

# U.S. Supreme Court to decide if Title VII protects LGBT workers

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*Since last year, we have been watching the U.S. Supreme Court to see whether it will hear a trio of cases that gave conflicting answers to the question of whether Title VII of the Civil Rights Act of 1964's ban on discrimination "based on . . . sex" protects LGBT workers. That burning question has been simmering for years, and now the Supreme Court is poised to take on the Title VII quandary.*

*The trifecta of cases, *Altitude Express v. Zarda*, *Bostock v. Clayton County, Georgia*, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, were initially set for Supreme Court consideration last September. But the Court punted then and continued to do so until last month. On April 22, 2019, the high court finally decided to move forward and hear the cases. After much waiting, we finally know the Supreme Court will weigh in on the question and issue the final word on the scope of Title VII's prohibition on sex discrimination.*

## **What were those three cases again?**

Because each of the cases has its own set of facts, it's helpful to recap the specific issues the Supreme Court will be considering:

- In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, the U.S. 6th Circuit Court of Appeals reasoned that gender identity is fundamentally tied to biological sex. Therefore, the court ruled that an employer violated Title VII when it terminated a transgender employee for failing to conform to gender norms.
- In *Altitude Express v. Zarda*, a skydiving company is asking the Court to overturn the

2nd Circuit's ruling that a former employee established a viable Title VII claim when he alleged the company fired him because of his homosexuality.

- In *Bostock v. Clayton County, Georgia*, the 11th Circuit ruled that an employee's claim that he was fired after his employer learned he had joined a gay softball league wasn't legally cognizable under Title VII. That ruling, of course, is in direct conflict with the 2nd Circuit's decision in *Zarda*.

Significantly, the litigation of the three cases has exposed sharp disagreement within the federal government over Title VII's range. The U.S. Department of Justice (DOJ) and the Equal Employment Opportunity Commission (EEOC) have taken opposite positions on this significant issue. The EEOC has maintained that Title VII extends to sexual orientation and gender identity, while the DOJ has taken the position that it does not. The Supreme Court will have the final word on which agency is correct.

## **What's next?**

It has been a long time coming, but now we can expect clarity from the highest court in the land on the meaning of "sex" in Title VII. However, that clarity will not come immediately. The Supreme Court process will take a while.

First, the Court will set a briefing schedule, and then it will schedule a date for oral argument in the fall. The cases have been consolidated, and a total of one hour has been allotted for oral argument. After oral argument, we will have to wait for the Court to deliver its opinion, which likely will not come until sometime in early 2020.

## ***What should you do now?***

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While we wait, we recommend that you chart a course to safeguard your business against a potentially expansive reading of Title VII. Until we have an answer from the Court, the safest route is to implement policies that protect, and are inclusive of, all your employees, irrespective of their sexual orientation and gender identity. The Supreme Court's decision to address whether Title VII applies to LGBT employees may shine a new spotlight on the potential for expanded protections under Title VII, and workers may very well become aware of the issue for the first time.

As the debate reaches the Supreme Court and the date for oral argument approaches, you can expect Title VII issues to be on the minds of many more workers. The 2nd Circuit (whose decisions apply to employers in Connecticut, New York, and Vermont) and the 7th Circuit (whose decisions apply to employers in Illinois, Indiana, and Wisconsin) have prohibited discrimination based on sexual orientation. The 4th Circuit, which is based in Richmond and decides cases applicable to Virginia employers, hasn't ruled either way. However, the Commonwealth of Virginia protects state workers from sexual orientation discrimination, and many Virginia localities have adopted protections for gay employees in their jurisdictions.

Updating your antidiscrimination and antiharassment policies and training your workforce are the best ways to protect yourself against potential liability for discrimination against LGBT employees. Consider contacting experienced employment counsel, the best source of information for developing employment policies and training your managers on possible changes to the scope of Title VII.

## ***Takeaway***

Getting ahead of the curve as to the changing currents in Title VII law will put you in the best position to address the employment issues you will be facing, no matter how the Supreme Court defines the term "sex" for Title VII purposes.