CLIENT ALERTS & INSIGHTS

Supreme Court Rules that Title VII Protects Gay and Transgender Employees from Unlawful Discrimination

JUNE 15, 2020

Authors: Johanna Fabrizio Parker

"An individual's homosexuality or transgender status is not relevant to employment decisions," according to a 6-3 majority of the Supreme Court in its significant June 15, 2020 opinion in Bostock v. Clayton County, Georgia. "Sex plays a necessary and undisguisable role in the decision [to fire a homosexual or transgender individual], exactly what Title VII forbids" Accordingly, an employer who fires an individual for being gay or transgender violates Title VII of the Civil Rights Act.

The Court's opinion was written by Justice Neil Gorsuch and joined by Chief Justice John Roberts as well as Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justices Clarence Thomas, Samuel Alito, and Brent Kavanaugh dissented. The decision in *Bostock* (considered in conjunction with *Altitude Express, Inc., et al.* v. *Zarda et al.* and *R.G. & G. R. Harris Funeral Homes, Inc.* v. *Equal Employment Opportunity Commission, et al.*) resolves disagreement among the courts of appeals over the scope of Title VII's protections for gay and transgendered persons and makes plain that termination decisions based on an employee's sexual orientation or gender identity violate Title VII. The Court, however, left unresolved significant questions regarding gender-specific policies and practices, including gender-specific bathrooms and locker rooms, as well as the extent to which religious freedom might override Title VII's restrictions.

Background

The Court's decision followed briefing and argument in three cases where the employers conceded that termination decisions were made on the basis of an employee's LGBT status:

- In Bostock, the plaintiff, Gerald Bostock, was a child welfare advocate for Clayton County, Georgia. He was fired not long after he began participating in a gay recreational softball league and was criticized for doing so by influential members of the community. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and upheld the dismissal of Bostock's case.
- In Zarda, the plaintiff, Donald Zarda, was a skydiving instructor. He was fired days after mentioning he was gay. Contrary to Bostock, the Second Circuit held that sexual orientation discrimination does violate Title VII and allowed Zarda's case to proceed.

- In Harris Funeral Homes, the employee, Aimee Stephens, worked as a funeral director. When she was initially hired, she presented as a male. However, six years later, she 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 and that, upon her return, she would begin complying with the dress code applicable to women as opposed to men. Stephens was fired shortly before going on vacation. On appeal, the Sixth Circuit held that Title VII prohibited employers from firing employees because of their transgendered status.

The Court's Analysis: Consideration of Sexual Orientation or Transgender Status Is Consideration of Sex.

The Court's majority held that sexual orientation or transgender discrimination violates Title VII's prohibition of discrimination "because of . . . sex." To begin, the Court articulated a "straightforward rule" derived from the text of Title VII: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." It does not matter, the Court concluded, "if other factors besides the plaintiff's sex contributed to the decision." And, "it doesn't matter if the employer treated women as a group the same when compared to men as a group." "[I]f changing the employee's sex would have yielded a different choice by the employer-a statutory violation has occurred."

More simply stated, "*it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.*" (Emphasis supplied.) To illustrate, the Court offered the simple example of two employees, both of whom are attracted to men. The employees are identical in all respects, except that one employee is a man and the other is a woman. If the employer fires the man for no reason other than the fact he is attracted to men, it fires him "for traits or actions it would not have questioned in members of a different sex." This is illegal sex discrimination. Per the majority, "homosexuality and transgender status are inextricably bound up with sex."

The Court also explained that its decision was consistent with principles described in its past precedent:

- It is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. It doesn't matter that, colloquially, individuals might perceive their termination to be because of their sexual orientation as opposed to their sex, or that an employer might attempt to draw similar distinctions.
- The plaintiff's sex need not be the sole or primary cause of the employer's adverse action. An employer cannot escape liability by simply pointing to some other nonprotected trait and insisting it was more important in the outcome.
- An employer cannot escape liability by demonstrating that it treats males and females comparably as a group. Firing both male and female employees for being homosexuals simply doubles the discrimination; such conduct is not a Title VII defense.

The Dissents

Justice Alito, joined by Justice Thomas, wrote a sharply worded dissent that accused the majority of "breathtaking" "arrogance" for interpreting Title VII in a way that no one could have anticipated when it was passed in 1964. In Justice Alito's view, "there is not a shred of evidence that any Member of Congress interpreted the statutory text" such as to provide protection for gay and transgender employees. Justice Alito's dissent concluded that the Court went far beyond its judicial role and engaged in outright legislation by expanding the scope of Title VII protections. Justice Kavanaugh wrote a separate dissent that, although notably less fiery in tone, raised many of the same concerns regarding what he viewed as the Court's usurpation of the legislative process.

For its part, the Court's majority largely rejected the relevance of legislative history to the question before it because of Title VII's unambiguous language. In the Court's words, "when the meaning of the statute's terms is plain, our job is at an end," and "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." Further, the majority countered that the dissents did not suggest that the statutory language bore some other *meaning*, but rather that few in 1964 expected the *result* of this case. But, the majority noted, the Supreme Court has long rejected the argument that unexpected results are grounds for the Court to ignore a statute's plain meaning.

Unanswered Questions

Importantly, the Court was careful to explain what questions it was *not* deciding in *Bostock* and which it left for future cases to answer. Noting that some employers have raised the concern that "sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today," the Court wrote that it does not "purport to address bathrooms, locker rooms, or anything else of the kind" and that the "only question before us is whether an employer who fires someone simply for being homosexual or transgender" has discriminated against that individual in violation of Title VII. The Court further explained that, as used in Title VII, the term "discriminate against" refers to "distinctions or differences in treatment that injure protected individuals." Firing an employee because of a statutorily protected trait clearly counts as actionable discrimination that "injure[s] protected individuals." But, "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."

The Court also made clear that it was not addressing how the First Amendment and/or the Religious Freedom Restoration Act of 1993 (RFRA) might supersede Title VII's requirements in appropriate cases. Notably, the Court pointed out that the defendant in *Harris Funeral Homes* had raised a RFRA-based defense in the district court and the court of appeals, but chose not to pursue that defense at the Supreme Court. Thus, the Court expressly left open the possibility that employers in other cases may raise free exercise arguments "that merit careful consideration." Undoubtedly, the interplay between religious liberty and Title VII will be fertile ground for litigation in the years to come.

Key Takeaways for Employers

Although the Supreme Court's decision in *Bostock* leaves significant questions unanswered, it is now settled law that adverse employment actions based on an employee's sexual orientation or transgender status are prohibited nationwide under Title VII. Employers should review their non-discrimination policies and related training materials for consistency with the Court's decision. And, when evaluating significant personnel decisions, employers should be mindful of facts that might lead to an inference of discrimination with respect to LGBT employees.

For more information, please contact a member of Benesch's Labor & Employment Practice Group.

Johanna Fabrizio Parker at jparker@beneschlaw.com or 216.363.4585; or

Corey Clay at cclay@beneschlaw.com or 216.363.4158