

Supreme Court Issues Landmark Decision Expanding Title VII Protections to Bar Discrimination Based on Homosexuality and Gender Identity

On Monday, June 15, 2020, the United States Supreme Court issued its watershed decision in the consolidated cases captioned *Bostock v. Clayton County, Georgia*, reversing the decision of the Eleventh Circuit and recognizing for the first time that sexual orientation and transgender status are protected from discrimination under Title VII of the Civil Rights Act of 1964.

The 6-3 decision penned by Justice Neil Gorsuch joined by Chief Justice John Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan, has the enormous potential to impact not only traditional employment law, but other statutes that incorporate notions of “sex” as a class entitled to protection. The anticipated impact of this decision will be explored in future alerts.

The decision resolves a circuit split that had developed in the last few years over whether the plain language of Title VII prohibiting discrimination “on the basis of ... sex” includes discrimination based on sexual orientation or gender identity. This split emerged after two federal circuits rejected previously settled case law that the plain language of Title VII’s prohibition of “sex” discrimination did not encompass discrimination based upon sexual orientation or gender identity.

The decision relates to the consolidated cases in *Bostock*, on appeal from an Eleventh Circuit, *Zarda v. Altitude Express*, in which the Second Circuit’s held in favor of the employee, and *RG and GR Harris Funeral Homes v. Stephens*, in which the Sixth Circuit likewise found in favor of the employee. Both *Bostock* and *Zarda* involved claims by employees fired after their employers learned they were homosexual. The employee in *Stephens* was fired after she communicated her intent to transition from male to female, and to begin living and dressing as a woman including at work.

A “Straightforward Application of Legal Terms”

In a decision drafted by Justice Neil Gorsuch, the Court characterized the analysis underlying its decision as simple. “At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms[.]” *Slip Op., Majority, at 12*. In so doing, the Court fully embraced arguments made in favor of a broader interpretation of Title VII in each of the cases on appeal, that there can be no sexual orientation or gender identity discrimination that is not also discrimination based upon sex.

“Each of the three cases before us started the same way,” Justice Gorsuch wrote for the majority. “An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status.” *Id. at 2*. Considering the language of Title VII, the Court continued: “From the ordinary public meaning of the

statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision." *Id.* at 9. "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.*

The Court flatly rejected arguments against an expanded interpretation of Title VII that disapproval of homosexuality or transgender status can be applied equally to men and women and therefore does not constitute discrimination "on the basis of" sex. "When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law[.]" the Court noted. *Id.* at 6. "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 he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. 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. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* at 10.

Alito Characterizes Majority Opinion as "Legislation"

Dissenting opinions were penned by Justice Samuel Alito, joined by Justice Clarence Thomas, and by Justice Brett Kavanaugh.

In his 54-page dissent, followed by a 53-page appendix, Justice Alito pulled no punches, opening: "There is only one word for what the Court has done today: legislation." *Slip Op., Alito Dissent*, at 1. Alito proceeded to characterize the majority opinion's argument that it was applying the plain language of Title VII "preposterous[.]" further accusing the majority of "arrogance" in asserting that its application of the unambiguous language of Title VII when clearly Congress at the time that it passed the statute never intended its reach to extend so far. *Id.* at 6. Alito noted, in attacking the position of the majority that it was simply applying the plain language of Title VII that such argument was belied by the fact that "until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex." *Id.* at 7.

Taking issue with the majority's position that it was simply applying the plain text of the statute, Alito noted "[t]he court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated — the theory that courts should 'update' old statutes so that they better reflect the current values of society."

Justice Brett Kavanaugh in his dissent observed that courts are obligated to rely upon the "ordinary" meaning of language and not the "literal" meaning of words, and noting that the "ordinary meaning" of a prohibition "on the basis of sex" clearly would not extend to include sexual orientation or gender identity. Like Alito, Kavanaugh characterized the majority's opinion as engaging in writing an expanded law instead of interpreting the law that had been passed.