U.S. Supreme Court Holds That Title VII of the Civil Rights Act Prohibits Employment Discrimination on the Basis of Homosexuality and Transgender Status

Bostock v. Clayton County, Georgia
U.S. Supreme Court No:17-1618
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By Gordon Lewis

On June 15, 2020, in a landmark decision, the United States Supreme Court held that Title VII of the Civil Rights Act of 1964 – the statute that prohibits employment discrimination on the basis of race, color, religion, sex or national origin – also prohibits employment discrimination on the basis of homosexuality or transgender status. In a 6-3 decision, with Justice Gorsuch writing for the majority, the Court held that discriminating against an employee because of the employee's sexual preference or transgender status necessarily discriminates against that employee because of the employee's sex, and this discrimination is prohibited by Title VII.

The Court noted that 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…sex." Title VII is violated if an employee's sex is the "but-for" cause of an adverse employment decision against the employee. Thus, with respect to a discharged employee, "if changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred." The Court observed that discriminating against employees because of their homosexuality or transgender status therefore violates Title VII "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

As an example, the Court gave a hypothetical of an employer with two employees, both of whom were attracted to men. The employees were otherwise identical in all other material respects, except for one was a man and the other was a woman. The Court stated that if the employer fired the male employee for no reason other than the fact that he was attracted to men, the employer is discriminating against that male employee for traits or actions that it tolerates in its female employees. In this circumstance, the employee's sex would be the "but-for" cause of the discrimination.

The Court stated, "[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms."

Justice Alito filed a dissent in which Justice Thomas joined. Justice Alito argued that the original drafters did not intend for the word "sex" to include sexual orientation or transgender status. Justice Kavanagh also dissented, asserting that protecting homosexuals and transgender persons under Title VII was the responsibility of the Congress and the President. The majority, however, noted that the plain language of the statute as enacted covered discrimination based on sexual preference and transgender status, and stated "[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." As a consequence, "[a]n employer who fires an individual merely for being gay or transgender defies the law."

In light of this ruling, if employers have not already done so, employers should revise their policies to make sure that sexual preference and transgender status are included as protected classes in the employer's anti-discrimination policies. Employers will need to take steps to train employees that harassment based on an employee's sexual preference or transgender status is now explicitly prohibited by Title VII, and employers should update any existing discrimination and harassment trainings to include sections and discussions on sexual preference or transgender

status. And as always, employers will want to make sure that discipline decisions are based on objective performance standards, and that there is appropriate documentation and support for disciplinary actions employers seek to take with their employees.

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ABOUT THE AUTHOR

GORDON LEWIS has more than 25 years of experience representing public and private employers in all manner of employment issues, policies and practices, including wrongful discharge, racial discrimination, sexual discrimination and harassment (including same-sex sexual harassment), age discrimination, disability discrimination, civil rights violations, Family and Medical Leave Act, Unfair Labor Practice charges, and wage and hour claims.

glwewis@jshfirm.com | 602.263.7341 | jshfirm.com/glewis