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Briefly

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SUPREME COURT TO TACKLE SCOPE OF TITLE VII'S PROHIBITION ON SEX DISCRIMINATION

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"With an increased focus on LGBT issues … the Supreme Court will now weigh in on whether [Title VII] should be read to include sexual orientation and/or transgender status as protected classifications."

On Monday, April 22, 2019, the United States Supreme Court announced it would review three cases, *Bostock v. Clayton County, GA*, *Altitude Express, Inc. v. Zarda*, and *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC*. In doing so, the Court will consider whether Title VII's prohibition on discrimination "because of … sex" necessarily includes a prohibition on discrimination because of sexual orientation and/or transgender status. For decades, Congress has declined to amend Title VII to explicitly include sexual orientation and/or transgender status (gender identity) as protected classifications under Title VII. With an increased focus on LGBT issues in the courts and in society over the last decade or more, the Supreme Court will now weigh in on whether the 1964 statute should be read to include sexual orientation and/or transgender status as protected classifications.

What Does Title VII's Prohibition on Discrimination Because of Sex Mean?

Prior to 1989, the courts which have evaluated Title VII's prohibition on discrimination because of sex unanimously concluded that the statute prohibited the favoring of men over women and did not cover sexual behavior or sexual orientation. The statute's purpose was to provide a level playing field in the workplace for both women in comparison to men and for men in comparison to women. In 1989, the Supreme Court issued its decision in *Price Waterhouse v. Hopkins*, which, although failing to result in a majority opinion, has been cited as a paradigm shift in the application of Title VII. At the heart of the issue in *Price Waterhouse* was whether Ms. Hopkins was discriminated against because of her sex when she was denied a promotion for "unbecoming" behavior that her similarly situated male colleagues were permitted to display without consequence. What would normally have been a simple case of whether Ms. Hopkins was held to a disadvantageous term or condition of employment in comparison to her similarly situated male colleagues has become far more due to the plurality noting that Ms. Hopkins was penalized for failing to meet certain sexual stereotypes, namely perceptions on how women should dress, speak and act. Aggressive speech and an overbearing management style were cited as reasons to deny her promotion to partner, while several of her male colleagues engaged in similar behavior but were nonetheless promoted. This disparate treatment resulting in the loss of a promotion proved sufficient evidence that Ms. Hopkins was discriminated against because of her sex, as a majority of the Court held, even if they could not agree on the terminology to use.

The question the Supreme Court is asking in the *R.G. and G.R. Harris Funeral Homes* case is whether a plaintiff may state a claim simply for failing to abide by sexual stereotypes. The Court's question begs the question of whether Price Waterhouse changed the analysis when it comes to Title VII's prohibition on discrimination because of sex. Yet, opinions from the Supreme Court after *Price Waterhouse* would tend to answer that question in the negative. As Justice Ginsburg made clear in her concurring opinion in *Harris v. Forklift Systems* in 1993, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." The Supreme Court adopted Justice Ginsburg's standard for interpreting Title VII when it issued its decision in *Oncale v. Sundowner Offshore Servs., Inc.* in 1998.

Does Title VII Prohibit Discrimination on the Basis of Sexual Orientation?

Under the Ginsburg standard, a practice that does not subject women to a disadvantageous term or condition of

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TENNESSEE ANTI-BULLYING LAW NOW COVERS PRIVATE EMPLOYERS

Rosalia Fiorello

"[T]he Bill aims to … allow employees to sue the bully as an individual, hold the employer accountable and seek restoration of lost wages and benefits."

In 2014, Tennessee was the first state to pass the Healthy Workplace Act. This Act addresses abusive conduct in state, county and city government workplaces and encourages safe and civil public workplaces for employees. In its Model Abusive Conduct Prevention Policy, the Tennessee Advisory Commission on Intergovernmental Relations ("TACIR") details the progression of workplace bullying and the corresponding movements to combat work place bullying in the United States beginning in the early 1990's.

According to the Healthy Workplace Bill's website, the Bill aims to provide an avenue for employees for legal redress for health harming cruelty at work, compels employers to prevent and correct future instances, allows employees to sue the bully as an individual, hold the employer accountable and seeks restoration of lost wages and benefits. For employers, the Bill protects conscientious employers from vicarious liability risk when internal correction and prevention mechanisms are in effect, gives employers a reason to terminate or sanction offenders, requires plaintiffs to use private attorneys, requires proof of health harm by licensed health or mental health professionals, plugs the gaps in current state and federal civil rights protections and precisely defines an "abusive work environment." (See www.healthworkplacebill.org for more information.)

Within its model policy, TACIR quotes The Centers for Disease Control and Prevention National Institute for Occupational Safety and Health as it pertains to the interplay between abusive conduct and reporting of such conduct, noting:

> … it is widely agreed that violence at work is underreported, particularly since
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> most violent or threatening behavior—including verbal violence (e.g., threats,
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> verbal abuse, hostility, harassment) and other forms such as stalking—may not
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> be reported until it reaches the point of actual physical assault or other
>
> disruptive workplace behavior.
>
> Department of Health and Human Services, 2004.5.

As a legal incentive for public employers to adopt a policy similar to or identical as the policy set forth in the Model Abusive Conduct Prevention Policy, the Healthy Workplaces Act provides that any government entity adopting the policy or conforms to the requirements set out in Tennessee Code Annotated, Section 50-1-503(b), is immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish.

To obtain immunity under the Act, the policy must do two things. First, the policy must assist employers in recognizing and responding to abusive conduct in the workplace; and second, it must prevent retaliation against any employee who has reported abusive conduct in the workplace. The Act defines "abusive conduct" as "acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, which can include but is not limited to: repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets; verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or the sabotage or undermining of an employee's work performance in the workplace." The language of the statute makes clear the Act focuses primarily on the conduct itself versus the motivation and/or reasoning for the conduct.

Until recently, the Tennessee Healthy Workplaces Act only applied to public employers. In April 2019, Governor Bill Lee signed into law a bill which ***expands the definition of "employer" to include private employers***. While the amendment does not create a new cause of action for private employers, private employers who adopt an anti-abusive policy and procedure that meets with the statute's requirements will have immunity from suit for negligent and intentional infliction of emotional distress claims.

It is important to mention; the adoption of this amendment does not *mandate* private employers to adopt

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to such a policy nor does it prevent private employers from exposure to harassment claims at the federal level or under Tennessee statutes pertaining to protected classes. Further, the amendment is unclear as to whether immunity is granted for employers who adopt the policy verses employer who adopt *and enforce* such a policy. Based upon the TACIR's model policy, it appears a written policy alone may not be enough to invoke the immunity defense.

An even grayer area of law for private employers with the expansion of this Act seemingly lies within the Tennessee Workers' Compensation laws and how to deal with harassment in the context of a workers' compensation claim brought by an employee. While Tennessee's workers' compensation laws recognize that where the employee suffers from a nervous, emotional, or psychiatric injury, it may qualify as an occupational disease or an injury by accident (See *Mays v. United States Fidelity & Guaranty Co.*, 672 S.W.2d (Tenn. 1982.); *Jose v. Equifax, Inc*. 556 S.W. 2d 82 (Tenn. 1977)), Tennessee courts have unswervingly held workers' compensation claims pertaining to claims of negligent infliction of emotional distress based on conduct in the workplace are barred under its exclusive remedy provision. Based upon the language of the amendment as written it does not appear the exclusive remedy provision is affected. However, only time will tell as to whether the Act influences an amendment to the exclusive remedy provisions in the workers' compensation realm.

Employers should weight the pros and cons of adopting an anti-bullying policy or altering an existing policy to meet the TACIR standards. From a cost perspective, the adoption of an anti-bullying policy in conjunction with the notion that the TACIR model policy suggests some form of enforcement rather than a policy alone, requires employers to conduct internal investigations to deal with bullying complaints. Some private employers may not have the capacity or capital to embark on such investigations.

Should employers opt to have a policy in place that holds abusers accountable for their actions they may deter misconduct and in turn, employers have a mechanism for corrective action and appropriate discipline for workplace abusers. In addition, without an anti-bullying policy, victims of abuse and harassment in the workplace remain unprotected and will not feel compelled to report such conduct.

For more information on the Healthy Workplace Act, visit www.healthyworkplacebill.org. To see the Bill, visit www.capitol.tn.gov/Bills/11/Bill/HB0856.pdf

employment when compared to their male colleagues is not sex discrimination under Title VII. When analyzing a claim of discrimination based on sexual orientation, men and women are held to the same standard and thus, any discrimination because of the individual's sexual orientation is not discrimination "because of ... sex." This is the case because even if sexual behavior and sexual attraction are "the *sin quan non*" of sexual stereotypes, such a stereotype does not disadvantage women versus men or vice versa.

In *Bostock*, the plaintiff asserted he was discharged for participating in a gay softball league, while the county claimed he was terminated for misuse of funds. In *Zarda*, the plaintiff, a tandem high-dive instructor, asserted he was terminated for being gay, while the defendant claimed he was terminated for inappropriate touching of a female customer. While the United States Court of Appeals for the Eleventh Circuit upheld its prior precedent in *Bostock* that Title VII did not prohibit discrimination on the basis of sexual orientation, the United States Court of Appeals for the Second Circuit reversed its prior precedent when, in *Zarda*, it opined that discrimination based on sexual orientation was a form of sex discrimination. The Second Circuit recognized that the term "sex" under Title VII "means biologically male or female" in reaching its conclusion that making an employment decision based on an employee's sexual orientation applied an impermissible sexual stereotype in violation of Title VII.

In an effort to support the often required "comparator evidence" (a similarly situated person not of the protected classification who was treated more favorably), the Second Circuit held that had the plaintiff been female and involved in a romantic relationship with a male, the plaintiff would not have suffered the same fate, in this case termination. In following the United States Court of Appeals for the Seventh Circuit's analysis of "only changing the sex of the plaintiff and leaving all other factors the same," the Second Circuit changed two relevant factors, both the person's sex and the person's sexual orientation by comparing a homosexual male to a heterosexual female. Such a comparison fails to compare two people who are similarly situated, especially when the (previously non-covered) factor is sexual orientation and that factor is discounted as of no consequence. Yet, the Second Circuit concluded that, based on its comparison, "sexual orientation is a factor of sex" and, therefore, protected under Title VII.

The Supreme Court will have to determine the proper analysis for applying Title VII's prohibition on discrimination because of sex. It is unknown whether the Court will hold that the application of a "sexual stereotype" is in and of itself a violation of Title VII even if that alleged stereotype applies equally to both men and women as in the *Zarda* case, and if so, what constitutes an impermissible sexual stereotype. Because *Bostock* and *Zarda* reached opposite conclusions on the same legal question, the two cases have been consolidated for briefing and oral argument.

Does Title VII Prohibit Discrimination on the Basis of Transgender Status?

In *R.G. and G.R. Funeral Homes*, the United States Court of Appeals held that a person's transgender status or intent to undergo a gender transition was a protected status and that discrimination against a person on the basis of transgender status or an intent to undergo a gender transition was discrimination because of sex. The Sixth Circuit held that the Funeral Homes' decision to terminate a male funeral director who announced that, upon his return from a vacation, he would appear and dress consistent with the female dress code violated Title VII. The Sixth Circuit found that the decision necessarily considered the employee's sex and, therefore, violated Title VII because an employee's sex "must be irrelevant to employment decisions." The Sixth Circuit also found that a person's gender non-conforming behavior could not be considered because to do so would be to apply an impermissible sexual stereotype. Relying on *Price Waterhouse*, the Sixth Circuit held that if a female employee could not be denied a position for failing to wear make-up and wear dresses, then a male employee could not be denied a position when he did. According to the Sixth Circuit, "discrimination based on a failure to conform to stereotypical gender norms" violates Title VII.

The Supreme Court has asked the parties to address two issues in this case. First, the Court will consider "whether Title VII prohibits discrimination against transgender people based on their status as transgender." Second, the Court will consider "whether Title VII prohibits discrimination against transgender people based on ... sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989)." How the second question is answered will likely have a significant effect on how the Court decides the cases of *Bostock* and *Zarda*. A ruling is expected late spring 2020, but no later than the end of the Supreme Court's next term in June 2020.