

June 23, 2020

U.S. Supreme Court Holds That Title VII Prohibits Sexual-Orientation and Transgender Discrimination

Key Takeaways

- In ***Bostock v. Clayton County***, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their sexual orientation or transgender status.
- The decision may impact more than 100 other federal statutes prohibiting discrimination because of sex, but leaves open questions concerning exemptions for valid religious objections to sexual orientation and gender identity, as well as whether forms of discrimination other than employment-termination are actionable.

On June 15, 2020, the United States Supreme Court issued its decision in ***Bostock v. Clayton County***,¹ holding that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their sexual orientation or transgender status.

Below, we describe the legal framework, the factual background, the Court's decision, and its implications.

Legal Framework

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 with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”² Its coverage extends to all private employers that (i) have at least fifteen employees on each working day in at least twenty weeks in the current or preceding calendar year; and (ii) are engaged in an industry affecting interstate commerce.³

Background and Procedural History

The Supreme Court’s decision in *Bostock* involved three consolidated cases: *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* from the Sixth Circuit, *Altitude Express, Inc. v. Zarda* from the Second Circuit, and *Bostock* from the Eleventh Circuit.

Harris Funeral Homes – Respondent Aimee Stephens was terminated soon after notifying her employer, petitioner R.G. & G.R. Harris Funeral Homes, Inc., that she intended to transition from male to female and

would represent herself and dress as a woman while at work.⁴ The Equal Employment Opportunity Commission (EEOC) sued the employer in federal district court in Michigan, alleging that it had violated Title VII by terminating respondent on the basis of her transgender or transitioning status, and her refusal to conform to sex-based stereotypes.

The district court dismissed the EEOC's claims, but the Sixth Circuit reversed. The Sixth Circuit held first that discrimination based on transgender or transitioning status is inherently sex discrimination, and second that there is "no reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual."⁵ The Court also rejected the employer's defense under the Religious Freedom Restoration Act ("RFRA").⁶

Altitude Express – Respondent Donald Zarda was terminated from his employment as a skydiving instructor with Altitude Express, Inc., shortly after confiding to a client that he was gay. Zarda brought suit against the employer in federal district court in New York, alleging gender-based discrimination in violation of Title VII.⁷

The district court granted summary judgment to the employer on Zarda's Title VII claim, relying on then-binding precedent from the Second Circuit that discrimination on the basis of sexual orientation is not cognizable under Title VII.⁸ A panel of the Second Circuit affirmed based on that same precedent, but the court granted rehearing en banc. In a divided opinion, the full Second Circuit reversed its prior precedent and held that "sexual orientation discrimination" is "motivated, at least in part, by sex and is thus a subset of sex discrimination."⁹

Bostock – Petitioner Gerald Bostock was employed by Clayton County, Georgia as a Child Welfare Services Coordinator.¹⁰ Bostock began participating in a gay recreational softball league and was terminated several months later, following negative comments by his employer about his sexual orientation.¹¹ Bostock filed suit in a federal district court in Georgia, alleging that his employer had violated Title VII by firing him.¹²

The district court dismissed Bostock's complaint based on binding precedent from the Eleventh Circuit, and the Eleventh Circuit affirmed in a *per curiam* opinion.¹³

The Supreme Court's Decision

In a 6-3 decision authored by Justice Gorsuch, the Supreme Court held that an employer who fires an individual for being gay or transgender violates Title VII. In reaching that conclusion, the Supreme Court relied primarily on the relevant statutory text, which makes it unlawful for an employer to "refuse to hire or to discharge" or "otherwise to discriminate against" any individual "because of" that individual's "sex."¹⁴

The Court granted for argument's sake the employers' contention that, at the time of Title VII's enactment, "sex" referred to "biological" sex, rather than "norms concerning gender identity and sexual orientation."¹⁵

The Court nonetheless concluded that the statute's prohibition against employment "discriminat[ion]" "because of" sex includes discrimination on the basis of sexual orientation and transgender status. First, the Court defined the phrase "because of" to mean "by reason of" or "on account of," and determined that it thus incorporates a "standard of but-for causation" which requires a plaintiff only to demonstrate that "a particular outcome would not have happened 'but for' the purported cause."¹⁶ Next, the Court defined the term "discriminate" to mean, "[t]o make a difference in treatment or favor."¹⁷ Finally, based on the statute's repeated references to "individual[s]," the Court determined that the "discrimination" prohibited by Title VII is discrimination against "individuals," rather than "groups."¹⁸ This distinction, the Court observed, is "anything but academic," as it allows any individual to sue an employer who has treated them differently "because of" their sex, regardless of whether the employer similarly discriminates against other employees.¹⁹ "Taken together," the Court interpreted these terms to mean that "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."²⁰

Applying its textual analysis to the question presented, the Court concluded that Title VII prohibits employment discrimination based on an "individual's homosexuality or transgender status" because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."²¹ For example, an employer who discharges a male employee because he is attracted to men—but does not discharge female employees who are attracted to men—treats the discharged employee differently "because of" his sex.²² Likewise, an employer who discharges an employee who was born biologically male but identifies as female—but does not discharge employees who were born biologically female and identify as female—discriminates against the discharged employee "because of" their sex.²³

The Court proceeded to address and reject the employers' contrary arguments, several of which are of particular interest to employers going forward.

The employers first argued that the conduct at issue is discrimination on the basis of a person's sexual preferences or sexual identity, rather than on the basis of their biological sex, and therefore is not prohibited under Title VII. The Court rejected this argument: even if sexual preference or identity were one causal factor in an adverse employment action, the individual's sex still "plays an unmistakable and impermissible role" in the employer's decision.²⁴ The Court explained that this holding is consistent with prior precedent, in which it had held that Title VII prohibits employers from taking adverse actions against employees of one sex, even on the basis of purportedly neutral criteria.²⁵

The employers also argued that Title VII requires a showing of "intentional" discrimination, and discriminating against gay and transgender individuals does not "intentionally" discriminate on the basis of a person's biological sex. That is, an employer could categorically discriminate against gay or transgender employees without ever knowing the sex of the affected individuals.²⁶ The Court rejected this argument as

well, explaining that “an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules.”²⁷

The employers next argued that discrimination against gay and transgender employees cannot constitute sex-based discrimination because it affects men and women equally. Yet because Title VII prohibits discrimination against individuals, the Court held that it does not matter that an employer may apply its discriminatory practices “comparably” to men and women “as groups.”²⁸ The employer still treats an individual differently than other employees with the same sexual attractions or gender expressions “because of” the individual’s sex.

Finally, the employers argued that expanding Title VII liability could yield unintended policy consequences, such as the elimination of single-sex bathrooms or locker rooms. The Court responded that these disputes had not been briefed, and were not properly before the Court.²⁹ Separately, the employers argued that prohibiting discrimination on the basis of sexual orientation or transgender status could “require some employers to violate their religious convictions.”³⁰ The Court emphasized that it is “deeply concerned with preserving the promise of the free exercise of religion.”³¹ It observed that Title VII contains exemptions for religious organizations, and that both the First Amendment and the Religious Freedom Restoration Act³² prohibit Congress from unduly burdening an individual’s exercise of religion. But the Court concluded that, since no argument grounded in these provisions was before it, “how these doctrines protecting religious liberty interact with Title VII are questions for future cases.”³³

Justice Alito, joined by Justice Thomas, dissented, principally arguing that the court’s interpretation amounted to legislation—not judging—in contravention of the separation of powers. Justice Kavanaugh filed a separate dissent, contending that the majority opinion impermissibly relied on the statute’s literal, not ordinary, meaning.

Implications

The Court’s decision is notable not only for its practical implications for LGBT employees, but also for its potential impact on other civil-rights statutes, and for the questions it left unanswered.

First and foremost, the decision marks a significant shift in the law of employment discrimination. Employers across the country have, for years, prohibited discrimination against LGBT employees as a matter of policy.³⁴ But, for many, terminating an employee based on sexual orientation or transgender status came with no prospect of civil liability under federal—if any—law. Prior to the Court’s decision, a majority of lower federal courts had held that Title VII did not protect LGBT employees.³⁵ Only twenty-two states plus the District of Columbia (as well as certain municipalities) had enacted provisions prohibiting employment discrimination based on sexual orientation or gender identity,³⁶ some of which did not provide the same levels of protection as Title VII.³⁷ Now, any employer subject to Title VII “who fires an individual merely for being gay or transgender defies the law.”³⁸

The Court's decision could impact the interpretation of other anti-discrimination statutes, too. Over 100 federal statutes—including Title IX,³⁹ the Fair Housing Act,⁴⁰ and the Equal Credit Opportunity Act,⁴¹ and the Affordable Care Act⁴²—prohibit discrimination “because” or “on the basis” of sex.⁴³ Applying the reasoning behind the Court's interpretation of Title VII, those statutes also arguably prohibit discrimination based on sexual orientation or transgender status. And because many state courts rely on federal-court interpretations of Title VII to interpret their own employment-discrimination statutes, the Supreme Court's decision could signal a change in the interpretation of such state provisions as well.⁴⁴

Finally, the Court's decision is notable for what it did not resolve. Because all three plaintiffs had been fired, the Court declined to address whether other forms of discrimination based on sexual orientation or transgender status are actionable under Title VII, such as hiring, promotion, sex-segregated locker rooms, bathrooms, and dress codes.⁴⁵ Similarly, the Court did not address the circumstances in which discrimination based on sexual orientation or gender identity may be permissible based on a “bona fide occupational qualification.”⁴⁶ Lastly, the Court left open the possibility that employers could seek exemptions from Title VII's prohibition on discrimination against gay and transgender individuals. In particular, the Court noted that several possible exemptions to Title VII's coverage might apply to employers asserting religious objections. Title VII itself contains a provision that exempts religious organizations from coverage “with respect to the employment of individuals of a particular religion to perform work connected with” the organization's activities.⁴⁷ And both the First Amendment and the Religious Freedom Restoration Act⁴⁸ prohibit Congress from placing undue burdens on the exercise of religion. The Court suggested that these exemptions might limit the scope of Title VII's protections for gay and transgender employees, noting that such questions would be questions for “future cases.”⁴⁹

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ No. 17-1618 (U.S. June 15, 2020).

² 42 U.S.C. § 2000e-2(a)(1).

³ *Id.* § 2000e(b).

⁴ Ms. Stephens died the month before the Court issued its decision. See Aimee Ortiz, *Aimee Stephens*, 59, *Plaintiff in Transgender Rights Case*, N.Y. Times, May 14, 2020, at B12.

⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572, 576-581 (6th Cir. 2018) (internal quotation marks omitted).

⁶ *Id.* at 583-97.

⁷ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 109 (2d Cir. 2018) (en banc).

⁸ *Id.*

⁹ *Id.* at 112.

¹⁰ *Bostock v. Clayton Cty.*, No. 1:16-CV-1460-ODE, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017).

¹¹ *Id.*

¹² *Id.* at *2-3.

¹³ *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 964-65 (11th Cir. 2018).

¹⁴ *Bostock v. Clayton Cty.*, No. 17-1618, Slip Op. at 4 (U.S. Jun. 15, 2020) (quoting 42 U.S.C. § 2000e-2(a)(1)).

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.*

- 20 *Id.*
- 21 *Id.* at 9.
- 22 *Id.* at 10.
- 23 *Id.*
- 24 *Id.*
- 25 *Id.* at 12–14 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)).
- 26 *Id.* at 17–18.
- 27 *Id.* at 17.
- 28 *Id.* at 21.
- 29 *Id.* at 31.
- 30 *Id.* at 32.
- 31 *Id.*
- 32 107 Stat. 1488, codified at 42 U. S. C. § 2000bb *et seq.*
- 33 Slip Op. at 32.
- 34 See Human Rights Campaign Foundation, *Corporate Equality Index 2020*, at 5-6 (Mar. 2020).
- 35 See Slip. Op. at 21-22 (Kavanaugh, J., dissenting) (collecting cases).
- 36 See Slip. Op. at 18 (Kavanaugh, J., dissenting) (collecting statutes); see, e.g., N.Y.C. Code § 8-107(1)(a). Additionally, many states have issued executive orders prohibiting discrimination in public employment. See Slip. Op. at 18-19 (Kavanaugh, J., dissenting) (collecting authorities).
- 37 For example, unlike Title VII, certain state anti-discrimination do not prohibit discrimination based on *perceived* sexual orientation. Compare *Davis v. Fred's Appliance, Inc.*, 287 P.3d 51, 58 (Wash. Ct. App. 2012), with *Capek v. BNY Mellon, N.A.*, Civ. No. 15-4155, 2016 WL 2993211, at *3 (S.D.N.Y. May 23, 2016). Still others “do not allow for recovery of punitive damages at all, or they impose caps that are lower than those under Title VII.” Sandra F. Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 Okla L. Rev. 701, 716 & n.96 (2010).
- 38 Slip Op. at 32.
- 39 20 U.S.C. § 1681(a).
- 40 42 U.S.C. § 3631.
- 41 15 U.S.C. § 1691(a)(1).
- 42 42 U.S.C. § 18116.
- 43 See Slip. Op. at 66-81 (Alito, J., dissenting) (cataloging federal statutes prohibiting sex discrimination).
- 44 See, e.g., *Labra v. Mid-Plains Constr., Inc.*, 90 P.3d 954, 957 (Kan. Ct. App. 2004).
- 45 Slip. Op. at 31.

⁴⁶ 42 U.S.C. § 200e-2(e)(1).

⁴⁷ 42 U.S.C. § 2000e-1(a).

⁴⁸ 42 U.S.C. §§ 2000bb et seq.

⁴⁹ Slip Op. at 32.