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CLIENT ALERT

Supreme Court Holds Title VII Prohibits Discrimination Against LGBT Employees

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On June 15, 2020, the U.S. Supreme Court ruled that gay and transgender employees are protected by Title VII of the Civil Rights Act of 1964. *Bostock v. Clayton County, Georgia*, No. 17-1618 (U.S. June 15, 2020). Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). In a 6-3 decision, the Court held that discrimination on the basis of sexual orientation or transgender status is unlawful sex discrimination under Title VII, stating, "[I]t is impossible to discriminate against a person for being gay or transgender without discriminating against that individual based on sex."

There were three cases before the Court in *Bostock*. In each case, the employer fired a long-time employee shortly after learning the employee identified as gay or transgender, allegedly for no reason other than the fact of the employee's LGBT status. *First*, Gerald Bostock, a child welfare advocate for the county government in Clayton County, Georgia, was fired shortly after joining a gay recreational softball team for "conduct 'unbecoming' a county employee." *Second*, Donald Zarda, a skydiving instructor in New York, was discharged just days after revealing to his employer that he was gay. *Third*, Aimee Stephens, who presented as a male when she was hired, was fired from a funeral home in Michigan after notifying her employer that she planned to "live and work full-time as a woman." The Eleventh Circuit held that Bostock's employer did not violate Title VII by firing him because he is gay or transgender, while the Second and Sixth Circuits held that the employers who fired Zarda and Stephens, respectively, *did* violate Title VII.

In overturning the decision of the Eleventh Circuit and affirming the decisions of the Second and Sixth Circuits, the Supreme Court explained that an employer cannot avoid liability for sex discrimination "by citing some *other* factor that contributed to its challenged employment decision." As long as sex is a contributing factor to the action, Title VII applies. Discrimination based on sexual orientation, the Court reasoned, is based on two factors: (1) the employee's sex; and (2) the sex to which the employee is attracted. Discrimination based on transgender status is also based on two factors: (1) the employee's sex assigned at birth; and (2) the employee's presented gender identity. The Court held that in both instances, the discrimination is at least in part "because of" the employee's sex and is therefore prohibited by Title VII.

In ruling as it did, the Court departed from the EEOC's longstanding position that Title VII did not extend to sexual orientation discrimination, as well as from the unanimous rulings of ten circuit courts that had addressed the issue

prior to 2017. Those precedents had treated sex and sexual orientation as analytically distinct concepts for purposes of Title VII. Nevertheless, in overturning those precedents, the Court—relying upon the plain text of the statute—reasoned that Title VII always encompassed protection of gay and transgender employees, regardless of whether this was apparent to its drafters. In synthesizing its reasoning, the Court noted:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

In separate dissents, Justices Alito and Kavanaugh accused the six-judge majority of legislating from the bench. Justice Alito likened the majority opinion to a "pirate ship," "sail[ing] under a textualist flag," while actually representing a theory of statutory interpretation that "courts should update old statutes so that they better reflect the current values of society." For his part, Justice Kavanaugh criticized the majority for what he considered a corruption of the textualist approach championed by the late Justice Scalia. According to Justice Kavanaugh, the majority had adopted a "literalist approach" to statutory interpretation, rather than looking to the "ordinary meaning" of the phrase "discriminate because of sex."

In light of the Court's decision in *Bostock*, employers should ensure that their policies and employment actions do not discriminate on the basis of sexual orientation or transgender status. They should also ensure that safeguards meant to protect employees against workplace harassment extend to protect gay and transgender employees. Although the three cases decided by the Court each involved an employee being fired because he or she was gay or transgender, liability could stem from other forms of LGBT discrimination, including harassment, job classification, and opportunities for advancement.

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