

# Insights

## U.S. Supreme Court Issues Ruling on Title VII Protections for Sexual Orientation and Transgender Status

June 15, 2020

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On Monday, June 15, 2020, the Supreme Court of the United States issued a landmark decision, *Bostock v. Clayton County*. In this 6-3 opinion, the Supreme Court held that the protections under Title VII of the 1964 Civil Rights Act (Title VII) extend to sexual orientation and transgender status.<sup>1</sup>

Title VII prohibits covered employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin. The parties conceded that "sex" as a protected characteristic "in 1964 referred to the biological distinctions between male and female."<sup>2</sup> The *Bostock* decision conclusively establishes that "sex" includes sexual orientation and transgender status. Covered employers must take prompt action to determine their compliance obligations and status as a result of this decision.

### The Landmark Case: *Bostock v. Clayton County*

In *Bostock*, the Supreme Court held that a covered employer who intentionally discriminates against a person on the basis of sexual orientation or transgender status violates Title VII of the Civil Rights Act.

Background. In this decision, the Supreme Court addressed three consolidated cases. Two cases addressed rights of homosexual individuals and one case addressed transgender rights. In the title case, Gerald Bostock had been fired for "conduct 'unbecoming' a county employee" soon after joining a gay recreational softball league, despite ten years of award-winning work for the County.<sup>3</sup> In the second case, Donald Zarda was fired from his position as a skydiving instructor at Altitude Express within days of mentioning that he was gay.<sup>4</sup> Finally, in the third case, Aimee Stephens was fired after informing her employer that she intended to transition from male to female.<sup>5</sup> The Supreme Court granted certiorari to resolve these conflicting decisions out of the Second, Sixth, and Eleventh Circuit Courts of Appeals.

The Court's Holding. The main issue underlying each of these cases is the scope of Title VII, more specifically, the interpretation of "sex" as a protected characteristic and its extent, whether narrow or broad. According to the ruling, "sex" covers sexual orientation and transgender status; thus, "[an] employer who fires an individual merely for being gay or transgender violates Title VII."<sup>6</sup>

The Court's Analysis. As author to the Court's opinion, Justice Neil Gorsuch asserted that "homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."<sup>7</sup>

For example, a Title VII violation arises when a covered employer discriminates against a woman for being a lesbian because it penalizes her for being attracted to women, where the employer accepts the same conduct from a man. Likewise, an employer "unavoidably discriminate[s]" against a person if it penalizes an employee for identifying with a one sex at birth and a different one today.

Limitations. There is at least one key limitation to this decision that will undoubtedly continue to be heavily litigated. Justice Gorsuch noted that “[w]hile other employers in other cases may raise free [religious] exercise arguments that merit careful consideration, none of the employers ...”<sup>8</sup> in the cases at issue here argued that granting protections under Title VII for sexual orientation and transgender status would infringe upon their religious liberties.

The Impact. The *Bostock* decision conclusively establishes that sexual orientation and transgender status are included in the protected characteristic of “sex” under Title VII. While at least one key area of uncertainty remains with respect to religious liberties, it is nonetheless a decision with broad implications for most covered employers and LGBTQ+ individuals.

### **What Are Next Steps for Employers?**

Employers subject to Title VII should carefully evaluate the *Bostock* decision to determine its impact. The impact may be minimal for employers with existing policies prohibiting harassment and discrimination based upon sexual orientation and transgender status. Other employers will need to determine their specific compliance obligations, update their handbooks and policies accordingly, and take additional steps to ensure compliance and mitigate risk.

A covered employer's next steps should, at a minimum, include the following:

- review the nature and scope of the employer's obligations under Title VII and identify potential compliance gaps;
- review and, if necessary, update employee handbooks, equal employment opportunity policies, anti-harassment policies, and/or anti-discrimination policies;
- revise any related forms, statements, or other disclosure documents as necessary;
- evaluate third party relationships to determine whether any changes need to be made (e.g., review anti-harassment/anti-discrimination policies for employees who work on-site for a client); and
- provide communication and additional training to employees, including managers, to prevent unlawful harassment and/or discrimination on the basis of sexual orientation or transgender status.

Krieg DeVault LLP's Labor and Employment team is available to help you understand the impact of this decision on your business, determine your compliance obligations, and move your compliance plan into action. We are pleased to offer flexible flat fee arrangements to assist clients with compliance-related activities, such as reviewing and updating employee handbooks, policies, and training materials. Please contact **Shelley M. Jackson** or any member of our **Labor and Employment team** for more information.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020), No. 17-1618, (U.S. Jun. 15, 2020).

[2] *Id.* at 2. The employees conceded this point only for arguments' sake. *Id.* at 5.

[3] *Id.* at 3.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2.

[7] *Id.* at 10.

[8] *Id.* at 33.