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TITLE VII/LGBT
IS SEXUAL ORIENTATION OR TRANSGENDER-BASED DISCRIMINATION

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.

- 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 Equal Pay Act and Salary History Bans: What You Need to Know

One of the other most anticipated employment cases before the Supreme Court this term was *Yovino v. Rizo*. The issue was whether an employer may properly rely on a new hire's salary history to establish starting pay under the federal Equal Pay Act (EPA).

Passed in 1963, the EPA was aimed at abolishing sex-based wage disparity. Yet, according to recent data from the U.S. Census Bureau, women earn only 80.7 cents for every dollar earned by men. In *Yovino*, a female employee was hired as a math consultant by the Fresno County Board of Education. Later, over an office lunch, she learned that her more recently hired male colleagues earned more than she did. The County defended the salary differential based on its policy that used an employee's past salary to determine his or her pay rate and argued that it was a nondiscriminatory "factor other than sex", while the employee challenging the policy contended that it was impermissible because it perpetuated discriminatory pay practices. In the end, the Supreme Court's *per curiam* ruling sidestepped the question and sent the case back to the Ninth Circuit.

Recognizing that the use of prior salary history can serve to disadvantage women, and with the purpose of ending the cycle of pay discrimination, as of November 1, 2019, **18 states** and **19 local governments** passed legislation that prohibit employers from asking job applicants about their salary history. The specifics of the laws vary: some bar employers from using an applicant's pay history to set compensation if it is discovered, or even if volunteered by the applicant; others require employers to provide applicants with a salary range for the position sought and some prohibit employers from taking disciplinary action against workers for discussing their wages.

In the Gulf South, the following states and cities have implemented salary history bans: Alabama; Atlanta, Georgia (for city agencies); New Orleans, Louisiana (for city departments); Jackson, Mississippi (for city agencies); and Missouri (for Kansas City departments and state-wide for employers with 6 or more employees). The scope of these bans differ dramatically. Even if your jurisdiction does not presently have a salary history ban, you should be mindful that it is an open question whether using an applicant's salary history to set his or her pay is permissible under the Equal Pay Act.

TIPS FOR COMPLIANCE WITH SALARY HISTORY BANS AND EQUAL PAY LAWS

- Review current and pending salary history ban and equal pay laws in your jurisdiction;

- Ensure job applications do not ask applicants to disclose their salary histories or prior pay;

- Do not ask applicants about their salary history during the interview process;

- If your company uses recruiters to assist with hiring, ensure that those companies do not seek salary history information from applicants;

- Employers may rely on an applicant's salary requirements and expectations, and use an applicant's experience and education to determine pay; and,

- Review salary data for men and women in the same positions to ensure that any pay disparity is justified by experience, education or job performance and not based on gender.

WHAT ARE THE "TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT" REFERRED TO IN TITLE VII AND WHY IT MATTERS

"Adverse employment action" is judicial shorthand for determining whether a plaintiff has demonstrated that an employer's action sufficiently affected the employee's "compensation, terms, conditions, or privileges of employment." This is a crucial element to sustain a § 703 claim under Title VII of the Civil Rights Act of 1964. However, what does "adverse employment action" really mean and how much harm must be alleged to satisfy the § 703 harm element? Examples of employer actions that are clearly adverse include denying a position to an employee who meets the minimum qualification, decreasing employee compensation or denying an employee a raise, or demoting an employee. Jurisdictions differ on the type of adverse employment action that must be shown to state a claim of discrimination under Title VII.

A writ of certiorari has been filed in *Peterson v. Linear Controls* asking the Supreme Court to rule on this issue: whether the "terms, conditions, or privileges of employment" covered by § 703(a)(1) of Title VII of the Civil Rights Act of 1964 are limited only to hiring, firing, promotions, compensation and leave. A ruling would provide clarity and consistency throughout the country on this critical issue.

In that case, *Peterson*, an African-American, brought suit against his former employer alleging, among other things, that he suffered racial discrimination when Linear Controls segregated the ten person work crew to which he was assigned. He claimed that the 5 black workers had to work outside and were denied water breaks, while the 5 white employees were assigned to work inside with air conditioning and were given water breaks.

In keeping with its precedent, the Fifth Circuit affirmed the grant of summary judgment in favor of Linear Controls holding that to establish discrimination under Title VII, the conduct must impact an "ultimate employment decision," limited only to those that concern hiring, leave, discharge, promotions and compensation. Because the complaint related only to an alleged discriminatory work assignment, the Court concluded that Peterson's claim failed.

While it is plain that the "terms, conditions, or privileges of employment" do not include every employment decision that makes an employee unhappy, the Fifth Circuit, along with the Third and the Eleventh, have taken a restrictive approach to the issue, concluding that Title VII only reaches matters that affect the employee's pocketbook. On the other hand, the Second, Sixth, Seventh,

Eighth, Ninth and Tenth Circuits have interpreted the phrase more broadly. And the Second and Seventh Circuits have ruled that discriminatory work assignments are violations of Title VII, while the Third and Fifth Circuits have concluded that they are not.

If the Supreme Court were to take the case and rule on the issue, it could potentially impact how the federal courts in all of the circuits interpret Title VII and provide a common understanding and uniform application of Title VII's prohibition on discrimination. Stay tuned. . .

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