



## CLIENT ALERT

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### **LGBTQ RIGHTS ON THE DOCKET: *Supreme Court to Decide Whether Title VII Protects Individuals from Discrimination Based on Their Sexual Orientation or Gender Identity***

**Cynthia B. Morgan**

On April 22, 2019, the United States Supreme Court announced that it would decide whether federal anti-discrimination laws protect LGBTQ workers from discrimination by granting certiorari in three cases: Bostock v. Clayton County; Altitude Express, Inc. v. Zarda; and R.G. & G.R. Harris Funeral Homes v. EEOC.

The decision to hear this trio of cases means that the Supreme Court will confront whether discrimination on the basis of sexual orientation and gender identity is discrimination “because of sex” and is, therefore, prohibited under Title VII of the Civil Rights Act of 1964 (Title VII).

The Court’s decision to hear the cases comes amidst conflicting opinions from the circuit courts and will have far-reaching implications for employers and employees. Currently, only 21 states explicitly prohibit discrimination on the basis of sexual orientation and gender identity. For LGBTQ individuals in the remaining states, Title VII provides the only possible protection against discrimination.

The deeply-divided Court’s decision(s) will most likely provide some clarity to employers and employees by offering a

more definitive interpretation of Title VII and the protections it affords.

By way of background, Title VII makes it unlawful for an employer to “fail or refuse to hire or to discharge...or to otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>1</sup> The language under scrutiny in all three cases is whether discrimination based on sexual orientation and gender identity is discrimination “because of...an individual’s...sex.”

Traditionally, courts have not allowed sexual orientation or gender identity claims under Title VII, leaving LGBTQ individuals to assert claims of workplace discrimination under state law, if state statutes permit them to do so. However, in 2012 and 2015 respectively, the Equal Employment Opportunity Commission (EEOC), with whom aggrieved parties must file a charge of discrimination prior to filing a lawsuit in court, held that discrimination on the basis of gender identity and sexual orientation is discrimination “because of...[an]

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<sup>1</sup> 42 U.S.C. § 2000e-2(a)(1)

individual's...sex", and is, therefore, unlawful.<sup>2</sup>

In 2017, the United States Court of Appeals for the Seventh Circuit became the first Court of Appeals to adopt the EEOC's reasoning, finding that an employer violated Title VII by denying a lesbian professor a promotion because she was attracted to women when a male professor attracted to women would not have been denied a promotion under the same circumstances.<sup>3</sup> The Court determined that the female professor would not have been denied the promotion "but for" her sex and thus, that her sexual orientation was a subset of sex and protected under Title VII.

The United States Court of Appeals for the Second Circuit followed suit in Zarda v. Altitude Express, Inc.,<sup>4</sup> holding that discrimination on the basis of sexual orientation is discrimination "because of . . . sex" and, therefore, is prohibited under Title VII. The Zarda Court concluded that sexual orientation discrimination is a form of sex discrimination because: (1) sexual

orientation is identified by a person's sex (i.e., a female attracted to males is heterosexual while a female attracted to females is homosexual); (2) it is invariably rooted in stereotypes about men and women; and (3) it constitutes prohibited association discrimination (the Second Circuit had previously held that Title VII prohibited an employer from taking action against an employee because of the employee's association with a person of another race).

However, in Bostock v. Clayton County,<sup>5</sup> the United States Court of Appeals for the Eleventh Circuit declined to extend Title VII's protections to sexual orientation discrimination, affirming summary judgment against an employee who alleged that he was terminated because he is gay. In an unpublished per curiam opinion, the Court cited the 1979 case of Blum v. Golf Oil Corporation,<sup>6</sup> which held that "[d]ischarge for homosexuality is not prohibited by Title VII." Blum was affirmed by the Eleventh Circuit in Evans v. Georgia Regional Hospital,<sup>7</sup> and the Court

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<sup>2</sup> See Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, EEOC Appeal No. 0120120821 (April 20, 2012) (EEOC held that discrimination against an individual because that person is transgender, also known as gender identity discrimination, is discrimination because of sex and, therefore, is prohibited by Title VII); David Baldwin v. Dep't of Transportation, EEOC Appeal No. 120133080 (July 15, 2015) (EEOC held that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and, therefore, prohibited under Title VII).

<sup>3</sup> Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017); see also, Rubin, Fortunato & Harbison Client Alert, April 2017,

RE-ORIENTING TITLE VII, Seventh Circuit Holds Sexual Orientation Discrimination Is Prohibited Under Title VII.

<sup>4</sup> 883 F.3d 100 (2nd Cir. 2018); see also Rubin, Fortunato & Harbison Client Alert, March 2018, SEXUAL ORIENTATION DISCRIMINATION IS ACTIONABLE UNDER TITLE VII: The Second Circuit's Holding Flies in Tandem with the Seventh Circuit's in Hively.

<sup>5</sup> 723 Appx. 964 (11th Cir. 2018).

<sup>6</sup> 597 F. 2d 936 (5th Cir. 1979).

<sup>7</sup> 850 F.3d 1248 (11th Cir. 2017).

held that the Evans decision foreclosed Bostock's claims.

The Supreme Court has consolidated Zarda and Bostock together for oral argument.

In the third case, EEOC v. R.G. & G.R. Harris Funeral Homes,<sup>8</sup> the Supreme Court will consider the reach of Title VII's protections to transgendered employees. Specifically, the Court will answer two questions: whether Title VII bars discrimination based on (1) an individual's transgender status; or (2) sex stereotyping under the Supreme Court's landmark decision in Price Waterhouse v. Hopkins,<sup>9</sup> which found that an employer could not discriminate against an employee based on stereotypes of how a man or woman should dress or behave. The United States Courts

of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuits all have found that Title VII protects transgendered individuals from workplace discrimination under these theories; the Tenth Circuit, however, has held that Title VII provides no such protection.

The Supreme Court's ruling in all three cases ideally will settle the deep circuit divide on LGBTQ issues and provide final guidance to employers and employees regarding the scope of Title VII's protections.

*Cynthia B. Morgan is admitted to practice in Pennsylvania. She may be reached at 610-408-2022, or at [cmorgan@rubinfortunato.com](mailto:cmorgan@rubinfortunato.com).*

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<sup>8</sup> 884 F.3d 560 (6th Cir. 2018); see also, Rubin Fortunato & Harbison Client Alerts, March 2018, SIXTH CIRCUIT RESURRECTS EEOC'S TRANSGENDER BIAS CLAIMS AGAINST MICHIGAN FUNERAL HOME,

and March 2018, Will Religious Beliefs Trump Discrimination Protection for LGBT Employees in the Workplace?

<sup>9</sup> 490 U.S. 228 (1989).