



LEGAL ALERT

August 3, 2020

US Supreme Court Holds That “Sex Discrimination” Encompasses Sexual Orientation and Gender Identity

What Happened?

On June 15, 2020, the Supreme Court of the United States held that Title VII protections against discrimination “because of sex” include sexual orientation and transgender status. Writing for a 6-member majority of the Court, Justice Neil Gorsuch concluded, “An employer who fires an individual merely for being gay or transgender defies the law.” The case is Bostock v. Clayton County, Georgia, and includes three cases that were consolidated for review.

Background

Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits discrimination in employment based on race, color, religion, sex, or national origin. Since 2012, the Equal Employment Opportunity Commission has taken the position that sexual orientation and gender identity are encompassed within the term “sex” and are therefore included within Title VII’s prohibition against discrimination based on sex. This position was embraced by the Department of Justice until 2017, when the Trump Administration took the position that sex discrimination does not encompass sexual orientation, gender identity or transgender status.

Notably, federal contractors, including banks, have been prohibited from discriminating based on sexual orientation and gender identity since at least 2014 in accordance with President Obama’s Executive Order 13672, which amended two earlier executive orders, including Executive Order 11246 of 1965 (nondiscrimination and affirmative action). As of June 2020, just under 25 states, along with numerous localities, had enacted anti-discrimination provisions protecting sexual orientation and/or gender identity; and just over 25 states had not yet enacted such protections.

With the Bostock decision, all employers covered by Title VII, that is, employers with 15 or more employees, are prohibited from engaging in sexual orientation and gender identity discrimination regardless of state law. This leaves the universe of employers with fewer than 15 employees, many of whom are already subject to state and local anti-discrimination laws. Several states that have not yet enacted these protections are expected to amend or otherwise reinterpret their existing laws to include sexual orientation, transgender and gender identity.

For example, even though Pennsylvania’s Human Relations Act does not specifically include sexual orientation or transgender status within its list of protected characteristics, the Pennsylvania Human Relations Commission has long taken the position that these characteristics are encompassed by the PHRA’s prohibition of sex discrimination.

Trio of Cases Consolidated for Review

The Supreme Court dealt with three different cases and fact patterns in the Bostock decision:

- Gerald Bostock worked as a child welfare advocate for Clayton County, Georgia. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league and was soon fired for conduct unbecoming a county employee.
- Donald Zarda was employed by Altitude Express in New York as a skydiving instructor for several seasons before management learned that he was gay and fired him days later.
- Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she applied for the job, Ms. Stephens presented as a male. Several years into her service with the company she was diagnosed with gender dysphoria and clinicians recommended that she begin living as a woman.

In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to live and work full-time as a woman after she returned from an upcoming vacation. She was fired before she left for vacation.

Each employee filed suit under Title VII alleging unlawful discrimination because of sex. The **11th Circuit** held that the law **does not** prohibit employers from firing employees for being gay, thus Mr. Bostock's suit could be dismissed as a matter of law. The **2nd Circuit** held that sexual orientation discrimination **does** violate Title VII, and so Mr. Zarda's case could proceed. The **6th Circuit** likewise found that transgender status discrimination **does** violate Title VII and so Ms. Stephens' case could proceed. To resolve this split among the Circuit Courts, the Supreme Court decided to hear all three cases on writs of certiorari.

Justice Gorsuch's Majority Opinion

The Court's majority opinion held that an employer violates Title VII when it intentionally fires an individual employee **based in whole or in part on sex**. The majority considered prior caselaw interpreting the "because of sex" concept and drew three primary conclusions: first, it is irrelevant what an employer might call its discriminatory practice or what might motivate it; second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action; third, the employer cannot escape liability by demonstrating that it treats males and females comparably as groups. The Court held that when an employer fires an employee for being gay or transgender, it intentionally discriminates against that individual in part because of sex and applies sex-based rules. Because the Court concluded that homosexuality and transgender status are "inextricably bound up with sex," an employer cannot discriminate on the basis of these categories without violating Title VII.

The Court also mentions the Religious Freedom Restoration Act of 1993 in its concluding remarks; however, it does not discuss how its ruling will impact free exercise of religion. Thus, conflict between religious liberty and the Court's Bostock ruling will remain unresolved for now.

Dissenting Opinions

Justice Samuel Alito was joined by Justice Clarence Thomas in a lengthy dissent that centered around two issues. He argues that "sex" is distinct from the concepts of "sexual orientation" and "gender identity" and also argues that the original intent of the drafters of Title VII did not encompass homosexuality or transgender status, concluding that this decision is an example of the Court acting as a legislature.

In a separate dissent, Justice Kavanaugh focuses on the Court's failure to follow proper judicial procedure by rewriting laws instead of interpreting them. He argues that the Court has ignored the concept of statutory interpretation as well as previous case law contradicting its present ruling.

Employer Takeaways

This decision affects the universe of employers covered by Title VII. Regardless of number of employees or whether employers were already subject to these prohibitions pre-Bostock, all employers should confirm that their policies mirror current federal, state, and local law as it applies to them. Employers covered by Title VII, and all federal contractors regardless of size, must ensure that their policies and practices conform to the law. Even employers who are not covered by Title VII and who are not otherwise prohibited from discriminating on the basis of sexual orientation and/or gender identity **at this time** should consider implementing such policies because many states and localities that have not yet included these prohibitions in their anti-discrimination laws are anticipated to do so in the near future. In addition, all employers should regularly review and update both their discrimination and harassment and their diversity and inclusion policies and training programs.

Need More Information?

If you would like additional information, please contact **Catherine E. Walters, Esquire** at Bybel Rutledge LLP at (717) 731-8303 or at her email address: walters@bybelrutledge.com.



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