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US Supreme Court Recognizes Title VII Protections to LGBTQ Employees

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On June 15, 2020, the Supreme Court of the United States "at last" issued a 6-3 decision in which it "did not hesitate" to extend protection under Title VII of the Civil Rights Act of 1964 to gay and transgender workers.

Background on Bostock v. Clayton County

In *Bostock v. Clayton County, Georgia*, the Court resolved a circuit split in the form of two lines of wrongful termination cases: one related to claims by gay men alleging they were fired because of their sexual orientation, and the other by a transgender woman claiming her former employer fired her when she announced at work her intention to transition her gender identity from male to female.[1] Finding in the employees' favor, and rejecting the employers' contention that even intentional discrimination against employees based on their homosexual or transgender status is not a basis for Title VII liability, the Court ruled that such discrimination is, inherently, "because of sex."

Analysis of the Supreme Court decision

Justice Neil Gorsuch writing for the majority, in an opinion that was joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan, opined that Tile VII's message is equally simple and momentous: an individual's homosexuality or transgender status is not relevant to employment decisions. The Court wrote that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

According to the Court's opinion, the question in these cases is simple: whether changing the employee's sex would have yielded a different choice by the employer.

The Court offered two examples:

- The case of 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.
- The case of 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.

Finding the terms of Title VII to be unambiguous, the Court rejected the employers' argument that application of Title VII to gay and transgender employees should be rejected on account of consequences that were unexpected and unanticipated when Title VII was enacted in 1964. The Court reasoned that major initiatives like Title VII guarantee unexpected consequences.

Impacts of Title VII decision on employment law

The Court's ruling expands the federal protections of Title VII to all workers employed in the United States by

employers with 15 or more employees. As 21 states, the District of Columbia, Guam and Puerto Rico have already enacted statutes prohibiting employment discrimination based on sexual orientation and gender identity in the public and private sector, the Court's ruling will have the greatest impact on employers in states without such protections.

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. Further, employees should receive training that underscores the discrimination against LGBTQ employees will not be tolerated.

Contact your Cooley counsel to ensure your employment policies, employee handbooks and training materials are updated in light of *Bostock.*

Notes

1. The Court used the female pronoun throughout to describe this employee.

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