

# U.S. Supreme Court to Hear Arguments on LGBTQ+ Workplace Protections under Title VII

By Michelle E. Phillips & Christopher M. Repole

October 7, 2019

## Meet the Authors



**Michelle E. Phillips**

(She/Her)

Principal

914-872-6899

Michelle.Phillips@jacksonlewis.com



**Christopher M. Repole**

(He/Him)

Principal

(212) 545-4019

Christopher.Repole@jacksonlewis.com

## Related Services

Employment Litigation

Workplace Training

The U.S. Supreme Court is set to hear oral argument on October 8, 2019, in three high-stakes cases that will decide whether LGBTQ+ employees are protected from workplace discrimination under Title VII of the Civil Rights Act of 1964.

The cases before the Court are *Altitude Express Inc. v. Zarda*, No. 17-1623, *Bostock v. Clayton County, Georgia*, No. 17-1618, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107.

The Court will consider:

1. Whether Title VII's ban on "sex"-based discrimination prohibits discrimination based on sexual orientation; and
2. Whether Title VII prohibits discrimination against transgender claimants based on their transgender status or based on sex stereotyping.

Oral argument will provide insights on the individual justices' views on those questions.

### Sexual Orientation and Title VII

The Court has agreed to hear *Zarda* and *Bostock* together in order to resolve a split in the U.S. Courts of Appeals on whether Title VII's prohibitions against discrimination "because of sex" extends to discrimination based on sexual orientation. The U.S. Court of Appeals for the Second Circuit in *Zarda* ruled that it does, while the Eleventh Circuit in *Bostock* ruled it does not.

In *Zarda v. Altitude Express Inc. and Ray Maynard*, 883 F.3d 100 (2d Cir. 2018), the Second Circuit held that Title VII extends to sexual orientation claims. Skydiving instructor Donald Zarda told one of his customers he was gay in an effort to make her more comfortable while skydiving in tandem with him. The employer fired Zarda after the customer's boyfriend told the employer Zarda was gay.

Zarda sued the employer, alleging (among other things) that his termination was discriminatory in violation of Title VII. A district court dismissed the Title VII claim. The Second Circuit reversed the district court decision. Joining the Seventh Circuit and the Equal Employment Opportunity Commission (EEOC), the Second Circuit held that Title VII extends to sexual orientation claims. It reasoned that sexual orientation-based discrimination is "a subset of sex discrimination." The Second Circuit joined the Seventh Circuit in ruling that Title VII prohibits discrimination on the basis of sexual orientation.

On the other hand, the Eleventh Circuit, in *Bostock v. Clayton County, Georgia*, 723 F. App'x 964 (11th Cir. 2018), held that Title VII does not apply to discrimination based on sexual orientation. Gerald Bostock received good work reviews as a child-welfare-

services coordinator for Clayton County over his decade-long career. After his employer fired him based on accusations that he mismanaged public money, Bostock claimed the firing was because of his sexual orientation.

Only the Second and Seventh Circuits have held that Title VII prohibits discrimination on the basis of sexual orientation. Every other circuit reaching the issue (including the Eleventh, in *Bostock*) has reached the opposite conclusion.

### Transgender Protection under Title VII

The third case to be heard on October 8 asks the Court to clarify whether Title VII's protections extend to discrimination based on gender identity.

In *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018), the Sixth Circuit held that Title VII prohibits discrimination based on gender identity. Aimee Stephens was a funeral director at a funeral home. The employment records identified Stephens as a man when she was hired in 2007. In 2013, Stephens informed the funeral home that she identified as a woman and wanted to wear women's clothing to work. Two weeks later, the funeral home terminated her based on the employer's religious views. Stephens sued for discrimination under Title VII. The Sixth Circuit, siding with the EEOC, held that Title VII prohibits gender identity-based discrimination, and that the firing was unlawful.

Since the Sixth Circuit's decision in *R.G. & G.R. Harris*, the Fifth Circuit has reaffirmed its view that discrimination on the basis of transgender status is not prohibited by Title VII, following the opinions of other circuits reaching the issue.

### Changing Public Views on LGBTQ+ Issues

As these three cases demonstrate, employers face a changing landscape regarding LGBTQ+ workplace issues. The number of cases filed with the EEOC alleging "LGBT-based sex discrimination" continues to rise. The EEOC received 1,811 such charges in 2018, up from 1,762 the previous year. Those cases resulted in monetary awards of at least \$6.1 million in 2018, up from \$5.3 million in 2017.

The rise in charges alleging workplace discrimination against LGBTQ+ employees comes amid reports of growing public acceptance of LGBTQ+ workplace protections. [According to a survey](#) by the nonprofit, nonpartisan Public Religion Research Institute (PRRI), nearly 70 percent of Americans favor laws that would protect against discrimination in employment, public accommodations, and housing. [PRRI also found](#) that 62 percent of Americans say they have become more supportive of transgender rights than they were in 2013.

In some respects, employers have led the way in fostering acceptance for LGBTQ+ individuals. [According to a Human Rights Campaign 2018 survey](#), 91 percent of Fortune 500 companies maintain non-discrimination policies that prohibit sexual orientation-based discrimination, and 83 percent maintain such protections against gender identity-based discrimination. Those figures are up from 87 percent and 41 percent, respectively, from 10 years ago.

At the same time, the majority of U.S. states still do not prohibit workplace discrimination on the basis of sexual orientation or gender identity. Only 22 states and the District of Columbia prohibit sexual orientation-based employment discrimination,

and only 21 states and the District of Columbia prohibit employment discrimination on the basis of gender identity. Moreover, despite reports of growing public acceptance of LGBTQ+ individuals, studies show the number of hate crimes against such individuals have increased in recent years. [According to the most recent FBI data available](#), the number of hate crime incidents reported to the FBI increased about 17 percent in 2017 [compared with the previous year](#), including a six-percent increase in the number of such crimes motivated by the victim's sexual orientation or gender identity.

### The Path Forward

The Supreme Court is expected to issue its decisions in *Zarda*, *Bostock*, and *R.G. & G.R. Harris* by June 2020. The outcome of those cases likely will significantly affect other court cases, federal and state legislation, and even elections.

Employers are at a crossroads when it comes to LGBTQ+ issues in the workplace, considering the changes in public opinion and perception, and the evolving legal landscape. In deciding how to craft work policies and how to implement employment decisions, employers must be careful to comply with existing legal standards, while anticipating how the law may change soon.

The EEOC's position continues to be that discrimination based on sexual orientation and gender identity is prohibited under Title VII. While the Eleventh Circuit, the U.S. Department of Justice, and many district courts have reached contrary decisions, the EEOC is the federal agency that handles investigations into workplace discrimination, and it has the power to commence lawsuits against employers in federal court. Bearing in mind the rising number of claims and monetary awards before the EEOC, employers taking adverse employment actions against LGBTQ+ workers continue to assume considerable risks.

Given the patchwork of legal protections for LGBTQ+ workers, and the uncertain legal landscape, employers should continue to promptly and thoroughly investigate all complaints of LGBTQ+ discrimination and take remedial action in response to discrimination. Gender identity and sexual orientation harassment should be prohibited under company anti-harassment policies and staff should be trained on the prevention of LGBTQ+ discrimination. It is equally important that managers are sensitized on how to respond to LGBTQ+ discrimination complaints, including the duty to report LGBTQ+ discrimination when placed on actual or constructive notice of discrimination and harassment.

Please contact a Jackson Lewis attorney with any questions related to harassment policies, training for management and employees, and other preventive practices.

©2019 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.