

SCOTUS to decide if Title VII prohibits sexual orientation/gender identity discrimination

By T. Christopher Bailey, Esq., Greensfelder, Hemker & Gale

JULY 30, 2019

Greensfelder Hemker & Gale attorney Chris Bailey discusses three pending U.S. Supreme Court cases that are likely to establish whether Title VII's ban on sex discrimination covers discrimination based on sexual orientation and gender identity.

The U.S. Supreme Court recently agreed to consider whether Title VII of the Civil Rights Act of 1964, the federal law that prohibits employment discrimination on the basis of sex, race, color, religion and national origin, similarly bans discrimination based on sexual orientation and gender identity.

The Supreme Court is expected to clarify whether Title VII's prohibitions of discrimination based on sex include protections that are of critical importance to members of the LGBT community and their supporters.

QUESTION DIVIDES CIRCUITS

The explicit text of Title VII, 42 U.S.C.A. § 2000e-2(a)(1), does not include the terms "sexual orientation" or "gender identity." Instead, it nominally bars only discrimination because of sex, race, color, religion and national origin.

In identifying the scope of coverage provided by the phrase "because of sex," the Supreme Court, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), determined that Title VII's coverage includes discrimination based on non-conformity with gender norms.

In 2015, the Equal Employment Opportunity Commission, the federal agency that oversees and enforces Title VII, relied on *Price Waterhouse* to conclude for the first time that sexual orientation is inherently a sex-based consideration and, therefore, an allegation of discrimination based on sexual orientation falls within Title VII's prohibition of discrimination because of sex. *Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

The issue quickly moved from the EEOC to the federal circuit courts.

The 2nd U.S. Circuit Court of Appeals extensively examined the evolving scope of sex discrimination and gender norms, subsequent legislative developments and the evolving case law before concluding in *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (2d Cir. 2018), that Title VII bars discrimination based on sexual orientation.

The 11th U.S. Circuit Court of Appeals took a much narrower view. In *Bostock v. Clayton County Board of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), it decided that Title VII does not prohibit discrimination based on sexual orientation. In so doing, it relied on an earlier decision from the circuit as binding precedent. This circuit split set the stage for consideration by the Supreme Court.

APPLYING TITLE VII TO GENDER IDENTITY DISCRIMINATION

While other circuits were considering the issue of sexual orientation, the 6th U.S. Circuit Court of Appeals addressed whether Title VII provides protection based on gender identity. In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018), the 6th Circuit relied on *Price Waterhouse* to conclude that discrimination based on transgender and transitioning status violates Title VII.

The Supreme Court granted certiorari, limited to the question of "whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse*." *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

WHAT'S NEXT?

The Supreme Court consolidated *Zarda*, *Bostock* and *Harris Funeral*, and set a schedule in which all briefs should be submitted by mid-September. Oral argument is not yet scheduled, but a final decision is expected by early next year.

If the court rules in favor of the employees, employment discrimination based on sexual orientation or gender identity will be prohibited under federal law. While this would represent a dramatic change in federal anti-discrimination law, a number of states already have laws that prohibit discrimination on the basis of sexual orientation, gender identity or both. In addition, a number of cities prohibit discrimination based on sexual orientation and/or gender identity.

On the other hand, a ruling in favor of the employers would clarify that sexual orientation and gender identity are not protected under federal law, meaning LGBT employees in states without



any statutory protection could face discriminatory treatment without recourse.

POTENTIAL IMPACT FOR EMPLOYERS

Because the EEOC takes the position that sexual orientation and gender identity are protected by Title VII, employers should be careful not to make employment decisions based on these factors — even in the 11th Circuit.

While the Supreme Court's decision will likely focus on the issue of discrimination against employees, it may also address whether an employer can make discriminatory employment decisions based on its deeply held religious beliefs.

In *R.G. & G.R. Harris Funeral Homes*, the 6th Circuit rejected the employer's argument that the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1, provided a defense to the EEOC's discrimination claims.

If the Supreme Court decides that sexual orientation and gender identity are protected classifications under Title VII, it should provide some insight as to what consideration, if any, an employer's deeply held religious beliefs should be given.

Employers must remain wary about making employment decisions based on any classification that may be protected under federal, state or local law.

This article first appeared in the JULY 30, 2019, edition of Westlaw Journal Employment.

ABOUT THE AUTHOR



Chris Bailey is an officer and member of the Labor and Employment practice group at Greensfelder, Hemker & Gale in St. Louis. His practice includes providing advice and training to clients to avoid, as well as representing clients currently facing, issues related to discrimination complaints, wage-and-hour disputes and union/management issues. He can be reached at tcb@greensfelder.com.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.