

Supreme Court Grants Review of Three Title VII Cases Concerning Protections for LGBTQ Workers

Earlier today, the Supreme Court of the United States granted review of a triad of cases addressing whether Title VII, the federal statute prohibiting certain types of discrimination in employment, prohibits discrimination against LGBTQ employees. Employers should closely monitor these cases because the justices' rulings could have major implications for employers nationwide.

The text of Title VII states that it is an "unlawful employment practice" if an employer fails or refuses to hire, discharges, or otherwise discriminates against any individual with respect to his or her compensation, terms, conditions, or privileges of employment because of such individual's "sex." Recently, several federal courts of appeals have been asked to decide whether Title VII's prohibition on discrimination because of "sex" prohibits an employer from discriminating based on an employee's or applicant's sexual orientation, or because an employee or applicant is transgender.

Today, the Supreme Court granted review of three cases to settle a split between federal circuit courts of appeals on this issue—two cases related to sexual orientation discrimination and one case related to transgender discrimination.

The Court consolidated two cases, *Altitude Express v. Zarda* and *Bostock v. Clayton County, Georgia*, for one total hour of argument. In each of those cases, the plaintiff claims he was fired because he is gay. In *Altitude Express*, the full United States Court of Appeals for the Second Circuit reversed the trial court's dismissal of the plaintiff's Title VII claims, concluding that because sexual orientation discrimination is "a subset of sex discrimination," it is prohibited by Title VII. In *Bostock*, the United States Court of Appeals for the Eleventh Circuit reached the opposite conclusion, agreeing with the trial court that Title VII does not prohibit sexual-orientation discrimination. The resulting circuit split prompted the Supreme Court to intervene.

The Supreme Court also accepted review of a third case, to be separately argued, that addresses whether Title VII prohibits discrimination against transgender employees or

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applicants. In *R.G. & G.R. Harris Funeral Homes v. EEOC*, a funeral home was sued after it fired an employee who identified as a man at the time of his hiring, but years later informed his employer that he identified as a woman and wanted to wear women's clothing to work. The employer argues the employee's conduct violated the funeral home's dress code and the termination was made for genuinely-held religious reasons. The Supreme Court granted review to decide whether Title VII prohibits an employer from discriminating based on stereotypes of how a man or woman should appear.

The Supreme Court's rulings in these cases could have significant ramifications for employers nationwide. Pundits are expecting a close decision in each case—possibly a 5-4 decision split down ideological lines. The Supreme Court's decision will resolve inconsistent opinions in federal-appellate courts across the country, including circuits that are currently deciding these same issues. For example, just last Wednesday, the United States Court of Appeals for the Eighth Circuit held oral arguments on whether Title VII prohibits sexual orientation discrimination in *Horton v. Midwest Geriatric Management, LLC*.

Although no immediate action is required, employers would be wise to begin considering whether policy changes are needed if the Supreme Court adopts an expansive view on Title VII. Moreover, even if the Supreme Court excludes sexual orientation and/or transgender status from within the ambit of "sex" discrimination, employers should be aware of state laws prohibiting discrimination based on sexual orientation and gender identity, which will remain unaffected by the Supreme Court's decision. Twenty-eight states have laws fully protecting employees from discrimination on the basis of sexual orientation or gender identity, and several others have passed limited protections to LGBTQ employees. The justices' rulings could also have implications outside the workplace. For example, courts routinely look to Title VII case law in other contexts, including cases involving education under Title IX.

The trio of cases is expected to be heard during the Supreme Court's term beginning on October 1. The Court's decision will likely be issued in June or July of 2020.