Potential Changes to Title VII Protections Against Discrimination 'Because of … Sex'

Title VII makes it an unlawful practice for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his … sex,” or “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s … sex.”

By **Stephen L. Korbel and Anna Z. Skipper** | November 07, 2019 at 12:20 PM

Stephen L. Korbel, left, and Anna Z. Skipper, right, of Babst Calland Clements & Zomnir.

On Oct. 8, the U.S. Supreme Court heard oral argument on three cases addressing the scope of sex discrimination protections under Title VII of the Civil Rights Act of 1964 Section 7, 42 U.S.C. Section 2000e-2 (1964). Title VII makes it an unlawful practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his … sex," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's … sex."

Two consolidated cases, *Altitude Express v. Zarda,* 883 F.3d 100 (2d. Cir. 2018), cert. granted, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (U.S. Apr. 22, 2019) (No. 17-1623) and *Bostock v. Clayton County Board of Commissioners*, 723 Fed. Appx. 964 (11th cir. 2018), cert. granted, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (U.S. Apr. 22, 2019) (No. 17-1618), address whether discrimination on the basis of sexual orientation is a form of discrimination "because of …

sex." A third case, *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, 884 F.3d 560 (6th Cir. 2018) *cert. granted in part,* 139 S. Ct. 1599, 203 L. ED. 2d 754 (U.S. Apr. 22, 2019) (No. 18-107), addresses discrimination on the basis of gender identity and transgender status.

In *Zarda*, the U.S. Court of Appeals for the Second Circuit held that an employee was entitled to bring a Title VII claim for discrimination based on sexual orientation as a subset of sex discrimination. The employee alleged he was fired due to his failure to conform to sex stereotypes referring to his sexual orientation, by making clients aware of his homosexuality. The court noted that under the Supreme Court Holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989), Title VII prohibits not just discrimination based on sex itself, but also discrimination based on nonconformity with gender norms. The *Zarda* court reasoned that sexual orientation discrimination is a subset of sex discrimination for three reasons. First, citing *Rivera v. Rochester Genesee Regulation Transportation Authority,* 743 F.3d 11, 23 (2d Cir. 2014), the court noted that because Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor, and sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted. Thus, it is impossible for an employer to consider sexual orientation without considering the employee's sex, resulting in a decision in which sex was a motivating factor. Second, the court noted that under *Price Waterhouse*, sex discrimination may be based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. It concluded that where a man who is attracted to men is treated differently than a woman who is attracted to men, sex discrimination has occurred. Finally, the court noted that sexual orientation discrimination is associational discrimination, similar to race discrimination based on the race

of an employee's spouse, rather than the race of the employee himself as stated in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008).

In the accompanying case, *Bostock*, an employee of the Clayton County, Georgia, Child Welfare Services alleges he was terminated from his position in violation of Title VII due to sex, sexual orientation and failure to conform to a gender stereotype, after he promoted his participation in an LGBTQ softball league. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court dismissal of Gerald Bostock's Title VII suit for failure to state a claim, in accordance with its holding in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1256 (11th Cir. 2017), cert denied, 138 S. CT. 557, 199 L. ED. 2d 446 (2017), which rejected the argument that Supreme Court precedent in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998) and *Price Waterhouse* supported a cause of action for sexual orientation discrimination under Title VII.

The final case, *R.G. & G.R. Harris Funeral Homes*, considers whether Title VII prohibits discrimination against employees either because of their failure to conform to sex stereotypes under *Price Waterhouse,* or based on their transgender and transitioning status. In *R.G. & G.R. Harris*, the U.S. Court of Appeals for the Sixth Circuit considered the case of a transgender woman, who was terminated shortly after notifying her employer that she intended to transition from male to female and would represent herself and dress as a woman while at work. The court, citing *Zarda*, stated that under *Price Waterhouse*, an employer engages in unlawful discrimination on the basis of sex when it expects either biologically male or biologically female employees to conform to certain notions of how each should behave. The court reasoned that it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by

the employee's sex, and thus, discrimination on the basis of transgender or transitioning status violates Title VII. In addition, the court held that "because of sex" inherently includes discrimination against employees because of a change in their sex.

The outcome of these cases will shape the landscape of federal protections for employees who experience discrimination based on sexual orientation and gender identity. In addition, a bill known as the "Equality Act" was introduced to the U.S. House of Representatives on March 13 by Rep. David Cicilline (D-RI-1). The bill notes that the absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under federal statutory law has created uncertainty for employers and other entities covered by federal nondiscrimination laws and proposes to amend Title VII by striking "sex" in each place it appears and inserting "sex (including sexual orientation and gender identity)". The bill has been received in the Senate, read twice and was referred to the Committee on the Judiciary.

At this time, there are no statewide statutory protections for discrimination based on sexual orientation or gender identity in Pennsylvania, and no relevant bills currently pending. However, more than 50 local municipalities and counties (including: Allegheny and Erie counties; Philadelphia and Pittsburgh; the municipalities of Mount Lebanon, Ross Township and State College among others) have ordinances in place prohibiting discrimination based on sexual orientation or gender identity in employment, housing and public accommodations. In addition, in 2018, the Pennsylvania Human Relations Commission issued guidance stating that for the purpose of persons filing complaints alleging discrimination under the Pennsylvania Human Relations Act, 43 P.S. Section 953 (1955), the commission will interpret "sex" to include sex assigned at birth, sexual orientation, transgender identity,

gender transition, gender identity, or gender expression, see Pennsylvania Human Relations Commission, Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act (2018).

The current momentum at the local, state and federal level is to extend discrimination protections to individuals based on sexual orientation as well as gender identity. Employers should be prepared to revise policies and handbooks to reflect a broader definition of discrimination because of sex. In addition, for some employers, it may, from employee relations and morale perspective, make sense to proactively expand protections prior to any Supreme Court ruling, or state or federal statutory change. When making this decision, employers should carefully consider their organizational culture to determine whether such a proactive change would benefit their organization.

Stephen L. Korbel *is a shareholder in the public sector and employment and labor services groups of Babst, Calland, Clements & Zomnir. He counsels public and private employers in all aspects of the employment relationship, from hiring through termination. Contact him at* ***skorbel@babstcalland.com*** *or 412-394-5627.*

Anna Z. Skipper *is an associate with the firm and may be contacted at* ***askipper@babstcalland.com*** *or 412-253-8806.*