

# Supreme Court Rules Sexual Orientation and Gender Identity Discrimination Prohibited by Title VII

In a landmark ruling that resolves a long-standing split in the lower courts, on June 15, 2020, the United States Supreme Court ruled that workplace discrimination on the basis of sexual orientation and gender identity is prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII").

For employers, there are several key takeaways:

- Both sexual orientation and gender identity are protected classifications under Title VII
- The law applies to discrimination, as well as harassment on the basis of sexual orientation and gender identity
- Policies and handbooks should be reviewed and updated as soon as possible to ensure compliance
- Employee training is crucial for employees to understand what those policies mean, the procedure to raise concerns and complaints, and the key responsibilities of managers and supervisors

## HOW DID THESE ISSUES COME BEFORE THE SUPREME COURT?

Title VII states that it is "unlawful . . . for an employer to fail or [to] refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."

In cases dating back to the 1970s, federal courts have addressed the question of whether Title VII's prohibition on sex-based discrimination included sexual orientation and gender identity, with conflicting decisions. In the trio of cases decided by the Supreme Court this week – *Bostock v. Clayton County, Georgia, R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, and *Altitude Express, Inc. v. Zarda* – the federal appellate courts also had reached different conclusions.

In *Bostock*, the Eleventh Circuit ruled that Title VII's protections do not apply to sexual orientation. In that case, Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate. After Mr. Bostock started to participate in a gay softball league, he claimed he faced criticism because of his sexual orientation, and the County then terminated his employment for "conduct unbecoming of its employees."

In *Zarda*, the Second Circuit held that Title VII does encompass discrimination on the basis of sexual orientation. In that case, David Zarda, a gay male, worked as a skydiving instructor. At times, he disclosed his sexual orientation to female customers to make them feel more comfortable when they performed jumps in tandem. Following a customer complaint, Zarda's employment was terminated. Zarda, however, contended that the real reason was his sexual orientation.

In *R.G. & G.R. Harris Funeral Homes Inc.*, the Sixth Circuit ruled that Title VII prohibits discrimination on the basis of one's transgender status. In that case, Aimee Stephens worked as a funeral director. After Stephens' informed her employer of her intention to transition from male to female, her employment was terminated.

In light of these and other federal decisions reaching conflicting conclusions on this issue, the Supreme Court agreed to hear these three cases to resolve the circuit split.

## **WHAT WAS THE COURT'S REASONING?**

The Supreme Court's majority opinion, authored by Justice Neil Gorsuch, declares that by applying the plain text of Title VII, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The Court provided two examples to illustrate its reasoning:

- In the first scenario, an employer has two employees – one man and one woman – who are identical in all material respects, including their attraction to men. "If the employer fires the male employee for no reason other than his attraction, the employer discriminates against him for traits or actions it tolerates in his female colleague."
- In the second scenario, an employer has two employees who both identify as female, but one of them was a biological male at birth. If the employer terminates the one who was male at birth, it "intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."

The Court further reasoned that in making any decision based on sexual orientation or gender identity, an employer inescapably "intends to rely on sex in its decision making." Rejecting arguments that Congress could not have intended for Title VII to encompass sexual orientation or gender identity when the law was passed in 1964, the Court explained "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." The text of the statute applies as written.

## **WHAT ARE THE BROADER IMPLICATIONS OF THIS RULING?**

As with other protected classifications under Title VII such as race, color, religion, etc., employers should assume that unlawful discrimination on the basis of sexual orientation and gender identity includes harassment based on those characteristics. Similarly, Title VII's anti-retaliation provisions apply with full force to protected activity related to sexual orientation and gender identity.

The Court did leave several questions unanswered, including:

- Do the concepts of sexual orientation and gender identity include other related statuses, such as gender expression (how one publicly expresses his or her gender, which can extend beyond one's physical appearance)? The answer likely is yes, but remains uncertain.
- Could an employer's religious beliefs regarding sexual orientation or gender identity trump the requirements of Title VII, under the federal Religious Freedom Restoration Act (RFRA)? Perhaps. The Court declined to answer that question, noting that the parties did not press that argument before the Supreme Court. The Court's opinion, however, clarifies that such arguments may well "merit careful consideration" in future cases.

**WHAT SHOULD EMPLOYERS DO?**

To ensure compliance and minimize risk, employers should consult with counsel and take the following steps as soon as possible:

1. Review policies and handbooks to ensure they make clear that discrimination and harassment are prohibited on the basis of sexual orientation and/or gender identity.
2. Review and update procedures for employees to raise concerns or complaints, and for those complaints to be promptly investigated and addressed.
3. Provide robust training for employees to clarify precisely what the prohibitions on sexual orientation and gender identity discrimination include.
4. Train managers and supervisors on their additional responsibilities to address any concerns or complaints of harassment, discrimination, and retaliation – and the consequences of failure to do so.
5. Review all applicable state and local laws, which may provide greater employee protections and impose additional obligations on employers (such as mandatory training at regular intervals).