

# Supreme Court cases focus on Title VII sex discrimination expansion

The Supreme Court opens the 2019-2020 term on October 7. It will waste no time getting right to the most contentious Supreme Court cases on its docket. On October 8 it will hear three cases that test the limits of Title VII's sex discrimination clause. The justices will consider whether sexual orientation and transgender discrimination are illegal sex discrimination under Title VII. It may also expand discrimination protection based on sex stereotypes to include transgender discrimination.

If the Supreme Court sides with the three employees whose cases are before it, their decision will provide one national standard. Currently, there's a patchwork of state and city laws that outlaw sexual orientation and transgender discrimination in the workplace.

## What is sex discrimination?

Title VII of the Civil Rights Act of 1964 outlaws employment discrimination based on protected characteristics, including sex. It bars discrimination "because of sex." The landmark legislation greatly expanded workplace protections for working women. Over four decades, federal courts and the Equal Employment Opportunity Commission (EEOC) agreed Title VII's sex discrimination protections didn't include sexual orientation. That began to change in the last five years.

Originally, Title VII's sex discrimination provision was interpreted to outlaw discrimination based on sex alone. Females could allege they were discriminated against in the workplace because they were women and males because they were men. Over time, though, employees and the EEOC pushed courts to adopt a more expansive definition of sex discrimination.

The first major expansion came in 1986 when the Supreme Court made sexual harassment actionable as Title VII sex discrimination. This definition was expanded again in 1989, when the Court added sexual stereotyping as sex discrimination. Women no longer could be discriminated against because they weren't "feminine" enough.

By 1998, the Supreme Court added same-sex harassment to the list of illegal Title VII sex discrimination. It also made it more difficult for employers to defend against sexual harassment allegations. To have a defense at all, employers had to provide a sexual harassment policy plus a complaint process. Then they had to stop harassment by investigating complaints and taking immediate action.

## Discrimination "because of sex" definition test

The Supreme Court has never decided whether sexual orientation discrimination or discrimination against the transgendered is Title VII sex discrimination. After the EEOC changed its stance on sexual orientation/transgender discrimination, it will now finally decide. Three cases have worked their way up through the federal system and were accepted for Supreme Court review. These will all be argued on October 8, 2019. They are:

- ***Bostock v. Clayton County, Georgia, 17-1618.*** The question the justices will tackle is “Whether discrimination against an employee because of sexual orientation constitutes prohibited discrimination “because of sex” under Title VII. Gerald Bostock, who is gay, worked for a decade building a government program for abused children in Clayton County with no employment problems. Then he joined a gay softball league, the Hotlanta Softball League. The county fired him a few months later, allegedly for “conduct unbecoming a county employee.” He sued, but his case was tossed out because both the trial court and the 11<sup>th</sup> Circuit Court of Appeals concluded Title VII didn’t make it illegal to fire a worker because of his sexual orientation. He appealed.
- ***Altitude Express v. Zarda, 17-1623.*** This case raises the identical question raised in the *Bostock* case. The 2<sup>nd</sup> Circuit Court of Appeals sided with the employee in this case, concluding that Title VII does outlaw discrimination based on sexual orientation, setting up a “split in the circuits.” Donald Zarda worked as a skydiving instructor. When a female customer expressed concern about being strapped to Zarda, he confessed to being “100% gay,” which he believed would allay her discomfort. It instead got him fired. He sued. Both the EEOC and the Department of Justice (DOJ) argued this case before the federal appeals court – on opposite sides.
- ***C. & G.R. Harris Funeral Homes v. EEOC, No. 18-107.*** This case raises a different, but related question – “Whether Title VII prohibits discrimination against transgender people based on their status as transgender or sex stereotyping...” Aimee Stephens, who considers herself transgender, worked as a funeral director for six years. She told her boss she was transitioning from male to female and would begin wearing dresses to work. He terminated her for violating the gender-specific dress code. That dress code required men to wear a suit and ties and women a skirted suit or dress. She sued, and won at the 6<sup>th</sup> Circuit Court of Appeals, which concluded the transgender are protected from discrimination under Title VII’s sex discrimination clause. The employer appealed to the Supreme Court.

## What happens next?

- **Briefs:** Each litigant has already filed a brief, explaining their position on the facts and the law. In addition, there have been numerous so-called amicus (‘friend of the court’) briefs filed. These support either the plaintiff or the defendant, depending on how each friend of the court views the law. For example, a group of over 200 employers filed an amicus brief in the cases supporting the employees. They argued that the modern workforce is diverse, requiring one uniform, national definition of sex discrimination. On the other hand, other organizations and employers filed briefs opposing the expansion of Title VII’s sex discrimination protection.
- **Oral argument:** Each case is typically allowed an hour to present the arguments to the nine justices, with 30 minutes for each side. In the *Harris* case, the DOJ sides with the employer while the EEOC brought the lawsuit. Thus, the justices will hear from two U.S. government agencies that take the opposite view on the law. The lawyers for the Harris Funeral Home and the DOJ will split their time, 15 minutes each. Oral arguments are audio-recorded, but not videotaped or televised. During the session, the justices often ask pointed questions, interrupting the litigants. The questions asked often give an indication of how the justices view the cases and the law.
- **Deliberation:** Justices rely on law clerks to review the briefs and oral arguments and come up with a proposed decision. The justices discuss the cases and take a straw vote to see if there is agreement on an outcome. If not, the Chief Justice (Roberts) assigns a justice to write the majority opinion. Other justices are free to write concurring or dissenting opinions.
- **Decision:** There is no set timeline for the final decision. If there is broad agreement, the opinion may come relatively quickly. If not, the case may remain pending until the end of the term – in this case, sometime in June 2020.

## Preparing for the decision

The Supreme Court may end up making several decisions in these cases. It may, for example, conclude that

Title VII sex discrimination includes sexual orientation discrimination but not transgender discrimination. That would bar employers from discriminating against gay and lesbian employees, but not against transgender workers. It's unlikely the Court would protect the transgendered and not strictly homosexual workers, though.

The Court might also find other, narrower grounds for protection. It could conclude that Stephens, the transgendered funeral director, was discriminated against based on sex stereotyping. That doesn't require expanding the definition of sex. Another possibility is that it will refuse to expand protection in any of the three cases.

If you already have a policy that bars discrimination based on sexual orientation and transgender status, you need do nothing. That's true even if the court does not expand Title VII's sex discrimination to include sexual orientation and transgender status. After all, employers are free to adopt inclusive workplace rules and insist that all be treated equally. Even in states that do not offer additional protections, employers can do so voluntarily.

If you currently don't have an inclusive non-discrimination policy and do not want to add one, wait for the decisions. *Do* make sure you're not in a state or city that outlaws transgender and sexual orientation discrimination. If so, you should already have policies and practices in place.

No matter what the Supreme Court decides, remember that it may not have the last word. Congress can – and has in the past – overridden Supreme Court decisions with new legislation. It could simply redefine Title VII's sex clause to include sexual orientation, gender identity or any other characteristic.