



# ADDENDUM

SEXUAL ORIENTATION, NON-CONFORMITY,  
AND GENDER DSYPHORIA --- ADA AND TITLE  
VII

# GENDER NON – CONFORMITY

- ▶ *Blatt v. Cabela's Retail, Inc.* 2107 WL 2178123 (E.D. Pa. May 18, 2017), held that the exclusion in 42 U.S.C. Section 12211(b)(1), preventing ADA protection for “gender identity disorders” refers to “the condition of identifying with a different gender,” but it does NOT exclude from ADA coverage those “condition that persons who identify with gender dysphoria, which substantially limited her major activities of interacting with others, reproducing, and social and occupational functioning.”
- ▶ Obviously the case law is developing



# GENDER NON-CONFORMITY AND SEXUAL ORIENTATION

- ▶ Sexual orientation is different from disability; no one is arguing that sexual orientation is a protected under the ADA, and the ADA does not support any such argument. 42 U.S.C Section 12211(a)
- ▶ But, the question of the day is: “Is sexual orientation a protected class under Title VII?”
- ▶ The answer is unclear, but the Supreme Court may address the issue soon.

# Because of Sex





# Sexual Orientation

- ▶ Sexual Orientation Discrimination - *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7<sup>th</sup> Cir. 2016) (en banc).
- ▶ 7<sup>th</sup> Circuit became first circuit in nation to hold that “because of . . . sex” in Title VII includes sexual orientation.
- ▶ Follows from EEOC decision in *Baldwin v. Foxx* in 2015.



# Sexual Orientation

- ▶ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).
- ▶ Relying on *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), for statutory interpretation of the text of the statute, the court reasoned that “because sexual orientation 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.”
- ▶ “[S]exual orientation discrimination is an actionable subset of sex discrimination.”

# Sexual Orientation

- ▶ *Franchina v. City of Providence*, 881 F.3d 32 (1<sup>st</sup> Cir. 2018).
- ▶ City firefighter alleged sex-based harassment. She was a lesbian, and much of the harassment invoked her sexual orientation.
- ▶ The First Circuit panel held that plaintiff's claim was actionable under a sex-plus theory in which the plus characteristic is her sexual orientation. In such a claim the plaintiff must prove that the employer took an adverse employment action *at least in part* because of the employee's sex.
- ▶ In a footnote, the court cited *Hively v. Ivy Tech* as support for the proposition that "the tide may be turning" for Title VII's protections.

## OTHER CIRCUITS HAVE SAID, "NO"

- ▶ *Gerald Lynn Bostock v. Clayton County*, No. 17-13801, 723 Fed. Appx. 964 (11th Cir. 2018)
- ▶ *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5<sup>th</sup> Cir. 2019)
- ▶ *O'Daniel v. Indus. Serv. Sols.*, 2019 U.S. App. LEXIS 11458 (5<sup>th</sup> Cir. 2019)



# SEXUAL ORIENTATION: BECAUSE OF SEX

- ▶ On April 22, 2019, the Supreme Court granted certiorari in three cases relating to Title VII's coverage (or noncoverage) of workplace discrimination based on sexual orientation and/or transgender status. Those cases are *Gerald Lynn Bostock v. Clayton County, supra*, *Altitude Express, Inc. v. Zarda., supra*, and *R.G. & G.R. Harris Funeral Homes v. EEOC, supra*.
- ▶ The Court consolidated *Bostock* and *Zarda*, which both concern whether discrimination against an individual because of his or her sexual orientation is discrimination "because of . . . sex" as prohibited by Title VII.
- ▶ In *R.G. & G.R. Harris Funeral Homes*, the Supreme Court will decide whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender or (2) sex stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).