

U.S. Supreme Court Rules Title VII Protects Gay and Transgender Employees from Employment Discrimination

Article

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On June 15, 2020, in a landmark decision, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sexual orientation or transgender status. This decision comes five years after the Court legalized same sex marriage. The Supreme Court's 6-3 decision was authored by conservative Justice Neil Gorsuch.

Title VII bars employers from discriminating against employees on the basis of sex, race, color, national origin and religion. This decision, which resolved three cases—*Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *RG & GR Harris Funeral Homes v. EEOC*—focused on the definition of “sex” in Title VII. The plaintiffs argued that discriminating against gay and transgender employees was inherently based on their sex, thus violating Title VII. However, the defendant employers argued that Congress did not intend for Title VII to protect gay and transgender employees when it passed the law.

The decisions of the intermediate appellate courts demonstrated a split among the federal appellate courts as to the meaning of “sex” within the context of Title VII: The Eleventh Circuit Court of Appeals, in the *Bostock case*, determined that the law did not prohibit employers from firing employees for being gay. In contrast, the Second Circuit, in the *Zarda case*, determined that employer sex discrimination in violation of Title VII includes sexual orientation discrimination, while the Sixth Circuit, in the *RG & GR Funeral Homes case*, held that Title VII bars employers from firing employees based on their transgender status. (In 2017, the Seventh Circuit Court of Appeals—which governs Wisconsin, Illinois, and Indiana)—held in the *Hively v. Ivy Tech case* that sexual orientation discrimination is a form of sex discrimination within the meaning of Title VII.

While the Court acknowledged that sexual orientation and transgender status are distinct concepts from sex, discrimination based on these factors constitutes illegal sex discrimination. Justice Gorsuch stated, “an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

PROFESSIONALS

Laurie E. Meyer
Partner

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Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. But the limits of the drafters' imagination supply no reason to ignore the law's demands. Only the written word is law, and all persons are entitled to its benefit."

According to the majority opinion, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. 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 is 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."

The Court also indicated that its decision does not reach into any bathroom, locker room or dress code questions that may be raised as a result of this opinion. The Court also declined to address how the decision might affect religious employers, as that issue was not before the Court.

While this decision is momentous on a national level, Wisconsin employers should recognize that discrimination based on sexual orientation has long been illegal under the Wisconsin Fair Employment Act. Moving forward, discrimination on the basis of sexual orientation or gender identity will also be recognized as illegal under federal law.

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