

U.S. Supreme Court to Review Trio of Cases Concerning LGBTQ Employee Rights under Title VII

Cameryn J. Hinton

Greenbaum, Rowe, Smith & Davis LLP Client Alert

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In its next term, the U.S. Supreme Court will review a trio of employment discrimination cases considering whether federal sex discrimination protections under Title VII apply to an employee's sexual orientation and gender identity.

Title VII prohibits employers from discriminating "against any individual . . . because of such individual's . . . sex." The federal circuit courts have long been divided on whether that prohibition extends to sexual orientation and gender identity.

In two of the cases the Court will hear, *Altitude Express v. Zarda* from the Second Circuit, and *R.G. and G.R. Harris Funeral Homes v. EEOC* from the Sixth Circuit, the terminated employees prevailed on claims alleging specifically illegal termination by relying on Title VII's protection against sex discrimination based upon sexual orientation and gender identity. The Eleventh Circuit took the opposite approach in *Bostock v. Clayton County, Georgia* and declined to extend such protection to the employee.

An overview of the three cases before the Court follows:

In *Altitude Express v. Zarda*, the Court will review the Second Circuit's finding that Zarda, a gay man, was illegally terminated from his position as a skydiving instructor because of his sexual orientation, and in violation of the prohibition of employment discrimination "because of sex" under Title VII.

In *Bostock v. Clayton County, Georgia*, the employer successfully defended against Bostock's illegal termination suit that alleged discrimination based upon his sexual orientation. Bostock, a social worker, also presented his claim in the U.S. District Court of Northern Georgia as a violation of Title VII's prohibition of sex discrimination in employment. The district court dismissed Bostock's claims, noting the Eleventh Circuit's refusal in other matters to extend Title VII's sex discrimination protections to sexual orientation.

Lastly, in *R.G. and G.R. Harris Funeral Homes v. EEOC* the employer illegally discriminated against its transgender employee Aimee Stephens. Stephens, who had previously identified as a man in her position as a funeral director, was fired after informing her employer that she would begin identifying as a woman and wearing women's business attire at work. The EEOC sued on Stephens behalf. The Sixth Circuit agreed with the EEOC's position that Title VII protected Stephens from discrimination based on gender identity. The circuit court also held that the employer violated the Court's 1989 decision in *Price Waterhouse v. Hopkins*, prohibiting discrimination based on one's failure to conform to gender

stereotypes.

The Court has consolidated *Bostock* and *Zarda*, as they present an identical question – whether Title VII protections extend to sexual orientation. The Court narrowed its scope of review for *R.G. and G.R. Harris* to whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping pursuant to the Court’s ruling in *Price Waterhouse*.

While twenty-one states, including New Jersey, have anti-discrimination laws protecting individuals against employment discrimination on the basis of sexual orientation and gender identity, there is no federal mandate protecting LGBTQ or transgender employees. New Jersey’s Law Against Discrimination (NJLAD) prohibits the treatment experienced by the employees in the cases presented for review. Since 1991, New Jersey has recognized sexual orientation as a protected class, and has prohibited employment discrimination on the basis of sexual or affectional orientation, including gender identity or expression.

Illegal employment discrimination includes, but is not limited to, refusal to hire, termination, harassment, and unequal salary or unfair treatment in other terms, conditions or privileges of employment. The Supreme Court’s review of these cases could finally bring federal protection for LGBTQ and transgender employees in line with that provided by New Jersey should it extend the sex discrimination protections under Title VII to sexual orientation and gender identity.

Moreover, the decision will reveal the impact the Court’s newly constructed conservative majority will have on the expansion of LGBTQ rights. The prior decision of the Supreme Court regarding this issue, *Obergefell v. Hodges*, guaranteed same-sex couples the right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. These Title VII cases will be closely watched and will likely draw a flurry of amicus curiae filings by civil rights organizations such as the ACLU, Lambda Legal, Freedom for All Americans, and Americans United for Separation of Church and State.

New Jersey employers should consult with counsel to ensure that their current anti-discrimination policies encompass sexual orientation and gender identity as a protected class. It will also be prudent to be prepared for a possible expansion of protections resulting from the Supreme Court’s decision in Spring 2020.

If you have any questions concerning the issues discussed in this Alert, please contact the author, **Cameryn J. Hinton**, a member of the firm’s **Employment Law Practice Group**.