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# U.S. Supreme Court, LGBTQ Discrimination, and Title VII Protections

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The U.S. Supreme Court may soon make a determination on whether sexual-orientation and gender-identity discrimination a discrimination based on sex. Erin Strohbehn and Max T. Stephenson discuss the cases before the Court that address protections in Title VII of the Civil Rights Act of 1964.

In October 2019, the United States Supreme Court heard oral arguments in three cases expected to have a major impact upon the more than 11 million members of the LGBTQ community.

At issue is the scope of the Civil Rights Act of 1964 and the incredibly important question of whether Title VII's prohibition on sex discrimination encompasses claims of discrimination on the basis of sexual orientation and gender identity.

## Background

Since the passage of the Civil Rights Act, it has been illegal to discriminate against an employee on the basis of that person's sex. But, since the passage of the Civil Rights Act, employers and lobbying groups have worked to limit **Title VII's protections for employees.**

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The Supreme Court rejected many of those Title VII challenges, and acknowledged over the past several decades that:

- discrimination can occur even when the parties involved share the same protected characteristic (same-sex sexual harassment);
- male employees can invoke the protections against sex discrimination (though men were not the primary intended beneficiaries of Title VII protection); and
- actions short of termination can constitute discrimination.

### *Price Waterhouse v. Hopkins*

This session, the Supreme Court is expected to decide the impact of Title VII on LGBTQ people and review the effect of *Price Waterhouse v. Hopkins*<sup>1</sup> on members of that community.



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In *Price Waterhouse*, the Supreme Court first recognized that employers' reliance on sex stereotypes limits workplace opportunities both for individuals who conform to traditional expectations about men and women and for those who do not. It also affirmed that Title VII's prohibition on sex discrimination includes what would become known as "sex stereotyping."

The Supreme Court's decision will have a considerable impact on the nation: in around half of U.S. states, Title VII is currently the LGBTQ community's only safeguard from workplace

discrimination, because state employment laws provide no such protection.

### Workplace Discrimination 'Because of Sex'

Workplace discrimination "because of sex" can take many forms. The consolidated cases of *Bostock v. Clayton County*<sup>2</sup> and *Altitude Express v. Zarda*<sup>3</sup> both involve men who contend that they were fired only because they identify as gay, and in *R.G. & G.R. Harris Funeral Homes v. EEOC*,<sup>4</sup> a woman alleges that she was fired only because she is transgender.

By taking up all three cases together, the Supreme Court has provided itself the opportunity to affirm Title VII's broad central purpose: "to achieve

equality of employment opportunities.”<sup>5</sup>

Over the past decades, courts and agencies across the country concluded that acts of workplace discrimination against gay, lesbian, and transgender employees are not separate or distinct claims, but are merely some of the many variants of sex discrimination in employment.

The Equal Employment Opportunity Commission has determined that, when an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is the same as in any other Title VII case involving allegations of sex discrimination: “whether the employer has relied on sex-based considerations or taken gender into account” when taking the action.

### An About-face

Despite the Equal Employment Opportunity Commission having previously fought in favor of employee rights in *R.G. & G.R. Harris*, the current U.S. Department of Justice (DOJ) has joined forces with those opposed to equal rights for the LGBTQ community. The DOJ is now urging the Supreme Court to adopt a reading of the Civil Rights Act that would allow employers to freely fire employees based on their sexual orientation or gender identity.

### A Chance to Prevent Devastating Harm

The Supreme Court now has the chance – keep posted as a decision is expected soon – to confirm what should already be clear: that sexual orientation and gender identity cannot be defined or understood without reference to sex, and therefore allegations of sexual orientation and gender identity discrimination absolutely state a claim for discrimination based on sex.

In doing so, it would prevent the devastating harm that would result from a decision retracting federal protections from workplace discrimination.

### Endnotes

<sup>1</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>2</sup> *Bostock v. Clayton County*, 723 Fed. Appx 964 (11th Cir. 2018).

<sup>3</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir 2018).

<sup>4</sup> *R.G. & G.R. Harris Funeral Homes v. EEOC*, 884 F.3d 560 (6th Cir. 2018).

<sup>5</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

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