

Management Alert



Supreme Court Hears Landmark Cases On Title VII Sexual Orientation and Gender Identity Discrimination

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Seyfarth Synopsis: On October 8th, the Supreme Court heard oral argument in a trio of cases that may decide whether Title VII prohibits discrimination on the basis of sexual orientation and gender identity. In much of the nation, gay and transgender workers have no legal protections against employment discrimination. These cases may decide if a federal right of action exists for individuals alleging discrimination based on sexual orientation and gender identity.

On October 8th, the Supreme Court heard oral argument in three cases that may determine whether Title VII's prohibition against discrimination "on the basis of sex," includes sexual orientation and gender identity. Two of the cases on appeal, from the [Second](#) and [Eleventh](#) Circuit Courts of Appeal, addressed the question of whether Title VII prohibits discrimination on the basis of sexual orientation.

In *Zarda v. Altitude Express*, the plaintiff, Donald Zarda, was a sky-diving instructor who told a client strapped to him for a tandem jump that he was gay to make her feel more comfortable. The client's boyfriend complained and Altitude Express terminated Zarda's employment. Zarda sued, alleging that Altitude Express terminated his employment because of his sexual orientation and that this constituted sex stereotyping in violation of Title VII. The district court granted summary judgment dismissing Zarda's Title VII claim, and the Second Circuit affirmed relying on precedent that a sex stereotyping claim cannot be predicated on sexual orientation. Zarda successfully petitioned for rehearing en banc. A divided court overturned the panel decision and Second Circuit precedent, holding that Title VII's prohibition against discrimination on the basis of sex necessarily prohibits discrimination based on sexual orientation.

Three months later, the Eleventh Circuit in *Bostock v. Clayton County* decided a similar case and reaffirmed that circuit's precedent holding sexual orientation is not protected by Title VII's prohibition against discrimination on the basis of sex. Bostock alleged that he was fired because he is gay, despite a long history of positive performance. In its brief opinion, the Eleventh Circuit declined to revisit its prior holdings in *Blum v. Gulf Oil Corp* and *Evans v. Georgia Regional Hospital* and affirmed dismissal of his Title VII claim. Plaintiff then petitioned for rehearing en banc. Though the Eleventh Circuit denied the petition for rehearing, two Circuit Court judges dissented from the [court's denial](#). They chided the majority for clinging to the thirty-nine year old *Blum* precedent, and lamented the widespread effects of sexual orientation discrimination. The dissenting judges concluded that, because Title VII prohibits discrimination on the basis of sex and sex-based stereotypes, the statute necessarily prohibits discrimination on the basis of sexual orientation.

At oral argument, the Justices questioned counsel for both parties vigorously. Justices Alito and Breyer questioned counsel for Bostock and Zarda about the policy implications of expanding Title VII's protections to sexual orientation. Counsel responded that the Court would be going no farther than it had in *Oncale* and *Price Waterhouse*, when it decided that

Title VII prohibited same-sex harassment and sex-based stereotyping, respectively. During argument, Justice Roberts raised concerns about the effect on religious organizations of expanding Title VII's reach. Justice Gorsuch is shaping up to be the potential swing vote on these cases. He appeared sympathetic to Bostock and Zarda's arguments, saying sex "appears to be a factor" in the terminations, but also expressed concerns about changing "the meaning of what Congress understood sex to mean" by including sexual orientation in the definition of sex. He said that whether Title VII bars employment discrimination based on sexual orientation and gender identity is a "really close, really close" question, but raised concerns about "massive social upheaval" that would flow from a ruling affirming an expanded understanding of Title VII's protections.

The Justices also probed counsel for Clayton County and Altitude Express to explain how a person's sexual orientation can be independent of sex. Justice Breyer likened sexual orientation to discrimination against inter-religious marriage. Justice Gorsuch also suggested that, under Title VII's but-for causation standard, termination on the basis of sexual orientation alone would not constitute impermissible sex discrimination.

The Supreme Court also heard oral argument in the matter of *R.G. & G.R. Funeral Homes v. EEOC*, a case where the Sixth Circuit decided that Title VII prohibits discrimination on the basis of gender identity. In that case, plaintiff Aimee Stephens worked for six years as a funeral director and embalmer. After appearing and dressing as a man for several years, she disclosed to her employer in 2013 that she would transition to dressing as a woman and planned to have sex-reassignment surgery. Her employer responded that "this is not going to work out," offered Ms. Stephens a severance agreement, and terminated her. Ms. Stephens sued and alleged discrimination on the basis of sex under Title VII. Though the district court granted summary judgment in favor of R.G. & G.R., the Sixth Circuit reversed. The Sixth Circuit explained that the type of discrimination Ms. Stephens experienced fell squarely within Title VII's prohibition against discrimination on the basis of sex and sexual stereotyping and held that Title VII prohibits discrimination on the basis of gender identity.

Justice Roberts asked the funeral home's counsel how the Court should approach analyzing a transgender employee's claim of sex discrimination. In particular, Justice Roberts focused on whether the court should consider biological sex in its analysis of the individual's transgender status. Justice Gorsuch also expressed concern that the decision to expand Title VII protections to an area that the legislature likely had not considered in 1964 was essentially a legislative decision. Justice Gorsuch acknowledged in his questioning that he thought the case was very close as a matter of textual interpretation.

Justice Breyer reiterated his view that sex and gender identity were as interrelated as discrimination on the basis of race and interracial marriage or religion and interreligious marriage. The funeral home's counsel answered that discrimination in the latter two instances resulted from discriminatory animus towards a particular race or religion, which are clearly protected under Title VII, whereas discrimination based on gender identity is motivated by an independent, and unprotected, characteristic. In response to petitioner's argument that interpreting Title VII to protect transgender employees could impact businesses with legitimate reasons for gender-based criteria, such as women's shelters, Justice Sotomayor suggested that bona fide occupational qualifications were a potential solution to a conflict between a business's sex-based policies that further legitimate objectives and protecting transgender workers against discrimination.

Twenty-five states still do not have statutes prohibiting discrimination on the bases of sexual orientation or gender identity in private employment. The Supreme Court could dramatically alter this landscape and recognize a federal right of action under Title VII for discrimination based on sexual orientation or gender identity, with significant implications for employers operating in states that currently provide no such protection. Justice Gorsuch's intense questioning of the parties suggests the cases will be closely decided, and that he may be the surprise swing vote on this issue.

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