

Title VII/LGBT – Is Sexual Orientation or Transgender-Based Discrimination Considered Discrimination “Because of ... Sex”?

Employers across the nation should be closely monitoring three cases currently pending before the Supreme Court relating to the scope of protection, if any, Title VII of the Civil Rights Act of 1964 affords against sexual orientation and gender identity-based discrimination. Specifically, the Supreme Court is expected to rule whether the language in Title VII that prohibits employment discrimination “because of ... sex” also extends to sexual orientation and/or transgender-based discrimination.

- In *Altitude Express v. Zarda*, Don Zarda was fired for revealing his sexual orientation to a customer – an incident his employer referred to as sharing his “escapades” publicly. Zarda brought a claim in federal court alleging, among other things, that Altitude Express violated Title VII of the Civil Rights Act of 1964 by terminating him because of his sexual orientation. The district court ruled for Altitude Express, finding that Title VII does not protect against discrimination based on sexual orientation. Thereafter, Zarda appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed the ruling. The panel declined Zarda’s request that it reconsider the Circuit’s prior interpretation of Title VII, as only the court sitting *en banc* can do that. The Second Circuit then agreed to rehear the case *en banc* and expressly overruled its own prior cases, finding that Title VII’s prohibition on discrimination because of sex, necessarily includes discrimination because of sexual orientation.
- In *Bostock v. Clayton County*, Gerald Bostock, a gay man, was employed as an official with Clayton County since 2003, with good performance records through the years. In early 2013, he joined a gay softball league where he promoted the County’s activities. A few months later, co-workers who had significant decision-making influence began openly criticizing Bostock’s participation in the league. Shortly thereafter, the County conducted an audit of funds controlled by Bostock and subsequently fired him for “conduct unbecoming of a County employee.” Bostock filed suit alleging the County used the claim of misspent funds as a pretext for discrimination based on sexual orientation, in violation of Title VII of the Civil Rights Act of 1964. The district court dismissed the claim finding that Title VII does not include protection against sexual orientation discrimination. Bostock appealed, and the U.S. Court of Appeals for the Eleventh Circuit upheld the decision. In addition to noting procedural deficiencies in Bostock’s appeal, the Eleventh Circuit panel pointed out that it cannot overrule a prior panel’s holding in the absence of an intervening Supreme Court or Eleventh Circuit *en banc* decision.

Related Practices

[Employment Law](#)

Attorneys by State

FLORIDA

[Autumn P. George](#)

LOUISIANA

[Doris T. Bobadilla](#)

[Wendell Hall](#)

[Jose L. Barro](#)

- In *R.G. & G.R. Harris Funeral Homes Inc.*, Aimee Stephens considered herself a transgender woman for most of her adult life but presented herself as a male. In 2013, she decided to come out to family and friends, and arranged to undergo reassignment surgery within the next year, expressing herself as a woman prior to transition as part of real-life experience. At that time, she had been an employee of R.G. & G.R. Harris Funeral Homes for six years, and had an excellent work record. Before taking a vacation, she wrote her supervisor and advised that she would return to work in attire appropriate for female employees as outlined in the employee handbook. Two weeks later, Stephens was notified by mail that she had been terminated by the funeral home's owner. Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she had been terminated based on unlawful sex discrimination. After conducting an investigation, the EEOC brought a lawsuit charging that the Funeral Home violated 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 stereotypes. The district court granted summary judgment in favor of the Funeral Home. The U.S. Court of Appeals for the Sixth Circuit reversed, holding that the Funeral Home's termination of Stephens based on her transgender status constituted sex discrimination in violation of Title VII.

The Supreme Court heard consolidated oral arguments in all three cases on October 8, 2019, and the rulings are expected in the first part of 2020.

The issues presented have become the subject of an increasing amount of litigation. In 2015, the EEOC received a total of 1,412 charges that included allegations of sex discrimination related to sexual orientation and/or gender identity/transgender status. This represents an increase of approximately 28% over the total LGBT charges filed in 2014. Outside of the federal arena, protections for gay and transgender employees vary throughout the country with less than half of the states offering the full scope of protections at issue in these three cases. A majority of southern states do not prohibit sexual orientation or transgender-based discrimination in private or public employment, but local laws may provide protections for both public and private employees.

In addition to monitoring these three cases, employers should consider taking the following steps at this time:

- Review all LGBT discrimination laws in your jurisdiction being mindful that local laws may provide protection for LGBT employees;
- Ensure your policies comply with current LGBT discrimination laws;
- Identify any policies that could be impacted by rulings in these cases, particularly policies relating to hiring, termination and harassment, as well as the terms, conditions, and privileges of employment; and,
- Seek legal advice to update your policies before and/or after the Supreme Court ruling to ensure compliance.

**The information provided does not, and is not intended to, constitute legal advice