

LEGAL UPDATES

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# As Eighth Circuit Deliberates Title VII and Sexual Orientation, SCOTUS Weighs In

On Wednesday, April 17, a three-judge panel of the Eighth Circuit heard oral arguments in an appeal from the United States District Court for the Eastern District of Missouri in *Horton v. Midwest Geriatric Management LLC*. Although the forthcoming Eighth Circuit decision would add to the split among the federal circuits as to whether the prohibition against sex discrimination in Title VII applies to discrimination based on sexual orientation, today's order list indicates that SCOTUS will settle the issue.

## A dismissal of his claim by the lower district court

The district court dismissed a complaint filed by the plaintiff, Mark Horton, which alleged that Midwest Geriatrics Management (MGM) violated Title VII of the Civil Rights Act of 1964 by unlawfully discriminating against Horton on the basis of sex and religion. In his complaint, Horton claimed that MGM withdrew its offer of employment after learning that Horton, a male, was in a relationship with another man. Horton's complaint alleged three bases for his Title VII claim of discrimination based on sex: 1) that he was discriminated against based on his sexual orientation, 2) that he was discriminated against because of his association with a person of a particular sex, his male partner, and 3) that he was discriminated against because he failed to conform with sex stereotypes and MGM's preconceived definition of how males should behave.

The district court rejected Horton's argument that discrimination on the basis of sexual orientation is a form of sex discrimination. In reaching its holding, the district court pointed to *Williamson v. A.G. Edwards & Sons Inc.*, (*Williamson*), which held that "Title VII does not prohibit discrimination against homosexuals," and *Pambianchi v. Arkansas Tech University*, which

rejected the use of the sex stereotyping theory to bring under Title VII what is essentially a claim of discrimination based on sexual orientation. Similarly, the court refused to entertain Horton's claim of religious discrimination because it was related solely to his sexual orientation.

### **Oral argument before an Eighth Circuit panel**

In oral argument before the panel, Horton's attorney took the position that *Williamson's* holding was based on race discrimination and that the statements in *Williamson* regarding sexual orientation were dicta and non-binding. The panel countered that the *Williamson* court was entitled to affirm on any ground supported by the evidence. The panel also referred to *Sommers v. Budget Marketing Inc.*, which held that gender identity discrimination was not prohibited by Title VII, as a case antithetical to Horton's position. When Horton's attorney responded that sexual orientation and gender identity discrimination were different, one of the members of the panel replied it "wasn't clear to [him] at all" that when interpreting the definition of sex discrimination under Title VII, gender identity and sexual orientation claims were different. In addition, as *Sommers* noted, on "ten" occasions, Congress has refused to amend Title VII to include a prohibition against sexual orientation discrimination, which this particular member of the panel stated was "rather significant" and "even more controlling than the decision on the facts."

An attorney representing the Equal Employment Opportunity Commission (EEOC), who also argued on behalf of Horton, emphasized two reasons the panel should reverse the district court decision:

The plain language of the statute, "because of sex," incorporates sexual orientation discrimination because discrimination on the basis of sexual orientation "means that gender is not irrelevant, and Title VII requires gender to be irrelevant" to employment decisions.

To test for sex discrimination, the only thing that changes in the comparison of individuals is gender. Because a change in the sexual orientation of Horton eliminates the gender non-conformity, sex is the determining factor and the discrimination is because of sex.

Counsel for MGM began by arguing that the Eighth Circuit could rely on *Williamson* to affirm the lower court's dismissal of Horton's complaint. When a member of the panel challenged MGM's assertion that *Williamson's* language denying Title VII protection to homosexuals was a holding, MGM stood firm. In further support of its position that sexual orientation discrimination is not actionable under Title VII, MGM referred the court to the decision of *Schmedding v. Tnemec Co. Schmedding*, an Eighth Circuit decision handed down after *Oncale v. Sundowner Offshore Services Inc.* (holding that same sex harassment is prohibited under Title VII) and *Price Waterhouse v. Hopkins* (finding sex stereotyping actionable), cited the *Williamson* decision in a footnote as holding that discrimination based on sexual orientation was not protected under Title VII. Consequently,

MGM urged the panel to rely on *Schmedding* to affirm the district court decision without addressing “policy questions” or “societal concerns.”

On rebuttal, Horton raised three points:

That neither *Williamson* nor *Schmedding* are binding on the Eighth Circuit on the issue of whether sexual orientation discrimination is prohibited under Title VII because the statements in those cases on that issue are dicta.

That the Eighth Circuit should “look to the original public meaning,” defined as the meaning of the words as understood by a reasonably intelligent person at the time of passage of Title VII to define the word “sex.” He emphasized that the word “sex” refers to a male or female and argued that Title VII protection encompasses “differential treatment” between a marriage between two males and a marriage between a male and a female.

That, unlike the ADA, Title VII does not contain an exception that excludes sexual orientation from protection under the statute, and the Eighth Circuit should not read such an exception into Title VII.

Then, in response to a final question from the panel, Horton acknowledged two relist cases before the U.S. Supreme Court, *Bostock v. Clayton County, Georgia* and *Altitude Express Inc. v. Zarda*, which address the issue of whether Title VII prohibits sexual orientation discrimination. Noting that the Supreme Court could grant certiorari to the pair of cases at their April conference, Horton requested that the panel delay its decision pending a SCOTUS decision in those cases.

According to today’s order list issued by SCOTUS, Horton likely will get his wish for a delay in the issuance of an Eighth Circuit decision. After being relisted in excess of 10 times since August 2018, SCOTUS granted certiorari to three cases: *Bostock v. Clayton County, Georgia*; and *Altitude Express Inc. v. Zarda*; as well as a case involving transgender discrimination *R.G. and G.R. Funeral Homes Inc. v. EEOC*. This means that the question of whether the prohibition of discrimination based on sex under Title VII encompasses discrimination against the LGBTQ community will soon be settled law.

### **What this means to you**

The outcome of the SCOTUS decision could represent a significant shift in the law that may affect your business. We will continue to monitor and keep you informed of the developments in these cases as they occur.

### **Contact Us**

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If you have any questions about the case pending before the Eighth Circuit or the cases granted certiorari by the Supreme Court on this issue, please contact Brittany Falkowski or your Husch Blackwell attorney.

*Tracey Oakes O'Brien was a contributing author of this content.*