



Employment Law Note

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U.S. Supreme Court Extends Title VII Protections to Sexual Orientation and Gender Identity in Landmark Decision

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In *Bostock v. Clayton County, Georgia*, 590 U.S. ___ (2020), which involved three consolidated cases, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 ("Title VII") protects gay and transgender workers from workplace discrimination. The 6-3 decision, issued on June 15, 2020 and authored by Justice Neil Gorsuch, held that an employer who fires an individual merely because that individual is gay or transgender violates Title VII because "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Background

In rendering its opinion, the Court considered three consolidated cases of alleged discrimination on the basis of sexual orientation or gender identity. In each case, the plaintiffs brought suit against their respective former employers alleging that they were terminated on the basis of their sexual orientation or gender identity in violation of Title VII on the following facts:

- **Gerald Lynn Bostock**, a gay man, was terminated by his county employer in Georgia for "conduct unbecoming" after he joined a gay recreational softball league.
- **Donald Zarda**, a gay man, was a skydiving instructor in New York who occasionally disclosed his sexual orientation to female students, purportedly to alleviate any concerns they may have with being strapped to a male instructor during tandem dives. After one such female student accused him of inappropriately touching her during a tandem dive, Mr. Zarda's employment was terminated.

- **Aimee Stephens**, a funeral home director and embalmer, presented as male when hired by her Michigan employer. Approximately six years later, Ms. Stephens disclosed to her employer that she intended to "live and work full-time as a woman" after she returned from an upcoming vacation. Before Ms. Stephens left for her vacation, her employer terminated her employment explaining that the basis for the decision was because Ms. Stephens "was no longer going to represent himself as a man" and "wanted to dress as a woman."

The Opinion

A majority of the Court's justices—in an opinion authored by Justice Gorsuch, President Donald Trump's first nominee for the Supreme Court—held that Title VII's prohibition against sex-based discrimination in employment by its plain language includes claims of sexual orientation and gender identity based discrimination. Title VII makes it unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." The Court explained that the ordinary meaning of the term "because of" incorporates the traditional standard of "but-for causation," meaning that so long as the plaintiff's sex—which *includes* his or her sexual orientation or gender identity—was one but-for cause of the adverse employment action, that is sufficient to trigger application of Title VII. Specifically, according to the Court: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

The Court analyzed, but ultimately rejected, the employers' various arguments as to why Title VII's prohibition against discrimination "because of . . . sex" should not apply to sexual orientation or gender identity discrimination. Most notably, the employers argued that in 1964 when Title VII was enacted, Congress likely did not intend it to apply to discrimination on the basis of sexual orientation or gender identity. In rejecting these arguments, the majority held that legislative intent or conventional use of the term "sex" in 1964 is irrelevant where the text itself is unambiguous and the result certain when applied to the facts.

Impact on Employers

Prior to the Supreme Court's decision in *Bostock*, some states—including Washington State—had adopted protections against sexual orientation and/or gender identity discrimination in the workplace. The *Bostock* decision now extends these prohibitions at the federal level. In doing so, *Bostock* does not alter the existing protections for gay and transgender individuals in the workplace under the Washington Law Against Discrimination but provides an additional source of protection for them. Washington State employers should continue to actively prohibit and take all reasonable steps to prevent discrimination in the workplace—including on the basis of sexual orientation and gender identity—while remaining mindful that unlawful "discrimination" can encompass many types of adverse employment actions beyond hiring and firing decisions.

To the extent employers do not already have equal employment opportunity and harassment policies that expressly include sexual orientation, gender identity and gender expression as protected characteristics, those policies should be immediately updated. Employers should additionally consider taking the following actions to create a workplace that protects and welcomes all gay and transgendered employees:

- Provide employees with anti-discrimination and harassment training that underscores that discrimination against employees on the basis of sexual orientation or gender identity will not be tolerated.
- Review benefits policies to ensure they provide coverage equally, regardless of gender identity or sexual orientation.
- Review and update dress code policies to ensure they are gender-neutral and do not prohibit employees from physically presenting themselves in the workplace based on their gender identity.
- Incorporate best workplace practices, including by offering all employees the option of adding pronouns to their email signatures, addressing employees by their preferred name and pronouns, and encouraging the use of inclusive, non-gendered language in the workplace.

For questions about the *Bostock* opinion and its implications for employers, please contact us at Sebris Busto James.

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