

LEGISLATIVE UPDATE

November 2018

The Department of Justice Contends Gender Identity Does Not Receive Coverage Under Title VII

For those keeping an eye on the cases heading toward the Supreme Court for review, it has been a busy month, especially concerning sex discrimination under Title VII. One case in particular, *R.G. & G.R. Harris Funeral Home v. EEOC*, has drawn some attention because the Department of Justice (“DOJ”) once again has voiced a position contrary to the EEOC.

In *R.G. & G.R. Harris Funeral Home v. EEOC*, the Sixth Circuit found that discrimination against employees, either because of their failure to conform to sex stereotypes, or their transgender or transitioning status, violates Title VII. In this case, Aimee Stephens was fired after notifying the funeral home that she would be transitioning to, and presenting herself as, female following a scheduled vacation. The funeral home petitioned the U.S. Supreme Court to review the Sixth Circuit’s decision, although the Court has not yet accepted certiorari.

On October 24, 2018, the DOJ filed a brief in opposition of the Sixth Circuit’s ruling, arguing Title VII’s prohibition against sex discrimination does not apply to discrimination based on gender identity. The DOJ further argued sex stereotyping is only illegal when it treats men and women differently. The DOJ relied on the definition of “sex” as defined by a 1958 edition of the Webster’s

Dictionary, which does not refer to gender identity. The DOJ also contended enforcement of a sex-specific dress code by itself does not constitute discrimination, although this question is not before the Supreme Court.

For years, the Justice Department’s Civil Right Department and the EEOC have operated under a memorandum of understanding regarding the application of civil rights laws. However, considering the contrary positions of the government on sex discrimination, it is questionable how the two agencies will coexist. Ultimately, the Justice Department represents the interests of the United States and has sole authority to represent the government before the high court.

It is noteworthy the Supreme Court has also been asked to review *Altitude Express, Inc. v. Zarda* and *Bostock v. Clayton Cnty.*, which present a related question on whether sexual orientation discrimination receives coverage under Title VII. The DOJ, which argued against the EEOC’s position during oral arguments in *Zarda* last year, has asked the Supreme Court not to rule on the petition for certiorari in the funeral home case until the Court decides whether it will grant review in *Zarda* and *Bostock*.



Holistic Approach to Combat Harassment in the Workplace

A year following the inception of the #MeToo movement, the Equal Employment Opportunity Commission (EEOC) held a public meeting on October 31, 2018, entitled Re-vamping Workplace Culture to Prevent Harassment. During this meeting, the Commission heard from 7 panelists who testified about how each of their respective organizations are tackling harassment in the workplace through preventive measures, innovative training approaches, awareness campaigns, and leadership accountability. Following the meeting, acting Chair Victoria Lipnic stated, "leadership and accountability set the tone and the expectation that harassment will not be tolerated in the workplace...Our witnesses today stressed how both leadership and accountability must also be driven throughout an organization from the line employees, to supervisors, to the CEO, and the Board." Commissioner Chai R. Feldblum stated, "today's testimony underscores that to really tackle the problem of workplace harassment, we need to change workplace culture, hold people accountable and have the right policies, procedures and training...no one element, alone, will suffice." Commissioner Feldblum who co-chaired the EEOC Select Task on the Study of Harassment in the



Workplace emphasized that combating harassment in the workplace takes a holistic approach and starts with addressing workplace culture.

The Commission also released the final [fiscal year 2018 data](#) which highlighted the agency's efforts to combat and prevent workplace harassment. The EEOC reported a 13.6 percent increase in sexual harassment charges, which was one and a half percent more than what was reported last month in the preliminary fiscal year 2018 data. For charges alleging harassment, probable cause

findings increased by 23.6 percent and resulted in 66 harassment lawsuits, 41 of which alleged sexual harassment. The EEOC also reported a 50 percent increase by individuals and employers seeking information and guidance on harassment on their website.

The Commission will be holding open the October 31, 2018 meeting record for 15 days and invites the public to submit written comments. Comments and feedback should be mailed to Commission Meeting, EEOC Executive Officer, 131 M Street, N.E. Washington, DC. 20507, or emailed to: Commissionmeetingcomments@eoc.gov.

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