

## ***Bostock v. Clayton County, Georgia, Altitude Express, Inc. v. Zarda (2019)*** **(consolidated)**

### **Background**

The 14th Amendment guarantees that “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” To help secure this constitutional protection, Congress passed the **Civil Rights Act of 1964**. This landmark piece of legislation prohibits discrimination based on race, color, religion, sex, or national origin in places of public accommodation, schools, and employment. One key provision of the Civil Rights Act is **Title VII**, which makes it unlawful for employers to make employment decisions based on a person’s race, color, religion, sex, or national origin. Since 1964, Congress has amended Title VII and passed additional laws making it unlawful for employers to discriminate based on other factors, such as pregnancy, age, and disability. While a bill called the Equality Act passed in the U.S. House of Representatives on May 17, 2019, it has not been taken up by the Senate yet, so there is no federal law that explicitly provides protections for LGBTQ workers against discrimination. Some federal courts have concluded that the protections against “sex” discrimination already contained in Title VII also restricts employers from discriminating based on sexual orientation or gender identity. Other federal courts have reached the opposite conclusion.

One way that an employer can unlawfully discriminate against an employee is if there is evidence of **disparate treatment**. Disparate treatment occurs when a member of a group that is protected under Title VII, called a **protected class**, is treated differently (“less well”) than **similarly situated** peers. Two individuals are similarly situated if they share the same relevant characteristics—such as education, job performance, and other qualifications—except for one individual’s membership in a protected class. For example, if two employees with the same qualifications—one man and one woman—were being considered for a promotion and the man was chosen over the woman because the company did not want to promote a woman, that would be evidence of disparate treatment. To prove a claim of sex discrimination, an employee can point to **sex stereotyping**, which occurs when an employee is punished for acting in a way that differs from how their employer expects them to behave based on their sex, such as firing a woman for not wearing makeup.

These cases concern alleged workplace discrimination against two gay men because of their **sexual orientation**, which refers to the gender to whom a person is usually attracted.

### **Facts: *Bostock v. Clayton County, Georgia***

In *Bostock v. Clayton County, Georgia*, a gay man named Gerald Bostock worked as a Child Welfare Service Coordinator for the Juvenile Court of Clayton County, Georgia. Throughout his career, he received favorable job evaluations and helped successfully lead the Court Appointed Special



Advocates program (CASA). He was even recognized statewide and nationwide for his dedication to making sure neglected and abused children are placed in safe homes.

In January 2013, Bostock started to participate in a gay recreational softball league. He also promoted volunteer opportunities to his fellow league members. His sexual orientation, his involvement in the softball league, and his frequent promotion of volunteer opportunities were heavily criticized by powerful individuals within Clayton County. In April 2013, Clayton County informed Bostock that they were conducting an audit (financial review) of the CASA program's funds. Because Bostock insists that he never used the program's funds inappropriately, he believes that this audit was **pretext**, or a reason offered to hide the county's true discriminatory purpose, and that the true intent was to discriminate against him because of his sexual orientation.

In May 2013, individuals present at the Friends of Clayton County CASA Advisory Board meeting made critical remarks about Bostock's sexual orientation. On June 3, 2013, Bostock was fired purportedly for "conduct unbecoming of a county employee."

Bostock filed a lawsuit in Federal Court alleging that Clayton County violated Title VII of the Civil Rights Act by firing him because of his sexual orientation and because he did not conform to gender stereotypes. The court **dismissed** the claim, deciding that Title VII does not protect employees from discrimination based on their sexual orientation, and, therefore, there were not legal grounds for Bostock to sue the county.

Bostock then appealed to the 11th Circuit Court of Appeals, again arguing that Title VII prohibits discrimination based on sexual orientation. The 11th Circuit agreed with the Federal Court's dismissal of Bostock's claim and ruled in favor of Clayton County.

#### **Facts: *Altitude Express, Inc. v. Zarda***

*Altitude Express, Inc. v. Zarda* began in 2010, when a gay man named Donald Zarda was working as a skydiving instructor for a company called Skydive Long Island, operated by Altitude Express, Inc. One of the opportunities available to customers is called "tandem skydiving," in which the customer and instructor are "strapped hip-to-hip and shoulder-to-shoulder." Due to the close physical proximity required for the tandem skydive, Zarda sometimes told female customers that he was gay in order to prevent them from feeling uncomfortable that he was so physically close to them during the skydives.

This case arose when a couple, Rosanna Orellana and David Kengle, purchased a pair of tandem skydives from Altitude Express. Zarda was Orellana's instructor and prior to the jump, he informed her of his sexual orientation. Several days following the jump, the couple reported that Zarda had touched Orellana inappropriately while they were strapped together for the tandem skydive. They also claimed that Zarda told the couple about his sexual orientation as a pretext, or cover-up, for his actions. Zarda denied these accusations, but he was nevertheless fired shortly after this incident occurred.



When Zarda filed for unemployment benefits, Altitude Express informed the New York Department of Labor that he had been fired “for shar[ing] inappropriate information with [customers] regarding his personal life,” not for the incident that the couple alleged.

Zarda claimed that he was discriminated against because of his sexual orientation and because he did not conform to the “straight male macho stereotype” like his co-workers. Zarda filed a suit against his former employer, alleging that they violated Title VII of the Civil Rights Act when they fired him.

The District Court granted Altitude Express’s **motion for summary judgment** on Zarda’s Title VII claims, which means that the judge decided that there was not enough evidence for a jury to find that Altitude Express discriminated against Zarda on the basis of sex. Shortly after this, the EEOC (Equal Employment Opportunity Commission) issued a decision in a different case in which it decided that “an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” Based on that EEOC ruling, Zarda asked the court to reconsider his Title VII claim against Altitude Express, but the court refused.

On appeal, the Second Circuit Court of Appeals found in favor of Zarda and ruled that “sexual orientation discrimination is properly understood as ‘a subset of actions taken on the basis of sex.’” In addition, the Second Circuit found grounds for sexual orientation discrimination claims in sex stereotyping, explaining that “sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.”

Both **Bostock** and **Altitude Express** asked the Supreme Court of the United States to review their cases. The Court agreed to hear the cases together in one oral argument.

### **Issue**

Does discrimination against an employee because of their sexual orientation amount to discrimination “because of...sex” under Title VII of the Civil Rights Act of 1964?

### **Constitutional Amendments, Laws, and Supreme Court Precedents**

- **14th Amendment to the U.S. Constitution**  
“No State shall...deny to any person within its jurisdiction the equal protection of the laws.”
- **Title VII of the Civil Rights Act of 1964**  
Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fire or refuse to hire an individual or to base their wages or benefits on the basis of their “race, color, religion, sex, or national origin.”
- **Price Waterhouse v. Hopkins (1989)**  
Ann Hopkins was a senior manager at Price Waterhouse, a major business management and accounting firm. Although she was nominated for partnership, she was eventually denied the



position. Hopkins sued Price Waterhouse for gender-based discrimination under Title VII of the Civil Rights Act of 1964. Hopkins argued that she was a successful senior manager, and yet she was denied a partnership because her demeanor, appearance, and personality was not deemed “feminine” enough. She said colleagues described her as “macho” and told her she should “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry” and take “a course at charm school” if she wanted to become a partner. Price Waterhouse argued that they did not offer her a partner position because of her poor relationships with others in the office, not because she was a woman, and that Title VII did not apply in this case. The Supreme Court considered and rejected the argument that the term “sex” in Title VII refers only to differences between men and women and ruled that when an employer relies on sex stereotypes to deny employment opportunities, it is acting “because of sex.”

The Court also decided that an employer is not liable (legally responsible) for gender discrimination under the Civil Rights Act if they can prove that, by a **preponderance of the evidence**, they would have made the same decision without a discriminatory motive. Here, preponderance of the evidence means that Price Waterhouse would not be liable if they could prove that it was more likely that Hopkins was not promoted because of her behavior, rather than her gender.

#### **Arguments in Favor of the Employees' Positions: Bostock (petitioner) and Zarda (respondent)**

- The firings of Bostock and Zarda violated Title VII because they were not judged as employees based on their individual merit and ability to do their jobs, but rather on their sexual orientation.
- **Sexual orientation discrimination:** The plain language of Title VII makes it clear that sexual orientation discrimination is prohibited because it is a form of sex discrimination. A person who identifies as homosexual is attracted to a person of the same sex, so a person's sex is a necessary part of their sexual orientation.
- When an employer fires someone because of their sexual orientation, they are treating the employee in a way that would be different if the employee's sex was different. Firing a man because he is attracted to men is unlawful because the employer is treating him differently than a woman who is attracted to men.
- **Sex stereotyping:** Title VII makes it unlawful for employers to discriminate against their employees based on whether they match the stereotypes of a particular sex.
- Discriminating against employees based on their sexual orientation is unlawful sex stereotyping because it discriminates against a gay person for defying a stereotype about who they should be attracted to. The idea that men should be attracted to only women and women to only men is the stereotype that Bostock and Zarda are contradicting in these cases.





**Arguments in Favor of the Employers' Positions: Clayton County (respondent) and Altitude Express, Inc. (petitioner)**

- **Sexual orientation discrimination** When interpreting laws, courts will typically understand words to carry their plain, everyday meaning at the time statute was enacted. When Title VII was passed, the word "sex" was understood to mean biological sex. This is not the same thing as, nor does it include, sexual orientation. Therefore, Title VII of the Civil Rights Act does not prohibit discrimination on the basis of sexual orientation.
- In order for a complaint under Title VII to be successful, a plaintiff must prove that the employer had a discriminatory motive for taking the employment action in question (in this case termination of employment). Neither Clayton County nor Altitude Express intended to discriminate against Bostock and Zarda based on their sexual orientation. They were simply responding to financial concerns and customer complaints, respectively.
- Sexual orientation discrimination is not a form of sex discrimination because sexual orientation is not a characteristic of just one sex. Both men and women can be attracted to individuals of the same sex.
- **Sex stereotyping:** These cases differ from *Price Waterhouse v. Hopkins* because sexual orientation is not a sex-specific stereotype. Even if Clayton County and Altitude Express believed that people should only be attracted to individuals of the opposite sex, that belief would apply equally to men and women.