



The Voice of the
Defense Bar™

The Voice

October 23, 2019

Volume 18, Issue 42

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Supreme Court Will Render Landmark Decisions Regarding LGBTQ Protection Under Title VII

By Chelsea E. Thompson

This fall, the U.S. Supreme Court heard three employment cases that collectively ask: Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of...sex,” encompass discrimination based on an individual’s sexual orientation or gender identity? The legal landscape surrounding this question is complex, with state statutes, municipal ordinances, circuit court decisions, and federal policy overlapping and conflicting. Thus, the Supreme Court’s decision could signal sweeping change in employment, housing, credit, and other areas subject to discrimination prohibitions.

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“It’s easy to find differences. Very easy. We need to take more time to find common ground.”

U.S. Representative Elijah E. Cummings ([1951-2019](#)).

This Week's Feature

Supreme Court Will Render Landmark Decisions Regarding LGBTQ Protection Under Title VII

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This fall, the U.S. Supreme Court heard three employment cases that collectively ask: Does Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination “because of...sex,” encompass discrimination based on an individual’s sexual orientation or gender identity? The legal landscape surrounding this question is complex, with state statutes, municipal ordinances, circuit court decisions, and federal policy overlapping and conflicting. Thus, the Supreme Court’s decision could signal sweeping change in employment, housing, credit, and other areas subject to discrimination prohibitions.

Cases Before the Supreme Court

On October 8, 2019, the Supreme Court heard oral arguments regarding Title VII employment discrimination protections in *Bostock v. Clayton County, Georgia*, *Zarda v. Altitude Express, Inc.*, and *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.* *Bostock* and *Zarda* deal with sexual orientation, which GLAAD, a nongovernmental media-monitoring organization founded by LGBTQ individuals in the media, defines as “an individual’s enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex.” *Harris* addresses gender identity, which GLAAD defines as “a person’s internal, deeply held sense of their gender.” According to Gallup, 4.5 percent of the U.S. population identifies as LGBTQ in 2019, meaning that these cases could provide Title VII protection to over 11 million individuals.

A Divided Federal Government

The Supreme Court must evaluate Title VII while navigating the complex—and often contradictory—legal landscape regarding LGBTQ employment discrimination. Perhaps the best demonstration of this contradiction is in the federal government. The U.S. Equal Employment Opportunity Commission (EEOC) held that Title VII protected gender identity (2012) and sexual orientation (2015) as subsets of “sex” and began administering claims on those grounds. In 2018 alone, the EEOC received 1,811 sexual orientation/

gender identity discrimination cases (double those in 2013) and resolved 2,101 such cases with awards totaling \$6.1 million. Thus, the EEOC not only recognizes LGBTQ protection under Title VII but is increasing enforcement.

The U.S. Department of Justice (DOJ), on the other hand, submitted an amicus curiae brief and argued before the Supreme Court on behalf of employers. Its position, in part, is that the ordinary definition of “sex” does not include sexual orientation or gender identity, and Congress—not the Supreme Court—should clarify the scope of Title VII.

As a result, two federal agencies have taken diametrically opposed positions, underscoring the need for Supreme Court intervention.

The Recent Federal Circuit Court Split

The federal circuit courts are equally divided on the issue. Historically, cases held that Title VII did provide protection based on an individual’s sexual orientation. Scrutiny of this case law intensified in 2015, due, in part, to the *Obergefell v. Hodges* decision recognizing same-sex marriage and the EEOC’s recognition that Title VII applies to sexual orientation and gender identity. Thus, a circuit split was born:

- The Second Circuit (*Zarda*), Sixth Circuit (*Smith v. City of Salem*), and Seventh Circuit (*Hively v. Ivy Tech Community College of Indiana*) held that sexual orientation and/or gender identity falls within Title VII protection; and
- The Fifth Circuit (*Wittmer v. Phillips 66*), Tenth Circuit (*Etsitty v. Utah Transit Authority*), and Eleventh Circuit (*Evans v. Georgia Regional Hospital* and *Bostock*) found that sexual orientation and/or gender identity do not.

Because of these decisions, the Supreme Court faces a nearly even, though still developing, circuit split regarding Title VII’s protection against employment discrimination based on sexual orientation and gender identity.

A Patchwork of State and Local Antidiscrimination Laws

Given the uncertainty surrounding Title VII's protections for LGBTQ individuals, some states have legislatively enacted statutes to incorporate protections at the state level. According to the Human Rights Campaign and the Movement Advancement Project, the patchwork consists of the following:

- Twenty-one states, two territories, and Washington, DC, prohibit discrimination based on sexual orientation and gender identity;
- One state prohibits discrimination based on sexual orientation;
- Two states interpret existing statutes on sex discrimination to include sexual orientation and/or gender identity;
- Seven states prohibit discrimination against public employees based on both classifications; and
- Four states prohibit discrimination against public employees based on sexual orientation.

The states are therefore evenly split on the issue. Currently, 26 states and three territories have no state protections against LGBTQ employment discrimination, leaving these employees to rely principally on Title VII.

This data raises two important caveats. First, the Supreme Court's decisions will affect state-level anti-discrimination laws to the extent that they rely on the EEOC for investigation and enforcement. If the Supreme Court finds that Title VII does not cover gender identity or sexual orientation, the EEOC could no longer assist the states. Second, municipal and county ordinances may offer protection where no statewide law exists. According to the Movement Advancement Project, roughly half the

states have at least one city or county with its own non-discrimination ordinance. These ordinances, however, have a varying impact due to population density. For example, in West Virginia, a dozen cities have such ordinances, but those ordinances encompass only 12 percent of the state's population.

Collectively, federal Title VII cases, state statutes, and municipal or county ordinances create a complicated patchwork of employment discrimination protection for LGBTQ Americans, with geography being a determining factor.

Conclusion: The Stage Is Set for Change

This term, the Supreme Court will evaluate the piecemeal protections currently in place and decide whether discrimination against an employee because of sexual orientation or gender identity constitutes prohibited employment discrimination "because of...sex" within the meaning of Title VII. It remains to be seen how *Bostock*, *Zarda*, and *Harris* will change our legal and social landscape. It is certain, though, that these landmark decisions will undoubtedly reverberate well beyond employment law.

Chelsea E. Thompson is an associate with **Spilman Thomas & Battle PLLC**, based in Charleston, West Virginia. Ms. Thompson's legal practice focuses on labor and employment matters before state and federal courts, the West Virginia Human Rights Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board. Ms. Thompson is a graduate of West Virginia University and Washington and Lee University School of Law. She is a member of the DRI Employment and Labor Law Committee. *Cited materials available from the author on request.*

DRI News

DRI Congratulates New Officers and Board Members

During the 2019 DRI Annual Meeting last week in New Orleans, the organization welcomed its new leaders. **Philip L. Willman** of Brown & James in Saint Louis, Missouri, is now DRI President, taking the reins from **Toyja E. Kelley** of Saul Ewing LLP in Baltimore, Maryland. Mr. Kelley will continue to serve as DRI Immediate Past President. **Emily G. Coughlin** of Coughlin Betke LLP in Boston, Massachusetts, is now DRI President-Elect. **Douglas K. Burrell** of Drew Eckl & Farnham LLP, in Atlanta, Georgia, rises to the office of DRI First Vice President.

Also joining the DRI presidential track, **Lana Alcorn Olson** of Lightfoot Franklin & White LLC, in Birmingham, Alabama, was elected DRI Second Vice President by the DRI Board of Directors. The board selected **Patrick J. Sweeney** of Sweeney & Sheehan PC in Philadelphia, Pennsylvania, to serve as DRI Secretary-Treasurer. The DRI Board of Directors also elected four new national

directors: **Diane Fleming Averell** of Porzio Bromberg & Newman PC in Morristown, New Jersey; **Baxter D. Drennon** of Wright Lindsey & Jennings LLP in Little Rock, Arkansas; **Rosary A. Hernandez** of Tiffany & Bosco PA in Phoenix, Arizona; and **E. Ford Stephens** of Christian & Barton LLP in Richmond, Virginia.

The new national directors join the four new regional directors who were elected earlier this year: **James O. Craven** of Wiggin and Dana LLP in New Haven, Connecticut, is the new Northeast Regional Director; **Jon L. Berkelhammer** of Ellis & Winters LLP in Greensboro, North Carolina, is the new Mid-Atlantic Regional Director; **Rebecca A. Nickelson** of Sinars Slowikowski Tomaska LLC in Saint Louis, Missouri, is the new Mid Regional Director; and **Scott Day Freeman** of Fennemore Craig PC in Phoenix, Arizona, is the new Pacific Regional Director.

Congratulations to all the new office holders!

DRI Establishes New Award Honoring John R. Kouris

During last week's Annual Meeting in New Orleans, in his final remarks to the audience at Friday night's Masquerade Ball, outgoing DRI President Toyja Kelley announced the creation of the **John R. Kouris President's Award**, with Mr. Kouris as the award's first recipient.

As DRI Executive Director for 21 years, John Kouris has always made the DRI community and its supporters his highest priority. His vision was to build a global organization by offering cutting edge education programs, outstanding publications, and opportunities for members to network and grow their practices, as well as to be a thought leader in public policy and advocacy.

The President's Award is among the highest distinctions given to an individual or organization that has made extraordinary contributions to the legal community. The

award will be presented by the DRI President during the Annual Meeting, but may not be conferred every year.

Criteria: The nominee should be a committed supporter of DRI who is now involved or has had long-standing involvement in and/or provided distinguished support to DRI, its mission, and its members. Nominees should demonstrate active and outstanding commitment to improving DRI programs and opportunities for members and have demonstrated positive impact on education programs, public policy, or guidance to members.

Eligibility: The nominee must be a current or past active contributing supporter of DRI and have demonstrated distinguished support of DRI, its mission, and its members.

Congratulations, John, and thank you!



DRI Executive Director John Kouris, the first-ever recipient of the President's Award that will bear his name, addresses Annual Meeting attendees as outgoing President Toyja Kelley and incoming President Phil Willman look on.

And The Defense Wins

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format,

along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

Mandi J. Karvis



DRI member and **Wicker Smith O’Hara McCoy & Ford PA** partner [Mandi J. Karvis](#) recently achieved a defense win in *Burke v. Eugene Kim, DDS*. In this case, plaintiff Angela Burke alleged that she experienced an injury to her right inferior alveolar nerve after placement of a dental implant at the location of tooth #30, by oral surgeon Eugene Kim, DDS. Ms. Burke alleged that Dr. Kim was negligent in selecting the size of the implant, performance of the pre-implant placement shaping drills, the placement of the implant itself, and his post-operative care. Ms. Burke claimed that she experienced permanent numbness in portions of her mouth, teeth, and bottom lip. Ms. Burke ultimately had the implant in question removed and replaced and underwent a nerve-grafting procedure, which caused her to experience pain in addition to the numbness in the area.

The defense contended that Dr. Kim appropriately performed the implant placement surgery and that Ms. Burke experienced a known complication of the subject procedure. The defense further contended that once Ms.

Burke reported that she was experiencing numbness, Dr. Kim recommended removal of the implant and placement of a shorter one but that she refused. The defense contended that Ms. Burke was comparatively at fault for failing to follow Dr. Kim’s recommendations to remove the implant and that if she had, it was highly likely that her numbness would have resolved.

At the conclusion of the six-day trial, the plaintiff’s counsel asked the jury to award Ms. Burke her out-of-pocket medical expenses of nearly \$5,000; \$200,000 for her past pain and suffering (four years from the date of the placement of the implant to when the case went to trial); and \$565,750 for future pain and suffering, which represented \$50/day for the rest of her 31-year life expectancy. The defense argued that Dr. Kim complied with the standard of care and that the nerve injury was the result of a known complication and not negligence. After just shy of two hours of deliberation, the jury returned a defense verdict. Ms. Karvis had served as lead defense counsel.

DRI Cares

ADLA's Women in the Law Committee: Helping Feed Underprivileged Kids in Alabama!


The newly formed **Alabama Defense Lawyers Association Women in the Law Committee** (ADLA WITL) hosted its first public service networking event on October 9. The group partnered with [Backpack Buddies](#), a children's weekend feeding program, to prepare bags of nutritious and easy to make meals, drinks, and snacks for children who are at-risk for food insecurity. ADLA WITL packed over 250

bags of weekend food supplies for local children. Not only did the women do something great for the community, but they also had a terrific time networking with each other! Special thanks to **Alabama Court Reporting** for sponsoring the food/drink supplies and for **Bradley** for hosting the event at their offices.



Upcoming Seminars

Complex Coverage Forum, November 6, 2019

dri	Complex Coverage Forum
	November 6, 2019 Hartford, CT REGISTER TODAY

DRI looks forward to welcoming you back to Hartford, Connecticut, this November for a one-day forum on the latest coverage issues. Our program will feature nationally recognized industry and outside counsel speakers in a collegial setting, designed to address cutting-edge developments, including the effect that new laws eliminating the statute of limitations for sexual abuse claims will have on the insurance industry. A highlight of the program will be our interactive, small group luncheon discussions on a broad array of topics. We welcome and encourage all in-house attorneys and claims professionals to attend with complimentary registration, provided by DRI and the sponsoring firms and companies. To ensure an intimate experience, registration will be limited. Register for

this exciting program today. Click [here](#) to view the brochure and to register for the program.

Bootcamp for New Life, Health and Disability Lawyers, November 8, 2019

dri	Boot Camp for New Life, Health, and Disability Lawyers
	November 8, 2019 Chicago REGISTER TODAY

The DRI Life, Health and Disability Committee is once again sponsoring a program for lawyers who are new to the practice. This program, taught by highly experienced attorneys, is aimed at providing a basic understanding of the concepts applicable to life, health, and disability litigation. This program receives rave reviews each year that it is held and sells out quickly. Young lawyers and older lawyers who are new to the practice, or who wish to brush up on their skills, are encouraged to attend! To encourage the classroom atmosphere, registration is limited to 50 persons. Click [here](#) to view the brochure and to register for the program.

Asbestos Medicine, November 14-15, 2019

dri	Asbestos Medicine Seminar
	November 14-15, 2019 Boston REGISTER TODAY

Head down the pike to join new friends and old in the cradle of liberty this November! The 2019 DRI Asbestos Medicine Seminar will bring together a superb lineup of experts in the science and medicine of asbestos and top-flight litigators to the city on a hill—Boston, Massachusetts. With updates on recent U.S. Supreme Court and state court rulings that affect our ever-changing litigation, the latest on genetics in causation, and insights into cross-examination and deposition taking, this seminar has more touch-downs than Brady to Gronk. And do not miss out on the opportunities for business development during the breaks, mixers, and receptions, or even those over a cup of Dunk's coffee before the day starts. Attendees of the 2019 DRI Asbestos Medicine Seminar will depart this city, which played a crucial role in American history, with the latest and greatest information to ride home and be revered by their peers! Click [here](#) to view the brochure and to register for the program.

Upcoming Seminars

Professional Liability, December 5–6, 2019

dri	Professional Liability Seminar
	December 5–6, 2019 New York REGISTER TODAY

The life of a professional can be hard. Client demands, complex and ever-evolving technology, and the stress of maintaining current relationships while developing new ones can strain most professionals. Add a lawsuit against the professional, and the strain can rise to a potential danger. The 2019 DRI Professional Liability Seminar addresses these stressors, offering solutions for handling current claims and practical tips to avoid the next one. Join our preeminent faculty, including former New Jersey Governor Chris Christie, for two days of stress relief, claims mitigation, and networking with clients and colleagues. Click [here](#) to view the brochure and to register for the program.

Women in the Law, January 22–24, 2020

dri	Women in the Law Seminar
	January 22–24, 2020 Scottsdale, AZ REGISTER TODAY

This is a seminar unlike any other. It is the best networking event for women lawyers. We gather outstanding women from law firms and corporate legal departments around the country to provide you with practical advice, excellent programming on aspects of the law that span all substantive areas, and the opportunity to build lasting relationships with the women you encounter. If you have attended this seminar in the past, you know this to be true. If you have never attended, we encourage you to join this amazing group of women as we strive to inspire and support each other. We sincerely hope that you will consider attending this year's DRI Women in the Law Seminar as we celebrate our history and look forward to our very bright future. Click [here](#) to view the brochure and to register for the program.

Upcoming Webinars

Professional Liability 101—Defending Accountant Malpractice Claims, October 29, 2019, 12:00 pm–1:00 pm CST



Defending claims against accounting professionals demands having a working knowledge of the types of engagements that accountants typically enter, the typical claims made against accounting professionals, and the available lines of defense to those claims. This primer on assessing and defending claims against accounting professionals will cover these topics, provide an understanding of the various applicable standards and governing regulatory authorities, and provide a technical vocabulary, which will allow practitioners to become competent handling accountant claims and to develop deeper expertise in this area. Click [here](#) to register.

Student Loan Best Practices for DRI Members, October 30, 2019, 12:00 pm–12:40 pm CST



Laurel Road, the preferred student loan refinancing provider of DRI, is hosting a “Student Loan Best Practices” presentation for DRI members. The webinar will cover a variety of topics related to refinancing student loans, such as the state of student loan debt in the United States, common refinancing terms, different repayment options available, public service loan forgiveness eligibility, and potential savings by refinancing. Click [here](#) to register.

Social Media, Government, and the First Amendment, November 1, 2019, 12:00 pm–1:15 pm CST



Our government clients use social media in a myriad of ways. Elected officials communicate with constituents. Police, fire, and other departments engage with their community to provide updates on key government events and crises and to recruit and hire new employees. Employees use social media in ways that blur the lines between off-duty and on-duty activities. This collision of agendas and views often results in claims and liability under the First Amendment. This webinar will provide a primer on how courts are applying the First Amendment to social media activities of elected officials and employment. Click [here](#) to register.

Traffic Signal Analysis, November 6, 2019, 12:00 pm–1:00 pm CST



Many traffic accident disputes can devolve into he-said she-said affairs with no clear means of determining which party is at fault. Unbeknownst to many people handling these matters, an analysis of the traffic signals involved can provide insight regarding which side of the story is accurate. This webinar will describe how traffic signals operate, how they are programmed, and how a forensic analysis of their operation can determine which party had the right-of-way during an accident. Case studies and examples will be used to illustrate the role that traffic signals can play in accidents involving vehicles, trains, or pedestrians. Click [here](#) to register.

Insurance Coverage Issues Arising from Hurricanes Harvey and Irma: Part I, Hurricane Irma, November 7, 2019, 12:00 pm–1:00 pm CST



The first of this two-part webinar will address the insurance coverage issues that have arisen after Hurricane Irma in Florida. The presentation will address the types of issues that insurers and coverage attorneys have dealt with following the influx of claims arising from the hurricane-related damages arising from the storm. Part 2 will deal with Hurricane Harvey in Texas, on December 9, 2019, 12:00 pm–1:00 pm CST. Click [here](#) to register.

DRI Membership—Did You Know...

DRI's New Young Lawyer Membership Package—Get More for Less

Click [here](#) to take advantage of DRI's new Young Lawyers Membership Package—"One Ask."

Did you know that DRI's new membership package *One Ask for Young Lawyers* is designed specifically for young lawyers who are within five years of their bar date, ready to renew their DRI membership, and plan to complete CLE credits for their coming year?

The *One Ask* membership package makes it easy to make **one ask** of your firm administrator to renew your DRI membership and save your firm (or your wallet) **up to 20 percent off the registration fees** for DRI's renowned annual meeting and seminars.

With **One Ask**, you pay your membership dues and lock in reduced registration fees for DRI's annual meeting and seminars.

Choose from two packages.

- **Package 1:** Young Lawyers Renewal Membership and the annual meeting and seminar discount combined: Your cost is \$1,500, and your saving is \$455.
- **Package 2:** Young Lawyers Renewal Membership and two seminars combined: Your cost is \$1500, and your saving is \$435.

Designed by DRI young lawyers for young lawyers.

New Member Spotlight

Jennifer E. Tully, Bailey & Wyant PLLC



[Jennifer E. Tully](#) is a member of the firm of **Bailey & Wyant PLLC** in Charleston, West Virginia. Her practice focus is civil rights defense, governmental liability, employment litigation, and general negligence. She is admitted to the West Virginia State Bar and the U.S. District Courts for the Northern and Southern Districts of West Virginia as well as the U.S. Court of Appeals for the Fourth Circuit.

Ms. Tully is a lifelong resident of West Virginia. She is a 2000 graduate of Emory & Henry College in Emory, Virginia, with a bachelor of science degree in business management with a concentration in accounting. At Emory & Henry, she was actively involved in the Blue & Gold Society, where she served as an ambassador of the college and met with prospective students and their parents. Ms. Tully graduated from West Virginia University College of

Law in 2003. While attending WVU College of Law, she was actively involved in the student life and received a CALI award.

As an active member of her community, Ms. Tully is an involved parent in her children's school activities and volunteers her time for local nonprofit organizations. You can find her cheering on her boys at local little league fields as well as backstage helping with her daughter's dance recitals. In the fall months she will be cheering on her son at local cross-country events across the tri-state area.

Quote of the Week

"It's easy to find differences. Very easy. We need to take more time to find common ground."

U.S. Representative Elijah E. Cummings ([1951-2019](#)).