



Supreme Court To Take Up LGBT Workplace Bias Cases For First Time

Insights

4.22.19

In a highly anticipated move, the U.S. Supreme Court today agreed to consider a trio of cases that will determine whether the nation's most prominent workplace discrimination statute prohibits employment discrimination against LGBT workers. The issue: whether Title VII's ban against "sex" discrimination covers claims involving sexual orientation and gender identity. Employers will finally have a definitive answer regarding the contours of the federal primary civil rights law as it applies to members of the LGBT community.

Sexual Orientation Discrimination

The first two cases accepted by the court cover the issue of sexual orientation discrimination. In February 2018, the 2nd Circuit Court of Appeals became the second federal appeals court in the country to hold that sexual orientation was covered by Title VII's protections (*Zarda v. Altitude Express, Inc.*). The case began when Donald Zarda, who worked as a sky-diving instructor for Altitude Express on New York's Long Island over the summer of 2010, was fired by his employer. He had often participated in tandem skydives, where he would be strapped hip-to-hip with clients. Zarda said he found it best to inform his female clients that he was gay in order to ease any concerns that they might have had about being strapped in close physical proximity to a man.

During one jump, he attempted to lightheartedly comfort his female client by telling her that he was gay "and had an ex-husband to prove it." The client claimed that Zarda inappropriately touched her and only disclosed his sexual orientation to excuse his behavior. She complained to the company, which in turn fired Zarda for violating company policy. Zarda, however, believed his termination was motivated by his sexual orientation and brought suit against his former employer, including a claim for gender discrimination under Title VII in his lawsuit.

The case eventually made its way to the 2nd Circuit Court of Appeals, which had several years before rejected just such a claim on the grounds that Title VII did not explicitly include protections for LGBT workers. But this time around, an *en banc* panel of judges acknowledged that times change and courts must change with the times. The full panel concluded that if sexual orientation bias is motivated at least in part by sex, then it is a subset of sex discrimination. And because Title VII explicitly outlaws sex discrimination, the court said, it naturally followed that sexual orientation discrimination should be outlawed under the statute.

Other circuits, however, did not see things the same way. In May 2018, the 11th Circuit Court of Appeals rejected a very similar argument and concluded that Title VII's prohibition against employment discrimination based on sex does not cover sexual orientation discrimination (*Bostock v. Clayton County, Georgia*). Gerald Bostock worked as a child welfare services coordinator for Clayton County's Juvenile Court System before being fired for purported irregularities discovered during an internal audit of the funds he managed. He filed suit under Title VII claiming that the real reason he was let go involved sexual orientation bias. Bostock cited disparaging comments made to him at work after it was alleged that his employer discovered that he was playing in a gay recreational softball league.

While his case was being litigated, the 11th Circuit Court of Appeals (with jurisdiction over federal cases arising out of Georgia) concluded in another case that Title VII does not protect gay and lesbian employees in claims of employment discrimination (*Evans v. Georgia Regional Hospital*). Following this same line of reasoning, the court of appeals rejected Bostock's claim; today the Supreme Court agreed to review the decision and have the final say.

Gender Identity Discrimination

Meanwhile, in March 2018, the 6th Circuit Court of Appeals became the first appellate court in the land to extend the nation's main federal employment discrimination statute to cover transgender and transitioning employees. In *Stephens v. R.G. & G.R. Harris Funeral Homes, Inc.*, the court ruled that employers cannot discriminate against such employees without violating Title VII. This is the third case to be accepted for review by the Supreme Court.

The facts of the case are fairly straightforward. Aimee Stephens, a transgender woman who was born biologically male, began work as a funeral director for R.G. & G.R. Harris Funeral Homes in Detroit, Michigan in 2007. At the time, she presented as a man and used her then-legal name, William Stephens.

After six years of employment, Stephens presented the owner of the funeral home a letter indicating that she had struggled with a gender identity disorder her entire life. "I have felt imprisoned in my body that does not match my mind, and this has caused me great despair and loneliness," the letter said. "With the support of my loving wife, I have decided to become the person that my mind already is. ... Toward that end, I intend to have sex reassignment surgery. The first step I must take is to live and work full-time as a woman for one year. At the end of my vacation, I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire."

The owner of the funeral home, Thomas Rost, fired Stephens in response to the letter. He indicated that he did not think things would "work out." He later justified his decision by saying he has a sincere belief that the Bible teaches that a person's sex is an immutable God-given gift, and that he would be violating God's commands if he were to permit his male-born funeral director to wear women's clothes. He also said that he believed that his customers would be unnecessarily distracted and upset by the situation.

Stephens filed a Title VII gender discrimination claim against the funeral home alleging that she was discriminated against on account of her “sex,” but the lower court dismissed Stephens’s claim. It ruled that transgender status is not a protected trait under Title VII, and that the Religious Freedom Restoration Act (RFRA) barred the claim because of Rost’s Christian beliefs. Stephens filed an appeal with the 6th Circuit Court of Appeals, which overturned the decision and ruled in Stephens’ favor.

“Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex,” the court said, meaning that such adverse employment actions would violate Title VII. Although the funeral home tried to argue that, for the purposes of Title VII, “sex” refers to a “binary characteristic for which there are only two classifications, male and female,” the court rejected this argument. “It is analytically impossible,” the court said, “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.”

What’s Next?

For employers in many jurisdictions, today’s announcement is somewhat of a non-story. After all, almost half of the states in the country and many local governments have laws prohibiting sexual orientation and gender identity discrimination in employment. The employers doing business in these jurisdictions have long since integrated workplace protections and policies to include LGBT applicants and workers.

However, for those doing business in the other half of the country with no existing prohibitions against LGBT discrimination, you should monitor the progress of these cases as they may require you to adjust your policies and practices to mirror current standards. A definitive statement by the Supreme Court permitting LGBT employees to bring Title VII claims will mean that you need to revise your handbooks, your training and orientation materials, and your overall approach to workplace relations.

The Supreme Court’s current term is already wrapping up, as it prepares to hear a final round of oral arguments this week. That means that argument in these cases will be scheduled to be heard during the next term, starting in October 2019. We can expect a decision by the end of 2019 or in early 2020.

Like with all Supreme Court cases impacting employers, we will monitor these cases and issue a same-day summary once decided. You should ensure you are subscribed to [Fisher Phillips’ alert system](#) to ensure you receive the most up-to-date information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific trio of Supreme Court cases. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Jeffrey A. Fritz
Partner
617.532.9325
[Email](#)



Richard R. Meneghello
Chief Content Officer
503.205.8044
[Email](#)

Service Focus

Employment Discrimination and Harassment

Litigation and Trials