Supreme Court Agrees to Hear Cases Determining Extent of Title VII Protection for LGBT Workers

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The Supreme Court of the United States announced three cases will be argued next term that could determine whether Title VII protects LGBT employees from workplace discrimination.

Title VII prohibits discrimination because of “race, color, religion, sex, or national origin,” but it does not explicitly mention sexual orientation or gender identity. Federal courts have disagreed on whether discrimination based on sexual orientation or gender identity falls within Title VII’s prohibition against sex-based discrimination. Differing opinions on this topic exist within the federal government as well: the Equal Employment Opportunity Commission (“EEOC”) has taken the position that Title VII prohibits discrimination based on sexual orientation and gender identity, while the Department of Justice has argued it does not. The Supreme Court’s decisions may ultimately decide these conflicts.

Two cases represent a split in federal appellate courts regarding the extent, if any, to which Title VII prohibits sexual orientation discrimination as a subset of sex discrimination. In Altitude Express v. Zarda, a skydiving company fired Donald Zarda, a skydiving instructor, after Zarda informed a female client he was gay to assuage her concern about close physical contact during skydives. The trial court dismissed Zarda’s sexual orientation discrimination claim. In an opinion written by Chief Judge Robert A. Katzmann on behalf of a full panel of the U.S. Court of Appeals for the Second Circuit, the Court reversed the trial court’s dismissal and held that sexual orientation discrimination is properly understood as a subset of discrimination on the basis of sex. In other words, in the Second Circuit, sexual orientation discrimination is prohibited under Title VII.

The U.S. Court of Appeals for the Eleventh Circuit reached the opposite conclusion in Gerald Bostock v. Clayton County Georgia. Gerald Bostock alleged he was terminated from his county job after the county learned of his involvement in a gay recreational softball league and his promotion of involvement in the league to co-workers. The trial court dismissed and the Eleventh Circuit affirmed, relying on its own precedent that broadly held that Title VII does not prohibit sexual orientation discrimination. In other words, in the Eleventh Circuit, Title VII does not prohibit sexual orientation discrimination.

The Supreme Court consolidated the cases into a single case to determine whether the prohibition in Title VII against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation.

The third case, R.G. & G.R. Harris Funeral Homes v. EEOC, focuses on whether Title VII applies to transgender employees. In 2007, a funeral home hired Aimee Stephens, whose employment records identified her as a man. Later, Stephens told the funeral home’s owner she identified as a woman and wanted to wear women’s clothing to work. The owner fired Stephens, believing allowing Stephens to wear women’s clothing violated the funeral home’s dress code and “God’s commands.” The EEOC filed suit on Stephens’ behalf. The trial court dismissed a portion of the lawsuit because “transgender . . . status is not currently a protected class under Title VII,” but permitted other portions to proceed based on the claim Stephens was discriminated against because the funeral home objected to her appearance and behavior as departing from sex stereotypes. The Sixth Circuit agreed
that Stephens had viable claims. The Supreme Court will review “[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping” under prior Supreme Court precedent.

All three cases will affect the employment rights of LGBT workers. Dinsmore & Shohl lawyers will closely monitor the Court’s analysis of these cases. Dinsmore’s Labor and Employment Practice Group stands ready to assist employers in navigating this developing area of law. Dinsmore’s experience in this arena includes accomplished labor and employment lawyers, former law clerks to federal judges who have drafted orders on these very issues, former federal government attorneys, litigators and published scholars.

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