

# Title VII and sexual orientation discrimination

For decades, employers assumed that Title VII of the Civil Rights Act's sex discrimination prohibition didn't include sexual orientation discrimination. That's been changing – fast. First, a series of Supreme Court cases expanded Title VII to include other types of discrimination related to sex. Sexual harassment, sex stereotyping and sexually hostile work environment claims became common. Employers cannot pay one sex less, demand that one sex adhere to sex stereotypes or ignore a hostile work environment. But neither Congress nor the Supreme Court added sexual orientation discrimination or gender identity to the expanding list.

Then cities and states began passing laws banning sexual orientation discrimination in the workplace. Next, the EEOC expanded its working definition of workplace sex discrimination to include sexual orientation discrimination and gender identity. Test cases have now made their way to the U.S. Supreme Court. Employers will finally have a clear answer when the Court decides those three cases.

Each case challenges the traditional meaning of discrimination “because of sex” in Title 7. The court accepted the cases April 22 and will decide them during the 2019-2020 term, which begins in October 2019.

The Supreme Court took the cases, in part, to resolve a split in circuit court decisions. Until now, some employers had to protect gay and transgender workers while others did not, depending on where they operated. The cases are:

- A Second Circuit ruling that Title VII of the Civil Rights Act bars sexual orientation discrimination;
- A Sixth Circuit ruling that the law prevents employers from discriminating based on an employee's transgender status; and
- An Eleventh Circuit decision that Title VII does not bar workplace sexual orientation discrimination.

## **Second Circuit rules Title VII covers sexual orientation**

In *Altitude Express v. Zarda*, a female skydiving student told her male instructor she was uncomfortable strapped to him. He explained she had nothing to fear because he was gay. Upon hearing the story, his employer fired him. He complained to the EEOC, alleging the employer violated Title VII of the Civil Rights Act when it fired him.

The employer countered that Title VII did not cover sexual orientation. The employer won in District Court and before a panel of the Second Circuit. Mr. Zarda appealed to the entire Second Circuit, which ruled in his favor. Meanwhile, Mr. Zarda died tragically in a base-jumping accident in Switzerland and his estate is pursuing the case.

## **Sixth Circuit decides Title VII applies to gender identity**

In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, a Detroit funeral home had a gender-specific dress code for its employees. For six years, the employee worked as a male and wore the required suit and tie. The employee then wrote a letter to his employer explaining that he was transitioning to female. Because the dress code required females to wear a dress or skirted suit, he began doing so. The employer fired the worker.

Now known as Aimee Stevens, the worker filed a complaint with the EEOC. The agency, which had recently changed its stand on whether Title VII covered sexual orientation and gender identity discrimination, sued. The trial court ruled for the funeral home, concluding that Title VII doesn't protect gender identity and the EEOC appealed. The Sixth Circuit reversed, concluding Title VII does bar gender identity discrimination. The funeral home then appealed to the U.S. Supreme Court.

### **Eleventh Circuit says Title VII does not prohibit sexual orientation discrimination**

The third case, *Bostock v. Clayton County, Georgia*, involves a child welfare coordinator who claims the county fired him after he joined a gay softball team. He sued and lost at the federal district court, which said Title VII does not cover sexual orientation discrimination. The Eleventh Circuit Court of Appeals refused to hear his case, effectively allowing the district court ruling to stand. He appealed to the Supreme Court.

### **Other types of discrimination: sexual harassment and stereotyping**

Sex discrimination did not include what we now know as sexual harassment and gender stereotyping until much later. It took two Supreme Court decisions to stretch Title VII to include them. The first case, the 1986 decision in *Meritor Savings Bank v. Vinson*, redefined sex discrimination to include sexual harassment.

The second case is *Hopkins v. Price Waterhouse*. In 1989, Ann Hopkins thought her career was on track to make her a partner at accounting firm Price Waterhouse. She had brought in more business than any of the other 87 male candidates. The firm rejected her. When she inquired, she was told she was "too macho," and needed to "dress more femininely." She sued, alleging that sexual stereotyping was no different from racial stereotyping. The Supreme Court agreed, adding stereotyping to Title VII's definition of sex discrimination.

### **Hostile work environment and sex discrimination**

The Supreme Court also expanded Title VII's sex discrimination provision to include claims of a hostile work environment based on same-sex harassment. The case, *Oncale v. Sundowner*, involved a male roustabout working on an oil platform on an all-male crew. He claimed fellow crew members humiliated him with sex-related acts and threatened him with rape. He quit and sued under Title 7, alleging he had worked in a sexually hostile environment.

The case went to the Supreme Court, which said Title 7 sex discrimination can include male-on-male harassment. Justice Antonin Scalia explained that laws can be interpreted "...beyond the principal evil to cover reasonably comparable evils." Employers will soon know whether that includes redefining sex discrimination to include sexual orientation and gender identity discrimination.

### **Practical considerations**

While waiting for the last word from the Supreme Court, employers should consider their options:

- Operating in a state or city that bars sexual orientation discrimination? If you already have policies in place to address such discrimination, you need do nothing for now. You will be well-positioned no matter what the court decides.
- If you operate in the Second Circuit or the Sixth Circuit, you should have policies in place already. Covered states are Connecticut, Kentucky, Michigan, New York, Ohio, Tennessee, and Vermont. If not, change your sex discrimination and harassment policies to include sexual orientation and gender identity.
- If you exclusively operate only in jurisdictions which don't protect gay and transgender workers, you can wait until the Supreme Court decides. You do risk litigation from the EEOC and gay or transgender workers trying to test existing law. Or you can prepare now by expanding your anti-discrimination policy and adding sexual orientation and gender identity.

**Final notes:** Don't assume the Supreme Court will have the final word if it says Title 7 doesn't bar discrimination. Congress may act. On May 17, 2017, the U.S. House of Representatives has passed the Equality Act. It would prohibit workplace and other discrimination against gay and transgender individuals. The bill faces opposition in the U.S. Senate.

Meanwhile, the Fifth Circuit Court of Appeals has just ruled that Title VII sex discrimination in the workplace does not include sexual orientation. In that case, a woman claimed she was fired because she is heterosexual. For now, employers in Mississippi, Louisiana, and Texas are not required to expand protection based on sexual orientation. But there's an exception to that rule too. Most major cities in Texas protect gay workers. Some cities in Louisiana and Mississippi also offer workplace protection.

**Many states have passed their own anti-discrimination laws**

Employers in many states operate under laws that bar workplace discrimination on the basis of sexual orientation or gender identity. These jurisdictions include the following:

<b>States and Territories with Sexual Orientation Protection</b>	<b>States and Territories with Gender Identity Protections</b>
Arizona*	California
California	Colorado
Colorado	Delaware
Connecticut	Connecticut
Delaware	Hawaii
Hawaii	Illinois
Illinois	Iowa
Indiana*	Kentucky*
Iowa	Maryland
Kentucky*	Michigan*
Maine	Maine
Maryland	Minnesota
Massachusetts	Massachusetts
Michigan*	Montana*
Minnesota	Nevada
Montana*	New Mexico
Nevada	North Carolina*
New Hampshire	New Hampshire*
New Jersey	New Jersey
New Mexico	Ohio*
New York	New York
North Carolina*	Oregon
Ohio*	Puerto Rico
Oregon	Utah
Pennsylvania*	Pennsylvania*
Puerto Rico	Virginia*
Rhode Island	Rhode Island

Utah	Washington
Vermont	Vermont
Virginia*	Washington, DC
Washington	
Washington, DC	