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In Landmark Ruling, the United States Supreme Court Holds that Title VII Prohibits Discrimination Based on Sexual Orientation and Gender Identity

On June 15, the U.S. Supreme Court issued its decision in *Bostock v. Clayton County,* resolving the question whether applicants and employees were protected from workplace discrimination under Title VII of the Civil Rights Act of 1964 based on their sexual orientation or gender identity. In a 6-3 decision, the Court handed gay, lesbian, and transgender individuals a landmark victory, and provided millions of LGBT people additional employment law protections.

The decision addressed three cases consolidated from federal circuit courts that had reached inconsistent conclusions:

- In *Bostock v. Clayton County*, the U.S. Court of Appeals for the Eleventh Circuit held that Title VII did not prohibit employers from firing employees for being gay.
- In *Altitude Express v. Zarda*, the Second Circuit held that Title VII did prohibit discrimination against employees based on their sexual orientation.
- In *R.G. & G.R. Harris Funeral Homes v. EEOC*, the Sixth Circuit held that Title VII did prohibit discrimination against employees based on their transgender status.

The Decision

Justice Neil Gorsuch wrote the majority decision and was joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented.

The question before the Supreme Court was whether Title VII's prohibition against discrimination in the workplace "because of sex" encompassed discrimination based on sexual orientation and gender identity. In holding that it did, the Court reasoned that when an employer intentionally discriminates against an employee for being homosexual or transgender, it necessarily discriminates against that individual in part because of sex. As the Court explained, in its view, there is no way to consider an employee's sexual orientation or transgender status without taking into account that individual's sex. If a person identifying as male and a person identifying as female both are attracted to men, an employer's distinction between them is sex-based.

Notably, even before the Supreme Court's decision, the U.S. Equal Employment Opportunity Commission had taken the position that discrimination based on sexual orientation and gender identity was prohibited under Title VII.

In reaching its holding, the Supreme Court rejected several arguments raised by employers. For example, the Court concluded that it is not a defense for employers to treat men and women who are in same-sex relationships comparably as a group, reasoning that such conduct still falls within Title VII's prohibitions because the individual employee still is being discriminated against based on sex. As the Court stated, "an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule." The Court applied the same reasoning to discrimination against transgender and gender-nonconforming individuals, reasoning that an individual's identified sex at birth is what distinguishes whether that individual's behavior is acceptable to the employer. The Court announced that the correct

standard is the "but for" analysis – if changing the individual's gender yielded a different result, there was a violation of the law, regardless of whether some other factor contributed to the challenged employment action.

The Supreme Court also rejected an argument about legislative intent premised on the notion that the drafters of Title VII in 1964 would not have expected that law to apply to discrimination against gay and transgender people and as such, the law should not be construed to provide such protections. The Court explained that legislative intent does not supersede unambiguous statutory text and that Title VII's broad ban on sex discrimination "guaranteed that unexpected applications would emerge over time."

Open Questions

The Court's decision left several questions unanswered. For example, the Court declined to address the interplay between its ruling and the First Amendment and the Religious Freedom Restoration Act of 1993's protections of religious beliefs and expressions. The Court recognized, however, that an employer's religious rights "might supersede Title VII's commands in appropriate cases." The Court also declined to provide any indication of how its decision impacts other issues employers may need to address in the workplace, including how to handle sex-specific bathrooms, changing rooms, and dress codes. These issues will need to be resolved through legislative amendments or future litigation.

Impact on Employers

Although less than half of the states in the United States provide workplace protections prohibiting employers from discriminating against employees and applicants based on their sexual orientation or gender identity, many states, including Connecticut, Massachusetts, New Jersey, and New York, already do. Notably, many of these states' laws may cover small employers not covered under Title VII, provide greater remedies, and/or have longer statutes of limitation. As such, the effects of the Supreme Court's decision will be lesser in those states than in other states that currently do not have any such state law protections.

Suggested Action

Given the Supreme Court's decision, it is an opportune time for all employers to review their employee handbooks and other workplace policies to ensure that they prohibit discrimination and harassment based on sexual orientation and gender identity. Employers should also ensure any anti-discrimination and harassment training includes coverage of such protected classifications to raise awareness, particularly for supervisors, that harassment on any protected basis, including sexual orientation and gender identity, is unlawful and will not be tolerated.

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Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com