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Employment Law Note

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A Conservative Majority U.S. Supreme Court is Back in Session and Discrimination is on the Docket

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Each year the United States Supreme Court accepts 100-150 of the more than 7,000 lower court decisions it is asked to review. The Court's term runs October through June, and to date, it has accepted just over 50 cases, including a few that may significantly impact employers. Issues to be decided by the Court include whether gay and transgender employees are protected under Title VII of the Civil Rights Act and the type of proof necessary to prove intentional race discrimination. With the retirement of Justice Kennedy last year, the longtime "swing vote" on the Court, and the appointment of conservative Justice Kavanaugh, the Court's decisions this term will likely favor employers.

Does Title VII Protect LGBT Employees?

In early October, the Court heard oral argument in three cases involving LGBT rights under Title VII. For the first question—*whether Title VII's ban on sex-based discrimination prohibits discrimination based on sexual orientation*—the Court consolidated two cases with the same issue that was decided differently by lower courts. In *Altitude Express Inc. v. Zarda*, a skydiving instructor alleged his employer wrongly fired him after he revealed his sexual orientation to a customer. In that case, the 2nd Circuit ruled that Title VII's ban on gender bias extends to sexual orientation discrimination. The 11th Circuit reached a contrary conclusion in *Bostock v. Clayton County,* where a Child Welfare Services worker claimed the basis for his termination—namely, mismanagement of funds—was a pretext for discrimination based on his sexual orientation. The 11th Circuit ruled that Title VII does *not* prohibit discrimination on the basis of sexual orientation.

The second question before the Court—*whether Title VII prohibits discrimination against transgender plaintiffs based on their status as transgender or based on sex stereotyping*—is at issue in a case brought by the Equal Employment Opportunity Commission (EEOC) against a funeral home company. In *R.G. & G.R. v. EEOC*, shortly after the employee announced her plans to transition from male to female and wear women's clothing to work, the company terminated her. The 6th Circuit held that discrimination because of employees' transgender or transitioning status is illegal under Title VII. The court also found that firing transgender workers for not conforming to gender norms is illegal sex-based stereotyping under the Supreme Court's 1989 *Price Waterhouse v. Hopkins* ruling.

Prediction: Many speculate this litigation will lead to 5-4 splits *against* LGBT plaintiffs. At oral argument, the justices appeared divided. Several of the Court's conservative justices expressed concern that Congress, not the courts, should be addressing this issue. The Court's four liberal justices voiced support for a broader interpretation of Title VII that would protect against sexual orientation and transgender discrimination, with Justice Sotomayor asking at what point courts need to intervene and put a halt to "invidious discrimination."

Significance of Decisions: The Court's ruling in these cases will dramatically affect approximately 8 million LGBT employees currently living and working in the U.S. and their employers. If the employers prevail, workers will be unable to assert federal protection from job discrimination on the basis of sexual orientation or gender identity. It would then be left to Congress to decide whether to update the Civil Rights Act to include protections for the LGBT community. Several states (including Washington), cities and companies already prohibit discrimination against LGBT workers, but those in places without such protections may be left without recourse.

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Is Race the Deciding or Motivating Factor in a Discrimination Suit?

In mid-November, the Court will consider whether a race discrimination claim under Section 1981 of the Civil Rights Act requires the plaintiff to show that race was the *deciding* reason for the adverse action, or only that race was a *motivating* factor. In *Comcast v. National Association of African American-Owned Media*, media mogul and TV personality Byron Allen alleges Comcast discriminated on the basis of race when it refused to carry his network's channels for more than eight years while at the same time introducing more than 80 lesser-known, white-owned channels. Allen further alleges a Comcast executive explained the decision by saying: "We don't need any more Bob Johnsons." (Johnson founded Black Entertainment Television and became the first black American billionaire.) Allen claims the rejection was a violation of the Civil Rights Act of 1866, which was passed in the wake of the Civil War to prohibit discrimination in the context of contracts. Courts have read it to bar race discrimination in a handful of contexts, including employment and business contracting.

A California federal judge dismissed the case, finding Comcast's decision not to work with Allen's studio could have been based on legitimate business reasons. The 9th Circuit reversed the decision, concluding that Allen only needed to show that racial bias was a factor in Comcast's rejections for the case to proceed.

Prediction: With the addition of Justice Kavanaugh, the Court appears to be more conservative, pro-employer and likely to be skeptical of discrimination claims. This, along with the Trump administration supporting Comcast and warning the Court of possible repercussions for other federal anti-discrimination laws, doesn't bode well for Allen and future civil rights plaintiffs. In 2013, the Court ruled 5-4 along party lines in *Univ. of Texas v. Nassar* that workers bringing Title VII retaliation claims must show retaliation was the "but for" cause of an adverse action, raising the bar for plaintiffs. Some predict the Court will reach a similar conclusion in this case.

Significance of Decision: Some believe that the outcome of the Court's decision in *Comcast* could either open the flood gates for discrimination claims or close the book on a 150-year old law that has provided federal protection from systemic racism in business, and that it may have far-reaching consequences for employers. In a "friend of the court" brief supporting Comcast, the Chamber of Commerce advises that a ruling for Allen will encourage employment discrimination plaintiffs to circumvent Congress' limits on claims under Title VII by bringing their claims under Section 1981 instead because it will be easier to show race was "a motivating factor" under Section 1981 than "the deciding factor" under Title VII. According to Chamber, as employment decisions are "inherently subjective," it will be "relatively easy for a plaintiff to allege that discrimination was a motivating factor. Then the defendant effectively has the burden of proving a negative—that discrimination was not a factor. Proving a negative is always difficult and it will be especially difficult when allegations of discrimination and mixed motives are swirling about." Conversely, Allen warns that "Comcast's proposed pleading standard would effectively shut the door to the federal courts for African Americans and other people of color who are treated differently in contracting because of race."

Key Takeaways

Employers should keep a close eye on the Supreme Court this term. The justices appeared divided at oral argument with respect to the trio of cases involving sexual orientation and Title VII and may respond similarly to argument in Allen's Section 1981 case against Comcast. Decisions in these cases are expected by summer.

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