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Supreme Uncertainty for LGBTQ Rights: A Look at the Three Title VII Cases Pending Before the High Court

Title VII of the Civil Rights Act of 1964 bans employment discrimination "because of sex." Courts' interpretation of this language has evolved to prohibit discrimination in hiring and promotion, sexual harassment, employment decisions motivated by sex stereotypes, and same-sex harassment.[1] Since 2000, multiple courts (including the Ninth Circuit) have interpreted Title VII to also prohibit discrimination based on gender identity, including nonconformity with gender norms and transgender status. More recently, the Second and Seventh Circuits interpreted the statute to prohibit discrimination because of sexual orientation. These courts' enforcement of Title VII protections have afforded lesbian, gay, bisexual, transgender and queer (LGBTQ) employees greater workplace protections in some parts of the country, approaching those of their straight, cisgender colleagues.

Yet these moderate advances could be taken away shortly, as the U.S. Supreme Court is poised to hear a trio of cases presenting the question of whether Title VII's prohibition of discrimination "because of sex" includes discrimination on the basis of sexual orientation and gender identity. After months of waiting, the Court granted petitions for certiorari in *Altitude Express, Inc. v. Zarda* (17-1623), *Bostock v. Clayton County, Georgia* (17-1618), and *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.* (18-107). These cases could have a significant impact on LGBTQ workers' rights under federal law.

Altitude Express, Inc. v. Zarda (sexual orientation)

In *Zarda*, the Second Circuit, sitting en banc, became the second appellate court in the nation (after the Seventh Circuit in *Hively v. Ivy Tech Community College*) to hold that "sex," as it is used in Title VII, includes sexual orientation.[2] Donald Zarda was a sky diving instructor whose employer, Altitude Express, fired him after he reassured a female client not to worry about being strapped to him for a jump because he was gay "and ha[d] an ex-husband to prove it." She later told her boyfriend about the comment and accused Zarda of inappropriately touching her, which Zarda denied. The boyfriend relayed her complaints to Zarda's supervisor, who terminated his employment. Zarda claimed that he was fired for being gay and not the alleged touching.

Zarda filed suit in 2010, claiming sex discrimination under Title VII and state law. The district court granted partial summary judgment to Altitude Express on the federal claims. Zarda's state law discrimination claims went to trial and also resulted in a judgment for Altitude Express. A Second Circuit panel affirmed the lower court's Title VII ruling because of circuit precedent holding that sex discrimination does not include that based on sexual orientation.

Sitting en banc, the Second Circuit reversed the panel. Writing for the court, Chief Judge Katzmann described multiple reasons why Title VII protects gay, lesbian, and bisexual workers. First, sexual orientation discrimination is sex discrimination per se because "sexual orientation is a function of sex," and taking an adverse employment action based on the gender of the person that the employee is attracted to "is a decision motivated, at least in part, by sex." Second, sexual orientation discrimination is unlawful discrimination on the basis of sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), because it is rooted in stereo-

typical assumptions of how a man or woman should behave. Quoting *Hively*, the court observed that "same-sex [sexual] orientation 'represents the ultimate case of failure to conform' to gender stereotypes." Third, sexual orientation discrimination is associational discrimination because it is "predicated on opposition to romantic association between particular sexes." For all of these reasons, the court concluded that Zarda stated a valid claim under Title VII. Altitude Express subsequently appealed to the Supreme Court.

Bostock v. Clayton County, Georgia (sexual orientation)

Conversely, in *Bostock*, an Eleventh Circuit panel issued a short per curiam opinion affirming the district court's dismissal of Gerald Lynn Bostock's Title VII sex discrimination complaint.[3] Bostock was a ten-year court-appointed advocate at the Clayton County juvenile court who endured ridicule and disparaging remarks at work after he mentioned that he participated in a gay softball league. Bostock was terminated three months later. In his pro se complaint, Bostock alleged Title VII sex discrimination because of his sexual orientation. The court dismissed the complaint.

Bostock appealed with counsel, but the Eleventh Circuit panel affirmed, citing precedent that Title VII did not prohibit sexual orientation discrimination.[4] The court denied Bostock's petition for en banc review of the decision.[5] Bostock subsequently appealed to the Supreme Court.

R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C. (gender identity)

In *Harris Funeral Homes*, the Sixth Circuit ruled in favor of a transgender woman alleging sex discrimination under Title VII. Aimee Stephens worked for almost six years as a funeral home director, but she was fired after she transitioned at work and asked to wear the female attire authorized by her workplace dress code. After Stephens filed an administrative charge, the EEOC took her case and initiated a Title VII action against the funeral home.

The district court granted summary judgment to the funeral home after finding that, although the EEOC had sufficiently demonstrated a Title VII violation based on binding Sixth Circuit precedent, the employer had a viable religious-based affirmative defense. But the Sixth Circuit panel reversed. The court first reiterated its previous decisions that discrimination because of transgender status is unlawful sex-stereotyping discrimination. Second, the panel held for the first time that discrimination because of transgender and transitioning status is per se sex discrimination. The court held that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex," and that "[t]here is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." The panel concluded that unlawful sex discrimination extends to requiring transgender workers to comply with a sex-specific dress code that is inconsistent with their gender identity. The panel also rejected the employer's religious-based defenses. The funeral home appealed, requesting review only of whether Title VII's prohibition of sex discrimination includes discrimination based on transgender status.

Supreme Uncertainty Looming

Zarda and *Bostock* evidence the current circuit split over the question of whether Title VII prohibits discrimination based on sexual orientation. However, there is no circuit split with regard to gender identity, as presented by *Harris Funeral Homes*. At least five circuits have held that transgender status discrimination is unlawful sex discrimination; none have held to the contrary. In granting certiorari in all three cases, the Supreme Court is taking on one of the most critical issues facing the LGBTQ community: whether federal law protects employees' right to express their identity in the workplace without reprisal or harassment.

These decisions could also reach far beyond the LGBTQ community. In *Harris Funeral Homes*, the Court restated the Question on appeal as "whether Title VII prohibits discrimination against transgender people

based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*." The "or" is important, and civil rights advocates fear that an answer in the negative to the second question could upend decades of case law protecting all women from discrimination because of a failure to conform to female stereotypes.

The Court consolidated *Zarda* and *Bostock* and placed all three cases on the same briefing schedule. Briefing will be complete in August; oral argument has not been set. The Court's decisions could come in the midst of the 2020 presidential election. Their outcome likely will thrust the Equality Act (recently passed by the House as H.R. 5) into the national spotlight. The Equality Act would add prohibitions on discrimination based on sexual orientation and gender identity to Title VII and other civil rights laws. The President has publicly stated his opposition to the bill. With the Supreme Court now involved, the debate around civil rights protections for LGBTQ people is becoming even more fierce.

[1]*See, e.g., Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[2]*Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018). The Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) was the first federal appellate court to conclude that sexual orientation-based claims are viable under Title VII.

[3]*Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 Fed. App'x 964 (11th Cir. 2018).

[4]*Bostock cited Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), and *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (decided before the Eleventh Circuit split from the Fifth Circuit). The Supreme Court declined to review *Evans*. 138 S. Ct. 557 (2017).

[5]*Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018) (en banc).

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