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Employee Benefit Plan Review

Finally! U.S. Supreme Court to Weigh In on Title VII LGBTQ+ Protection

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The U.S. Supreme Court finally agreed to hear three cases from the circuit courts that split on whether Title VII of the Civil Rights Act of 1964 protects against discrimination in the workplace based on sexual orientation and gender identity. The basic question boils down to whether the word "sex" includes a protection for LGBTQ+ employees.

EEOC Initiative/Trigger

Although there have been efforts over the last 50+ years to seek such protection under Title VII, the true impact came from the Equal Employment Opportunity Commission's (EEOC) push beginning in 2012, when it issued an administrative ruling holding that gender identity discrimination constitutes sex bias and therefore is protected. As is widely known, in *Hively v. Ivy Tech Community College*, the U.S. Court of Appeals for the Seventh Circuit jumped into the fray with both feet in 2017, finding that Title VII's "sex" does indeed include sexual orientation. In fact, before the full Seventh Circuit heard that case, a three-judge panel on that court had stated that it was a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act"—a reference to same sex marriage being legal.

Three Cases to be Heard

This momentum led to the three cases that will now be heard by the U.S. Supreme Court:

In February 2018, the U.S. Court of Appeals for the Second Circuit issued its decision in *Altitude Express, Inc. v. Zarda*, where a skydiving instructor was fired after disclosing to a female customer—to ease her husband's concerns about her being strapped to the instructor—that he was gay. The Second Circuit found sexual orientation to be protected by Title VII.

Only 10 days later came the U.S. Court of Appeals for the Sixth Circuit's decision in *EEOC v. R.G. & G.R. Harris Funeral Homes*, holding that Title VII does protect against gender identity discrimination. Finally, in May 2018, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in *Bostock v. Clayton County, Georgia*, holding that sexual orientation discrimination is not protected by Title VII—a clear conflict with the Second Circuit.

Let's Get Ready to Rumble

Not only does the Supreme Court's grant of review to these cases bode well for final resolution as to whether Title VII's "sex" includes sexual orientation and gender identity, but it also sets up a perfect forum for the battle among federal agencies to play out on this matter. As some know, prior to oral argument in the *Zarda* matter at the Second Circuit, both the EEOC and U.S. Department of Justice (DOJ) filed amicus briefs asserting opposite arguments. Perhaps more "interesting" is the fact that the DOJ will represent the EEOC before the U.S. Supreme Court in the *Harris Funeral Homes* case—yet the DOJ filed a brief with the

Supreme Court outlining the federal government's position that gender identity is not covered by Title VII. Wonder how the EEOC feels about that, after all of its work prosecuting the case through the lower courts and after its Chair, Victoria Lipnic (a Trump administration appointee), announced the agency's intent to continue prosecuting sexual orientation and gender identity claims. Even the U.S. Department of Health and Human Services jumped into the fray, issuing a memo in October 2018, which defined "sex" to exclude transgenderism, instead defining "sex" as "a person's status as male or female based on immutable biological traits identifiable by or before birth."

Clean-Up Needed

The absence of clear direction from the Supreme Court has led to a patchwork of decisions from lower federal courts on the scope and extent of protections afforded to LGBTQ+ individuals under Title VII. Recently, Judge Joel Slomsky of the U.S. District Court for the Eastern District of Pennsylvania, sitting in Philadelphia, felt compelled to dismiss a claim that a female plaintiff who identified as a lesbian and had a "masculine gender expression" had been subjected to unlawful discrimination when her employment was terminated based on a 2001 case decided by the U.S. Court of Appeals for the Third Circuit, which found that Title VII does not prohibit sexual orientation discrimination. The judge expressed doubts about the continued viability of the Third Circuit's 2001 decision but ultimately ruled that the precedent barred him from ruling in favor of the plaintiff.

Hold On to Your Hats

This battle at the U.S. Supreme Court will have every employer across the country watching and waiting for the battles to play out and to see where the patently conservative-leaning Court will come down on the issue. It has taken the Supreme Court nearly seven months to decide whether to hear these cases—but future centuries of protection for LGBT workers hang in the balance. Tune in next term….

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