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***SCOTUS TO HEAR ARGUMENTS ON WHETHER TITLE VII PROHIBITS
DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY***

On April 22, 2019, the United States Supreme Court agreed to place three employment discrimination cases—*Bostock v. Clayton County, Georgia*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*—on its docket for the October term to resolve a conflict among the federal circuits as to whether Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of sexual orientation and gender identity.

In *Bostock*, a case from the Eleventh Circuit, Gerald Bostock claimed his employer, Clayton County, Georgia, terminated him from his position as a child welfare services coordinator after his supervisors learned of his sexual orientation and thereafter falsely accused him, as a pretext for termination, of mismanaging county funds. The Eleventh Circuit affirmed the lower court's dismissal of Bostock's lawsuit alleging sexual orientation discrimination under Title VII because, based on Eleventh Circuit precedent, such a claim was not actionable.¹

In *Zarda*, the Second Circuit sitting en banc expressly overruled early circuit precedent and held that Title VII's protections extended to claims of discrimination based on sexual orientation. In so doing, the Second Circuit reversed the dismissal of Donald Zarda's federal lawsuit, in which Zarda claimed he was terminated as a skydiving instructor after revealing his sexual orientation to female skydiving students during tandem skydiving jumps as a way to alleviate any concerns about the close bodily proximity required by the tandem dives.² The question both *Bostock* and *Zarda* present to the Supreme Court is whether the language of Title VII prohibiting discrimination on the basis of "sex" encompasses claims based on sexual orientation.

In the third case, arising out of the Sixth Circuit, Aimee Stephens, a funeral home employee, told her employer that she intended to transition from male to female and would be wearing women's clothing to work. The funeral home subsequently terminated Stephens for violating its sex-specific dress code. The issue in *Harris Funeral Homes* was whether, pursuant to the Court's decision in *Price Waterhouse v. Hopkins*³ prohibiting discrimination on the basis of sexual stereotyping, Title VII should be read to include discrimination against transgender individuals and/or persons transitioning their gender identity.⁴ The Sixth Circuit found that the employer's decision to fire Stephens fell "squarely within the ambit of sex-based discrimination that *Price Waterhouse*" forbade.⁵

Action on these cases has been a long time coming, as the Supreme Court has submitted each of the cases for conference eleven times since the start of its 2018 term in October. Oral argument has yet to be scheduled, and it remains to be seen if, as in the lower courts, government attorneys will appear on both sides of the issue, with the EEOC arguing for a broad interpretation of Title VII and the Department of Labor seeking to prevent the Court from expanding Title VII beyond its traditional scope. Also of interest will be Chief Justice Roberts' approach to

oral argument, given the pivotal role he will likely play—after the retirement of Justice Anthony Kennedy earlier this term—in any deliberations on these cases. Now that the trio of cases has been docketed, there is hope the Court will offer clear guidance on the interpretation of Title VII; specifically, on the question of whether federal law protects employees from discrimination based upon their sexual orientation or gender identity.⁶

~ By Aaron Tandy, Pathman Lewis LLP

Endnotes

- 1 *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (request for en banc review denied).
- 2 *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).
- 3 490 U.S. 228 (1989).
- 4 *EEOC v. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).
- 5 *Id.* at 572.
- 6 While the Second, Sixth, and Seventh Circuits have decided that Title VII covers sexual orientation discrimination claims, the Fifth Circuit recently joined the Eleventh in finding that Title VII does not cover such actions. See *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019).

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12:00 noon - 12:50 p.m.

Presented by

Lindsey Wagner, Scott Wagner & Associates, P.A.,
Jupiter, FL and Burbank, CA

Jon Harris Maurer, Equality Florida, Tallahassee





The Florida Bar Alternative Dispute Resolution and Labor and Employment Law Sections present

Mediation and Arbitration Issues in Employment Matters: Thinking Outside the Box

Friday, June 28, 2019, 9:30 a.m. - 11:30 a.m.

COURSE CLASSIFICATION: INTERMEDIATE

Course 3210

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This program will be a round-table discussion with a moderator at each of the five tables. Registration is limited to 50 people.

TOPICS TO BE DISCUSSED:

1. *Not just because you have to...* why mediation during litigation?
2. Mediation before litigation: does it work or is it just a tactic for free discovery?
3. Viewpoints on arbitration post *SCOTUS* decision affirming the enforceability of arbitration clauses.

FACILITATOR

Lori Adelson, Adelson Law & Mediation, Fort Lauderdale

ROUND TABLE MODERATORS

Judge David Lee Brannon, Southern District of Florida
Marlene Quintana, Gray-Robinson Attorneys at Law, Miami
Karen Evans, Litigation Resolution Inc., Miami
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