

Supreme Court set to Decide Whether Title VII Protections Include Discrimination Based on Sexual Orientation

In one of our monthly columns from 2017, we outlined the *Hively v. Ivy Tech Comm’y College of Indiana* case. In the *Hively* case, the Seventh Circuit determined that the protections afforded by Title VII apply to claims of discrimination based on sexual orientation. At the time that *Hively* was decided (April, 2017), the Seventh Circuit was the only federal appellate circuit to reach that conclusion. The Eleventh Circuit had already specifically held that Title VII does not apply to sexual orientation claims. Because of the “circuit split” and the important legal issues involved, we predicted that the Supreme Court would step in and issue a definitive ruling. After a couple of years, the Court has recently accepted a series of consolidated cases that will allow it to do just that.

On April 22, 2019 the Supreme Court announced that it would hear the consolidated cases of *Altitude Express v. Zarda* and *Bostock v. Clayton Cty., Georgia*. The former is a Second Circuit case agreeing with *Hively*—that is, holding that Title VII protects against sexual orientation claims. The latter is another Eleventh Circuit case holding that it does not.

In *Zarda*, the plaintiff Don Zarda was a gay man working as a skydiving instructor. Before one jump, he told a female client that he was gay to “preempt any discomfort” from “being strapped to the body of an unfamiliar man.” After the dive, the client alleged that Zarda touched her inappropriately, and relayed that information to Zarda’s boss. Zarda was then fired. Zarda denied touching her inappropriately, and maintained that he was fired exclusively for his sexual orientation in violation of Title VII.

Ultimately, an *en banc* Second Circuit overturned its prior precedent and held that “because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.”

Bostock v. Clayton Cty., Georgia also involved a gay man, Gerald Bostock. From 2003–2013, Bostock worked for Clayton County, Georgia as a child welfare services coordinator. Throughout his employment he received positive reviews. In 2013, Bostock began participating in a gay recreational softball league. Shortly after, he began receiving negative reviews, and Clayton County conducted an audit of the program funds Bostock managed. Ultimately, Clayton County fired him for “conduct unbecoming of its employees.”

Bostock filed suit under Title VII maintaining that he was discriminated against on the basis of his sexual orientation. The District Court dismissed the case, holding that 2017 Eleventh Circuit precedent held that Title VII does not encompass sexual orientation claims. The Eleventh Circuit affirmed, noting that it could not overturn existing Eleventh Circuit precedent absent an intervening decision by the Supreme Court or the *en banc* Eleventh Circuit. Because the Eleventh Circuit judges voted against re-hearing the issue *en banc*, the three judge panel’s ruling endured.

One interesting note about both *Zarda* and *Bostock*, which highlights the contentiousness of the issues involved, is that the cases are pitting different agencies of the executive branch against each other. In both cases, the Equal Employment Opportunity Commissions (“EEOC”) backed the plaintiffs, who argued Title VII should apply; the United States Department of Justice backed the employers, arguing that Title VII should not apply.

What will this decision mean for businesses with employees in Wisconsin?

As we outlined in our earlier article on *Hively*, the Wisconsin Fair Employment Act (WFEA) already expressly prohibits employers from discrimination on the basis of sexual orientation. The Supreme Court’s

ruling in the upcoming *Zarda* and *Bostock* cases will not impact WFEA claims or Wisconsin law. However, should the Court hold that Title VII does encompass sexual orientation claims, Wisconsin employers could be liable for compensatory and punitive damages under Title VII that they would not be subject to under the WFEA.

What will this decision mean for businesses with employees in other states?

Regardless of how one feels about the underlying substantive issues at stake, the Supreme Court taking up these cases provides one large benefit: uniformity. Currently, businesses with employees in the Seventh and Second Circuit operate under one interpretation of Title VII law, while business with employees in the other Circuits operate under a different interpretation. Businesses with employees in opposing circuits have the burden of navigating both.

As far as state law protections, approximately half of the states have enacted laws similar to the WFEA that forbid employment discrimination based on sexual orientation. For those states, like Wisconsin, the impact of the Court’s decision will be minimal. For the remaining states, this decision will be extremely impactful for both employers and members of the LGBTQ community. Although Congress has tried on several occasions to pass legislation specifically preventing employment discrimination based on sexual orientation, it has thus far failed to do so. As it currently stands, Title VII is therefore the only possible federal statute through which the LGBTQ community is arguably afforded these protections.

Because of both the subject matter of the case and the impact of the Court’s decision, the *Zarda* and *Bostock* cases have already garnered substantial media attention. Moreover, given the general timeframe of Supreme Court cases, a decision is likely to come out in

the summer of 2020—right as the presidential election is at its most contentious.

R.G. & G.R. Harris and Gender Identity Under Title VII

The Supreme Court has also agreed to hear the case of *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, where it will address whether Title VII bars discrimination against transgender individuals based either on their transgender status or on sex-based stereotyping. This issue too arises from a circuit split.

Although not as high-profile as *Zarda* and *Bostock*, this case could potentially affect Wisconsin employers significantly more than those rulings. That is because the WFEA does not afford protection based on gender identity—thus, all employment protections based on gender identity in Wisconsin come from Title VII.

If the Supreme Court determines that Title VII protects gender identity, nothing in Wisconsin will change—that is already the law in the Seventh Circuit. However, if the Supreme Court finds that Title VII does not encompass gender identity claims, there will be no applicable statewide law in Wisconsin prohibiting adverse employment actions based on gender identity. It will therefore be up to each individual employer as to what their policy will be—at least until there is a federal or state legislative reaction.

While national headlines will (rightfully) focus on *Zarda* and *Bostock*, we encourage Wisconsin employers to make sure and follow *R.G. Harris*, as well. Of course, the IIAW will also keep you apprised of the results. 20523695.2



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