

Title VII Prohibits Workplace Discrimination Based on Sexual Orientation and Transgender Status

On June 15, 2020, the Supreme Court of the United States issued its opinion in *Bostock v. Clayton County, Georgia*. *Bostock* was consolidated with *Altitude Express v. Zarda* and *Stephens v. R.G. & G.R. Harris Funeral Homes* for oral arguments. In a 6-3 decision with an opinion delivered by Justice Gorsuch, the Court held that “[a]n employer who fires an individual merely for being gay or transgender violates Title VII.”

Gerald Bostock, a gay man, was employed as a child welfare services coordinator for Clayton County, Georgia beginning in 2003. In the course of his ten year employment with Clayton County, he received positive performance evaluations and various awards for his performance. In 2013, Mr. Bostock began participating in a gay recreational softball league. Shortly thereafter, influential members of the community allegedly made disparaging comments about Mr. Bostock’s sexual orientation and participation in the league. Not long after that, his employment was terminated for conduct “unbecoming” of a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express. After several years working for the company, Mr. Zarda informed his employer that he was gay and his employment was terminated days later.

Aimee Stephens was an employee at R.G. & G.R. Funeral Homes. When she was hired, Ms. Stephens presented as male. Two years after she was hired, she began treatment for despair and loneliness. Ultimately, she was diagnosed with gender dysphoria and began her transition. In her sixth year with the company, Ms. Stephens informed her employer in writing that she intended to “live and work full-time as a woman.” Shortly thereafter, her employment was terminated.

As a matter of statutory interpretation, the Court interpreted the terms of Title VII in accordance with their plain meaning. Title VII provides 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 his compensation, terms, conditions,

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or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

In applying the definition of 'sex' to include sexual orientation and transgender status, the Court found that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Therefore, "[a]n 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."

The Court acknowledged that sexual orientation and transgender status are distinct concepts from sex. "But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." Like sexual harassment and discrimination based on motherhood, the concepts of sexual orientation and transgender status are inextricable from the concept of sex. "As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."

The Court summarized its holding as follows:

In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

However, the Court warned that the *Bostock* opinion should not be read to extend beyond Title VII to other federal or state laws that prohibit sex discrimination. The Court specifically noted that its decision does not address the validity of sex-segregated bathrooms, locker rooms, or dress codes, "or anything else of the kind." Likewise, the Court declined to consider the interaction between the doctrines protecting religious liberty and Title VII with regard to sexual orientation or transgender status. The majority explained "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."

For employers, *Bostock* now means federally-mandated equal treatment for all LGBTQ employees. Although many states already had existing employment laws prohibiting discrimination on the basis of sexual orientation, now employers in all states must provide equal protection to LGBTQ workers.

If your employment policies do not currently provide for nondiscrimination based on sexual orientation and gender identity, you should update them to explicitly list those categories. While LGBTQ employees will now receive protection based on 'sex' regardless of employer policies, expanding your policy to include protections for sexual orientation and gender identity is not only the right thing to do, but it will provide evidence

that your company intends to comply with Title VII's protection of 'sex' in its totality.