"No Contest": Supreme Court Finds Title VII Protects LGBTQ Individuals From Workplace Discrimination

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In a 6-to-3 vote today, the U.S. Supreme Court ruled that workplace discrimination because of an individual's sexual orientation or gender identity — including being transgender — is unlawful discrimination "because of sex" under Title VII of the Civil Rights Act of 1964. The basis for the Court's ruling in *Bostock v. Clayton County* was summarized by Justice Gorsuch in his majority opinion: "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." What do employers need to know about this historic decision?

A Brief History Of Sex Discrimination Law under Title VII

As the flagship workplace antidiscrimination law, Title VII bars discrimination against workers because of race, color, religion, national origin, and sex. What conduct constitutes discrimination "because of . . . sex" has broadened over the years. For the statute's first two decades, federal courts interpreted "sex" narrowly. As one Court of Appeals put it in 1984, Title VII only prohibits discrimination "against women because they are women and against men because they are men."

In the late 1980s, however, the Supreme Court began to broaden the forms of sex discrimination barred under Title VII, finding in 1986 that sexual harassment was a form of impermissible sex discrimination (*Meritor Savings Bank v. Vinson*) and in 1989 that sex stereotyping also was a means of proving sex discrimination (*Price*

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In recent years, federal courts have grappled with the application of Title VII's prohibition against sex discrimination to the LGBTQ+ communities. This movement began in 2004, when the 6th Circuit Court of Appeals (with jurisdiction over Michigan, Ohio, Kentucky, and Tennessee) held that discrimination based upon an employee being transgender was impermissible sex stereotyping under Title VII. (*Smith v. City of Salem*.)

The legal landscape with respect to sexual orientation began to change in earnest in June 2015, when the Supreme Court found state bans on same-sex marriages unconstitutional. A month later, the EEOC ruled that an allegation of sexual orientation discrimination is necessarily an allegation of sex discrimination under Title VII. Two years later, in 2017, the 7th Circuit Court of Appeals (with jurisdiction over Illinois, Indiana, and Wisconsin) became the first federal appellate court to hold that sexual orientation claims are actionable under Title VII in *Hively v. Ivy Tech Community College*.

A Trio of Stories

The Court's opinion today considered and combined three cases before it — two involving employees who allege they were discriminated against because of sex when they were terminated based on their sexual orientation, and one involving an employee who alleges she was terminated on the basis of sex when she was terminated for being transgender.

Sexual Orientation Discrimination Cases

In 2016, Gerald Bostock, a former child welfare services coordinator for Clayton County's Juvenile Court System, filed suit in federal court in Georgia, claiming that he was terminated because of his sexual orientation. Bostock cited disparaging comments made to him at work after it was alleged that his employer discovered that he was playing in a gay recreational softball league. The trial court dismissed Bostock's claims under Title VII, finding that claims for discrimination based upon sexual orientation are not cognizable under Title VII. The 11th Circuit Court of Appeals affirmed in a *per curiam* (unsigned) opinion.

In another case, a skydive instructor named Donald Zarda who participated in tandem dives with customers would tell his female clients that he was gay in order to ease any concerns that they might have had about being strapped in close physical proximity to a man. One customer, however, claimed that Zarda inappropriately touched her and only disclosed his sexual orientation to excuse his behavior. She complained to the company, which in turn fired Zarda for violating company policy. Zarda sued, claiming that his former employer violated Title VII's prohibition on sex discrimination. The trial court dismissed Zarda's sex discrimination claim in 2014. An *en banc* panel of the 2nd Circuit (with jurisdiction over New York, Vermont, and Connecticut) vacated the trial court's decision

and found, by a 10-3 margin, that Title VII "prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'"

Gender Identity Discrimination Case

In the third case, Aimee Stephens was assigned the male sex at birth and raised as Anthony Stephens. She presented as a man and used her given male name (Anthony) when she started working for R.G. & G.R. Harris Funeral Homes in October 2007. But in July 2013, Stephens notified the owner of the funeral home that she intended to have sex reassignment surgery and would henceforth have to live and work full-time as a woman. Two weeks later, the funeral home terminated Stephens.

The EEOC filed suit on her behalf, but the trial court found that, because of the funeral home owner's religious beliefs, the closely-held, for-profit funeral home was entitled to an exemption from Title VII under the Religious Freedom Restoration Act (RFRA). The 6th Circuit Court of Appeals rejected the RFRA defense and reversed the lower court's opinion, granting summary judgment to the EEOC on the unlawful discrimination claim.

SCOTUS: Discrimination Against Gay and Transgender Persons Is Discrimination Because of Sex

With today's decision, the Supreme Court ruled that sexual orientation discrimination and gender identity/transgender discrimination are both forms of "sex" discrimination under Title VII. Specifically, in a majority opinion by Justice Gorsuch, the Court applied the "but-for" test of discrimination, finding that it is impossible to discriminate on the basis of sexual orientation or gender identity without impermissibly discriminating because of sex. "By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today."

The Court gave two clear examples for its reasoning:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Rejecting an argument raised by the employers, the Court highlighted that the law includes a focus on treatment of individuals, such that an employer who generally gives preferential treatment to women over men can still be liable for treating one woman worse than he would have treated a man. "Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as other groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability."

Finally, the Court noted that its decision today addresses only discrimination under Title VII. It does not address other issues involving sexual orientation and gender identity, such as bathroom and locker room issues, religious freedom issues, and healthcare issues.

What This Means for Employers

For employers in many jurisdictions, today's ruling may be somewhat of a non-story. After all, almost half of the states in the country and many local governments have laws prohibiting sexual orientation discrimination in employment, and many more have laws prohibiting gender identity discrimination. The employers doing business in these jurisdictions have long since integrated workplace protections and policies to include LGBTQ applicants and workers.

For those doing business in the other half of the country with no existing prohibitions against LGBTQ discrimination, however, you now must take proactive steps to prevent and prohibit LGBTQ discrimination in the workplace. In order to achieve this, you should review and update your written policies and handbooks to ensure that sexual orientation and transgender status are added as protected categories or the definition of "sex" is updated to include these categories. Dress code policies should be reviewed and applied to ensure that transgender and transitioning employees are permitted to follow the dress code of the gender that they identify with, rather than their biological sex.

Additionally, while today's opinion did not address other LGBTQ issues that may arise in the workplace, you may be wise to consider how this decision will impact future court decisions on these related topics – especially given the fact that we can anticipate a dramatic increase in federal litigation alleging LGBTQ discrimination in the near future. Accordingly, you may want to reconsider all of your policies with an eye towards this new obligation.

Specifically, you should review your policies regarding single-sex restrooms and locker rooms to ensure that transgender and transitioning employees are permitted to use the restroom and locker room of the gender with which they identify. You should also review health and other benefits offerings to ensure that transgender employees and those with same-sex spouses and domestic partners have equal access to employee benefits.

Finally, you should provide training to employees – particularly the managers and human resources individuals involved with hiring, promotion, discipline, and discharge – to ensure they are aware that sexual orientation and transgender status are protected categories and cannot be the basis of any employment decisions.

You should ensure you are subscribed to Fisher Phillips' alert system to ensure you receive the most up-to-date information related to these developments. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney.

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