



U.S. SUPREME COURT RULES THAT TITLE VII PROHIBITS DISCRIMINATION BASED ON LGBT STATUS

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On June 15, in a landmark 6-3 decision written by Justice Neil Gorsuch, *Bostock v. Clayton County Georgia*, the U.S. Supreme Court found that an employer who fires or otherwise discriminates against an individual for being homosexual or transgender violates Title VII. The *Bostock* decision used the terms “homosexual or transgender” to identify the new class of persons protected from discrimination under Title VII so this article will utilize the same terminology.

The Court Concludes “Sex” Has a Broad Meaning

Title VII commands that it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the employee's compensation, terms, conditions or privileges of employment, because of such individual's protected traits, including sex.

The court addressed whether the scope of “sex” under Title VII includes protections for homosexual and transgender persons. The court concluded an employer's discriminatory actions against a homosexual or transgender employee involves an employer's treatment of an individual for actions or attributes it would tolerate if the individual was of another sex, therefore such discrimination is included in the scope of “sex” and prohibited. For example, if an employee can show that he is a man attracted to other men and that factor played into the employer's decision to fire him, then his termination constitutes “discrimination because of sex.” Similarly, the court reasoned an employer's discrimination against a biological male who presents as a woman would likely not have occurred but for the fact that the individual is a biological male, and thus such actions are prohibited.

The Court Changes the Standard to Prove Sex Discrimination

A notable part of the decision is the court's departure from the traditional standard for proving sex discrimination – the "motivating factor" standard. Under that standard, an employee needs to prove that, even if there were other reasons the employer was either fired or treated in a negative way, the employee's sex was the employer's motivating factor in taking adverse action.

In the *Bostock* case, however, the court uses the "but for" causation standard which, in its estimation, means that for Title VII discrimination a defendant cannot avoid liability by citing other factors that contributed to the challenged employment action. The court's analysis requires employers to pass "the simple test" in considering whether an individual employee would have been treated the same regardless of the employee's sex. The court explained even if other factors played a role in an employer's decision, even ones of a more important role than the employee's sex, the other factors are of no significance. So long as an employee's sex was one but-for cause of that decision, then Title VII protection is triggered.

What About the Privacy Issues?

Importantly, the court declined to address the concerns raised in oral argument about the privacy issues implicated by expanding Title VII protection to homosexual and transgender individuals, such as transgender employees in either dressing rooms or bathrooms inhabited by individuals who were identified as a different gender at birth.

Advice for Employers in Response to This Decision:

There are some easy takeaways from this decision.

First, employers need to review their employee handbooks to ensure they include protection of homosexual and transgender individuals from discrimination.

Secondly, promptly notify supervisors who are responsible for making hiring, firing, and other significant employment decisions of their obligations not to discriminate against homosexual and transgender individuals.

Thirdly, update your harassment training to include a discussion of homosexual and transgender issues and proactive steps that can keep the workplace free of harassment of these individuals.

Unanswered Questions Raised by this Litigation:

As noted above, the court declined to address the privacy issues raised by this decision. For example, an employer's response to privacy issues associated with having an individual assigned as male at birth applying for work in a women's lingerie department or in a position where the individual would be in a women's dressing room. The court also failed to address situations in which employment decisions are made relating to employees who are homosexual or transgender, but the supervisor making the decision had no knowledge of the trait.

Final Thoughts:

The Supreme Court's decision will have very broad impact on the management of LGBT individuals in the workplace, as well as workplace discrimination litigation of gender based and LGBT discrimination claims. We will continue to update you as developments unfold on this important topic.

Related Practices

Labor and Employment

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