CLIENT ALERT: SUPREME COURT HOLDS TITLE VII PROTECTIONS EXTEND TO SEXUAL ORIENTATION AND GENDER IDENTITY

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In a landmark ruling for LGBTQ employees, the United States Supreme Court held on June 15, 2020, that Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on their sexual orientation or transgender status.

The 6-3 opinion comes in *Bostock v. Clayton County, Georgia* (No. 17-1618), a consolidated appeal involving three different plaintiffs whose employers fired them after learning of their sexual orientation or transgender status. Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act, and the courts below reached conflicting results.

- Gerald Bostock was a county employee in Clayton County, Georgia who was fired for “conduct unbecoming a county employee” shortly after joining a gay softball league. The Northern District of Georgia dismissed Mr. Bostock’s discrimination claim on the grounds that Title VII does not protect against discrimination on the basis of sexual orientation, and the Eleventh Circuit Court of Appeals affirmed.

- Donald Zarda was a skydiving instructor who was fired after telling a customer he was gay. Mr. Zarda’s discrimination claim was initially dismissed by the Eastern District of New York. However, the Second Circuit held that Title VII does prohibit sexual orientation employment discrimination under the existing “sex” protected category.

- Aimee Stephens was a funeral home director who was fired shortly after informing the funeral home’s owner that she intended to transition from male to female. Ms. Stephens’ claim was initially dismissed, but the Sixth Circuit Court of Appeals reversed and held that discrimination on the basis of her transgender status constituted sex discrimination in violation of Title VII.

The Supreme Court accepted certiorari on all three cases to consider whether “an employer can fire someone simply for being homosexual or transgender.” Writing for the majority, Justice Gorsuch — joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan — held that an employer who fires an individual merely for being gay or transgender violates Title VII.
In reaching this decision, the Court reiterated the well-known principle 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.” The Court then concluded that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” The Court provided the following example:

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 that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. … 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.

In other words, the Court recognized that gender identity and sexual orientation inherently rely on the employee’s sex. Applying this reasoning, the Court held that discrimination against employees because they are homosexual or transgender is discrimination “because of sex” under the unambiguous meaning of Title VII.

Three Justices dissented from the Court’s opinion. Justice Alito, joined by Justice Thomas, argued that there is a fundamental difference between discrimination because of sex and discrimination because of sexual orientation or gender identity and that Congress only intended to proscribe the former when drafting the Civil Rights Act of 1964. Justice Alito emphasized that judges should look past the literal text to analyze what the words meant to reasonable people at the time the text was drafted. Justice Kavanaugh similarly argued that both “common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination.” But the majority rejected these arguments, noting that, because the plain and unambiguous language of Title VII provides that discrimination because of sexual orientation and gender identity is discrimination “because of sex,” legislative intent was irrelevant.

Twenty-one states (including Delaware) and the District of Columbia already have statutes protecting employees from discrimination based on sexual orientation and gender identity. The Court’s opinion in Bostock now extends these protections to employees nationwide under federal law. The Court’s holding also could bolster efforts to extend similar protections into other federal or state laws prohibiting sex discrimination, such as those dealing with housing and public accommodations. However, the Court expressly declined to consider these potential effects, stating that “none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.” The Court also left open the question of whether an employer’s religious convictions “might supersede Title VII’s commands in appropriate cases,” which could lead to further litigation on the intersection of Title VII protections and religious freedom protections under the First Amendment and the Religious Freedom Restoration Act.

To discuss this case or for assistance with other employment law questions, contact Jennifer Gimler Brady, Kathleen Furey McDonough or Jennifer Penberthy Buckley.