 1999 the First Circuit held that “[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment [on the basis of] sexual orientation.”

However, within the last eight years the Equal Employment Opportunity Commission (“EEOC”) has encouraged federal courts to expand Title VII to prohibit discrimination on the basis of sexual orientation and transgender status. Specifically, the EEOC has argued that existing Supreme Court precedent provides that Title VII already prohibits discrimination on the basis of gender

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stereotypes. For example, in the landmark decision *Price Waterhouse v. Hopkins* the Supreme Court held that an employer could not lawfully refuse to promote an employee because she did not “dress” or “act” in a manner that conformed with the employer’s gender stereotypes. The EEOC has reasoned that discrimination on the basis of sexual orientation or gender identity is a form of such sex-based stereotyping.

### **The Circuit Split**

Since the EEOC took the position that Title VII prohibits discrimination against LGBT employees, the majority of courts have adhered to precedent holding that Title VII does not extend to sexual orientation or gender identity. However, a substantial minority of courts have been persuaded by the EEOC’s arguments.

Both the Second Circuit and the Seventh Circuit have recently overturned existing precedent to hold that Title VII extends to sexual orientation claims. In April 2017, the Seventh Circuit became the first federal court of appeals to hold that Title VII protects employees from discrimination on the basis of sexual orientation. The Court reasoned that it was not creating a new protected class, but rather that the plaintiff had been unlawfully discriminated against based on her non-conformity with the stereotype of female heterosexuality. Similarly, numerous federal courts have held that Title VII prohibits discrimination on the basis of an employee’s transgender status.

### **The Decisions Under Review**

The lower court decisions to be reviewed by the Supreme Court are: (1) *R.G. & G.R. Harris Funeral Homes v. EEOC*; (2) *Altitude Express, Inc. v. Zarda*; and (3) *Bostock v. Clayton County*.

(1) **R.G. & G.R. Harris Funeral Homes v. EEOC**: In *R.G. & G.R. Funeral Homes*, the EEOC filed suit on behalf of an employee who alleged that her employer terminated her after she revealed that she intended to transition from male to female. The Sixth Circuit ruled in favor of the EEOC and held that “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex” and “discrimination on the basis of transgender and transitioning status violates Title VII.”

Following the employer’s appeal of this case, the Department of Justice filed a brief arguing that the definition of “sex” does not extend to “gender identity.” Based on the Sixth Circuit’s holding in *R.G. & G.R. Funeral Homes*, the Supreme Court is set to consider “[w]hether Title VII 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).”

(2) **Altitude Express, Inc. v. Zarda**: In *Zarda*, the plaintiff is a sky-diving instructor who alleges that he was terminated after a customer informed his employer that he was gay. The Second Circuit refused to

dismiss the employee's sex discrimination claim and joined the Seventh Circuit in holding Title VII extends to sexual orientation claims.

(3) ***Bostock v. Clayton County***: In *Bostock*, the plaintiff alleges that he was terminated from his position as a child welfare services coordinator in Clayton County, Georgia after his employer discovered he is gay. In 2018, the full Eleventh Circuit denied an en banc appeal of the lower court's decision. In *Bostock* and *Zarda*, the Supreme Court will decide "[W]hether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of...sex' within the meaning of Title VII of the Civil Rights Act of 1964."

### **Bottom Line**

The Supreme Court's decisions in these cases will bring much needed clarity regarding the scope of Title VII's protections for LGBT employees. The Supreme Court will render decisions in these cases by the summer of 2020. Until the Supreme Court resolves this circuit split, we advise employers to continue to follow state and local anti-discrimination laws in the jurisdictions where they have operations.