

THE
NATIONAL LAW REVIEW

Title VII and LGBT Rights: The Current Landscape

Tuesday, November 20, 2018

The U.S. Supreme Court currently is contemplating whether to review three employment discrimination cases involving what, if any, protection Title VII extends against discrimination on the basis of sexual orientation and gender identity. See *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission et al.*, case number 18-107 (considering transgender discrimination under Title VII; see Sixth Circuit opinion below reported at [884 F.3d 560](#)); *Altitude Express v. Zarda*, case number 17-1623 (considering sexual orientation discrimination under Title VII; see Second Circuit opinion below reported at [855 F.3d 76](#)); *Bostock v. Clayton County, Georgia*, case number 17-1618 (same; see Eleventh Circuit opinion below reported at [894 F.3d 1335](#)). The Court will consider the *certiorari* petitions for all three cases in conference on November 30.

Under Title VII, it is illegal for an employer to discriminate against an employee “because of... sex.” The statute does not explicitly protect against sexual orientation or gender identity discrimination, and circuit courts are split as to whether Title VII’s protection against sex-based discrimination also provides protection based on sexual orientation, with the Second and Seventh Circuits holding that Title VII prohibits sexual orientation-based discrimination and the Eleventh Circuit reaching the opposite conclusion. In *Harris Funeral Homes*, the Sixth Circuit became the first federal Circuit Court of Appeals to recognize transgender discrimination as a form of prohibited sex-based discrimination under Title VII. The Supreme Court could choose to resolve these questions this term, but until then, this issue will continue to be closely watched by the nation, with government agencies and employers weighing in on the debate.

In October 2018, a U.S. Department of Health and Human Services (“HHS”) memo garnered national attention for defining “sex” to exclude transgenderism. The memo circulated internally within HHS for months, but was just recently made public in a New York Times article. The memo defines “sex” as “a person’s status as male or female based on immutable biological traits identifiable by or before birth.” In other words, HHS wants to rely on birth certificates as the main identifier of an individual’s sex, a policy that would essentially abolish federal recognition and protection of transgender individuals. The memo requests that other federal agencies – including the Departments of Justice, Education, and Labor – alter their own understanding of the word “sex” to match HHS’s proposed definition.

Shortly after the HHS memo became public, the Department of Justice (“DOJ”), appearing before the Supreme Court on behalf of the federal government, urged the Court to postpone consideration of *Harris Funeral Homes* until it decides whether to review *Zarda* and *Bostock* because the Sixth Circuit relied heavily on *Zarda* in concluding that Title VII prohibits transgender discrimination. Further, the DOJ contended, consistent with the HHS memo, that Title VII does not prohibit employers from discriminating against employees based on gender identity.

Not all agencies agree with the HHS and DOJ’s interpretation of Title VII. For instance, the Acting Chair of the U.S. Equal Employment Opportunity Commission (“EEOC”), Victoria Lipnic (who was appointed Acting Chair by President Trump in 2017), announced that the EEOC plans to continue prosecuting transgender discrimination claims in accordance with the agency’s stated policies. In response to these recent agency developments, nearly 200 companies – including Amazon, Apple, Pepsico, Twitter, and Uber – signed the [Business Statement for Transgender Equality](#) opposing “any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations.”



SQUIRE PATTON BOGGS

Article By
[Melissa Legault](#)
[Squire Patton Boggs \(US\) LLP](#)
[Employment Law Worldview](#)
[Labor & Employment](#)
[Litigation / Trial Practice](#)
[All Federal](#)

The federal stance on Title VII and LGBT discrimination is conflicting, to say the least. Until the U.S. Supreme Court rules on these issues, it is important for employers to remember that although there are currently no express federal protections against sexual orientation or transgender discrimination, many state and local governments prohibit such discrimination. Employers are encouraged to consult with counsel to ensure compliance with state and local laws regarding transgender and sexual orientation discrimination in the workplace. Stay tuned for our update on whether the Supreme Court decides to hear these cases.

© Copyright 2019 Squire Patton Boggs (US) LLP

Source URL: <https://www.natlawreview.com/article/title-vii-and-lgbt-rights-current-landscape>