

Employees Now Protected from Discrimination Based on LGBTQ Status

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On June 15, 2020, the United States Supreme Court ruled in a 6-3 majority opinion in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 (Title VII) protects employees from discrimination in the workplace based on sexual orientation and gender identity.

According to the Court, this result is required by the “ordinary public meaning of [Title VII’s] terms at the time of its enactment.” In relevant part, Title VII states that it is “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 [the individual’s] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

After a detailed analysis of each of the terms that make up Title VII’s prohibition of discrimination “because of sex,” the Court determined that the statute sets forth a “straightforward rule”: “An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”

The Court went on to hold that “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions . . . because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” The Court explained via example:

Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and

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invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

Thus, under Title VII, employers may not discriminate against men and women "equally" based on their LGBTQ status and may not discriminate against employees in any manner for being homosexual or transgender.

Prior to the Supreme Court's decision in *Bostock*, employee protection from discrimination based on sexual orientation and gender identity was largely jurisdiction dependent. For instance, on the federal level, the 5th and 11th Circuits previously held that Title VII did not protect LGBTQ employees, while the 2nd, 6th, and 7th Circuits all held that it did. On the local level, while many localities (such as Chicago) and states (such as Illinois) had enacted laws protecting LGBTQ employees from discrimination in the workplace, such discrimination remained legal in over half the states in the country.

Though *Bostock* is clear that Title VII prohibits discrimination based on sexual orientation or gender identity, there remain questions over its practical application. For instance, who is a proper "comparator" for an employee claiming discrimination based on sexual orientation? While *Bostock* suggests that comparators will be the opposite gender, that issue is far from clear.

Additionally, the Court left open the possibility that laws concerning the free exercise of religion, such as the Religious Freedom Restoration Act of 1993 (RFRA), may "supersede Title VII's commands in appropriate cases."

Employers who have questions about the impact of *Bostock* on their policies, procedures, or operation should be sure to contact their servicing attorney for more details.