

## NAVIGATING SEX, GENDER AND ORIENTATION DISCRIMINATION IN THE WORKPLACE

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### **Navigating Sex, Gender, and Orientation Discrimination in the Workplace**

*M. Cabell Clay and Sarah H. Negus*

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits private employers from discriminating against an individual on the basis of sex. 42 U.S.C.A. § 2000e-2(a) (1). But how broad is the scope of “on the basis of sex”? Does Title VII’s prohibition of sex discrimination prohibit discrimination on the basis of sexual orientation? What about gender identity? Different circuit courts, the Equal Employment Opportunity Commission (“EEOC”), and the Department of Justice (“DOJ”) provide different answers. A number of cases currently pending before the United States Supreme Court regarding these questions may provide a resolution and give clarity to employers. Additionally, although unlikely to pass the Senate given the current legislative climate, the Equality Act, which recently passed in the House of Representatives, would amend Title VII to explicitly include protections for sexual orientation and gender identity.

The breadth of “sex discrimination” also receives attention at the state and local levels. Although state statutes widely vary when it comes to their own definition of discrimination on the basis of sex, nearly half of all states specifically prohibit discrimination based on sexual orientation and gender identity. In these jurisdictions, an employer can be found liable for discrimination based on individual’s sexual orientation or gender identity, even if the employee fails to bring a Title VII claim. Further complicating the statutory framework for employers, certain counties and cities have also enacted ordinances explicitly prohibiting sexual orientation and gender identity discrimination in the employment arena.

Regardless of how the U.S. Supreme Court rules on the scope of Title VII’s definition “sex”, the issue will continue to garner attention. Even if the Supreme Court applies a narrow definition of “sex” under Title VII, employers can expect additional states, counties, and cities to continue to enact legislation and ordinances providing a wider array of protections. Additionally, the EEOC will likely continue to investigate charges, and perhaps bring cases, on the basis of sexual orientation and gender identity discrimination. Employers, particularly those that operate in a number of jurisdictions, are advised to review and update their anti-discrimination and anti-harassment policies and to consider providing training that addresses discrimination and harassment on the basis of sexual orientation and gender identity.

### **Federal Level: Supreme Court to Resolve Key LGBTQ Cases**

On April 22, 2019, the United States Supreme Court agreed to hear three cases addressing whether the definition of “sex” under Title VII is broad enough to encompass discrimination based on sexual orientation and gender identity. The first two cases, *Zarda v. Altitude Express, Inc.* and *Bostock v. Clayton County* address sexual orientation discrimination. The third case, *EEOC v. R.G. and G.R. Harris Funeral Homes* addresses gender identity discrimination.

In *Zarda*, the Second Circuit held that Title VII prohibits sexual orientation discrimination. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018), cert. granted sub nom. *Altitude Exp., Inc. v. Zarda*, No. 17-1623, 2019 WL 1756678 (U.S. Apr. 22, 2019). The plaintiff in *Zarda*, a skydiving instructor, told a customer that he

was gay. He was then terminated after the customer said the comment made her uncomfortable. *Id.* at 108-109. The plaintiff argued that he was discriminated against because of his sexual orientation and that he “did not conform to the straight male macho stereotype.” *Id.* at 109. The court agreed, and found “because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.” *Id.* at 115.

In *Bostock*, the Eleventh Circuit held that Title VII does not prohibit sexual orientation discrimination. *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App’x 964, 965 (11th Cir. 2018), cert. granted sub nom. *Bostock v. Clayton Cty., Ga.*, No. 17-1618, 2019 WL 1756677 (U.S. Apr. 22, 2019). The court, citing earlier cases, found no cause of action for sexual orientation discrimination to exist under Title VII and dismissed his case. *Id.* (citing *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017)). The *Bostock* plaintiff was terminated soon after persons with “significant influence” on his employer openly criticized the plaintiff’s involvement in a gay recreational softball league. *Bostock v. Clayton Cty., No. 1:16-CV-1460-ODE*, 2017 WL 4456898, at \*1 (N.D. Ga. July 21, 2017).

In *Harris Funeral Homes*, a transgender employee alleged she was fired after she told her employer about her intended transition from male to female. *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567-70 (6th Cir. 2018), cert. granted in part sub nom. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019). Ruling in her favor, the Sixth Circuit found that discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, violates Title VII. *Id.* at 575-76.

These cases highlight the differing approaches to LGBTQ rights that different government agencies hold, some of which have even submitted competing briefs in the three cases. The DOJ’s current position is that Title VII’s prohibition of sex discrimination does not cover gender identity or sexual orientation discrimination. In the DOJ’s Brief for the Federal Respondent in Opposition in the *Harris Funeral Homes* case, it argued for a plain meaning interpretation of the word “sex” and concludes that Title VII’s definition of sex means biological sex and does not encompass gender identity. Brief for the Federal Respondent in Opposition, *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 2018 WL 5293597, \*17 (Oct. 24, 2018). This approach echoes the DOJ’s earlier amicus brief in *Zarda*, where it argued that Title VII does

not encompass sexual orientation discrimination because “sex” refers only to membership in a class delineated by gender. Brief of the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 2017 WL 3277292, \*7 (July 26, 2017).

In contrast, the EEOC’s current position is that Title VII prohibits sex discrimination on the basis of both gender identity and sexual orientation. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, (July 15, 2015) (holding that discrimination against an individual because of that person’s sexual orientation is discrimination because of sex and, therefore, prohibited under Title VII); *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (holding that gender identity discrimination, including discriminating against someone on the basis of their transgender status, is discrimination because of sex and, therefore, prohibited under Title VII).

### State Level: Nearly Half of All States Already Protect Against Discrimination on the Basis of Sexual Orientation and Gender Identity.

There are currently only three states, North Carolina, Arkansas, and Tennessee that do not have any state or local statutes or ordinances protecting against sexual orientation or gender identity discrimination.<sup>1</sup> Twenty-three states and the District of Columbia have state statutes prohibiting private employers from discrimination on the basis of sexual orientation,<sup>2</sup> and more than twenty states have similar statutes prohibiting private employers from discrimination on the basis of gender identity or transgender status.<sup>3</sup> Many cities and counties also have enacted ordinances prohibiting discrimination on the basis of sexual orientation or gender identity.

### Practical Tips for Employers:

While awaiting decisions from the U.S. Supreme Court, employers can take proactive steps to increase the likelihood that their policies and practices are in

<sup>1</sup> For reference, see [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances/policies](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies)

<sup>2</sup> See Cal. Gov’t Code § 12940; Colo. Rev. Stat. § 24-34-402(1); Conn. Gen. Stat. Ann. § 46a-81c; Del. Code Ann. tit. 19, § 711; D.C. Code § 2-1402.11; Haw. Rev. Stat. § 378-2(a); 775 Ill. Comp. Stat. 5/1-103(O-1), (Q), 5/2-102(A); Iowa Code § 216.6(1); Me. Stat. tit. 5, § 4572(1); Md. Code Ann., State Gov’t § 20-606; Mass. Gen. Laws ch. 151B, § 4; Mich. Comp. Laws § 37.2202 (see also Mich. Civil Rights Commission Interpretative Statement [https://www.michigan.gov/documents/mdcr/MCRC\\_Interpretive\\_Statement\\_on\\_Sex\\_05212018\\_625067\\_7.pdf](https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf)); Minn. Stat. Ann. § 363A.08; Nev. Rev. Stat. 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code § 49.60.180; Wis. Stat. §§ 111.36(1)(d), 111.321, 111.322.

<sup>3</sup> See Cal. Gov’t Code § 12940; Colo. Rev. Stat. §§ 24-34-402(1), 24-34-301(7); Conn. Gen. Stat. Ann. § 46a-60; Del. Code Ann. tit. 19, § 711; D.C. Code § 2-1402.11; Haw. Rev. Stat. § 378-2(a); 775 Ill. Comp. Stat. 5/1-103(O-1), (Q), 5/2-102(A); Iowa Code § 216.6(1); Me. Stat. tit. 5, §§ 4553(9-C) and 4572(1); Md. Code Ann., State Gov’t § 20-606; Mass. Gen. Laws ch. 151B, § 4; Mich. Comp. Laws § 37.2202; Minn. Stat. Ann. §§ 363A.03, 363A.08.; Nev. Rev. Stat. 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. §§ 174.100(7), 659A.030(1); R.I. Gen. Laws § 28-5-7; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code §§ 49.60.180, 49.60.040(26).

compliance under federal, state, and local laws. In addition to monitoring current and pending legislation, employers should frequently review and update their policy handbooks, paying particular attention to the Equal Employment Opportunity (“EEO”) Statement and sections on discrimination and harassment. Employers should decide whether they want to add in terms like “gender identity” and “sexual orientation” into their EEO

statement and consider adding those terms to anti-discrimination and harassment sections as well.

Employers are also advised to provide training for employees on discrimination, and it is advisable to include in the training materials information on the prevention of discrimination on the basis of sexual orientation and gender identity.

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## Agenda

- Background
- Federal Level:
  - *SCOTUS Pending*
  - *The Equality Act*
- State Level:
  - *Taking Matters Into Their Own Hands*
- Best Practices for Employers

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## Background: “On the Basis of Sex”

- Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating against an individual *on the basis of sex*.
- What is the scope of “on the basis of sex”?
- Circuit Courts, EEOC, and DOJ all give different answers.

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## Background: Definitions

**“Sex”** and **“gender”** are often used interchangeably – but the Oxford English Dictionary now defines sex as biological and gender as social.

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## Background: Definitions

Many state laws define **gender identity** as “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth.”

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## Background: Definitions

**“Sexual orientation”** is generally defined as whether a person is attracted to members of the same sex, the opposite sex, or both sexes.

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## Federal Level: *SCOTUS Pending*

- SCOTUS will take up three key cases next term:
  - *Zarda v. Altitude Express*
  - *Bostock v. Clayton County*
  - *EEOC v. R.G. and G.R. Harris Funeral Homes*

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## Federal Level: *SCOTUS Pending*

- *Zarda v. Altitude Express*
  - Plaintiff was a skydiving instructor that told a customer he was gay; terminated after customer complained.
  - **Second Circuit held that Title VII prohibits sexual orientation discrimination.**

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## Federal Level: *SCOTUS Pending*

- *Bostock v. Clayton Cty. Bd. of Commissioners*
  - Plaintiff terminated due to his involvement in a gay recreational softball league.
  - **Eleventh Circuit held that Title VII does not prohibit sexual orientation discrimination.**

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## Federal Level: *SCOTUS Pending*

- *EEOC v. R.G. & G.R. Harris Funeral Homes*
  - Plaintiff alleged she was fired after telling employer about her intended transition.
  - **Sixth Circuit found that discrimination because of their failure to conform to sex stereotypes violates Title VII.**

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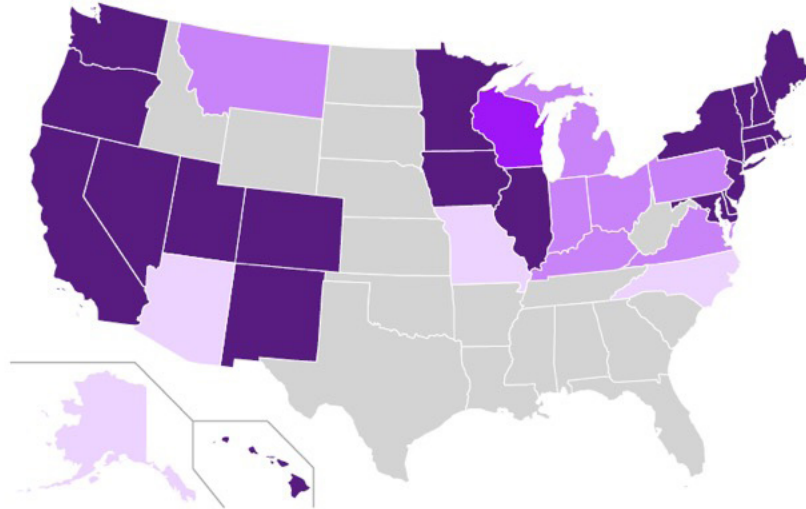
## Federal Level: *Equality Act*

- The House of Representatives recently passed the Equality Act.
- The Equality Act would amend Title VII to explicitly include “sexual orientation” and “gender identity”.
- Seems unlikely to pass the Senate.

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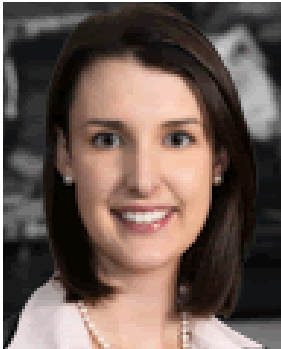
## State Level: *Into Their Own Hands*

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## Best Practices

- Monitor current & pending legislation in cities, counties, & states relevant jurisdictions.
- Frequently review & update policies.
- Provide training for all employees on discrimination, including sexual orientation and gender identity.

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Cabell Clay brings to her wide-ranging clients counseling and litigation experience in both employment matters and commercial disputes.

Cabell appreciates that every business is unique and believes that understanding her clients' business model, culture, and needs is crucial to successful attorney-client partnerships. Whether it involves high stakes litigation defense or review of employment practices and policies, Cabell works with clients to develop advice and strategies that align closely with their long-term goals and interests.

Cabell routinely advises clients on a variety of employment matters, including employment agreements, drafting of restrictive covenants, trade secret protections, employee discipline and terminations, severance agreements, employment handbooks and policies, ADA accommodation requests, FMLA compliance, discrimination and harassment issues, and wage & hour compliance and audits.

She also handles wide-ranging employment and commercial litigation, including trade secret misappropriation litigation, DOL investigations, restrictive covenants disputes, management representation in Title VII, ADA, ADEA, and wage & hour litigation, as well as proceedings before the EEOC and corresponding state and local agencies. Additionally, Cabell has substantial experience in handling class action defense, internal investigations, contract claims, securities and mortgage fraud defense, unfair trade practices claims, and civil appeals.

In addition to her extensive civil trial experience, Cabell spent six months on special assignment as an Assistant District Attorney in the Mecklenburg County District Attorney's Office, where she honed her trial skills by successfully prosecuting misdemeanors in both District and Superior Courts.

### **Practice Areas**

- Class Actions & Multi-District Litigation
- Employment & ERISA Litigation
- Employment & Labor
- Employment & Noncompetition Agreements & Trade Secrets Protection
- Financial Services Litigation
- Litigation
- North Carolina Business Court Litigation
- Trade Secrets Litigation
- Wage & Hour Compliance & Litigation
- White Collar, Regulatory Defense, and Investigations

### **Publications**

- Miller & Clay Publish "A New Litigator's Guide" - Article a top-read piece of "Expert Analyses"; Law360, July 2014
- Civil Litigators' Insights from the District Attorney's Office - North Carolina Lawyer, November 2013

### **Education**

- B.A., University of Virginia, 2005
- J.D., College of William & Mary, 2008, Order of Barristers