

Updates

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Supreme Court Holds Federal Law Forbids Firing Employees Based on Sexual Orientation or Transgender Status

The U.S. Supreme Court held that employers are prohibited from discharging employees on the basis of their sexual orientation or transgender status under Title VII, explaining that such discrimination necessarily requires an employer to intentionally treat individual employees differently because of their sex. The following Update discusses this decision and its implications for employers.

"An employer who fires an individual merely for being gay or transgender defies the law."

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees because of their race, color, religion, sex, or national origin. Prohibited acts of discrimination under Title VII include refusing to hire an applicant, terminating an employee's employment, failing to promote an employee, and demoting an employee because the employee has one or more of the characteristics protected under Title VII. Federal appellate courts were divided on the issue of whether Title VII's prohibition of discrimination because of "sex" encompassed discrimination based on sexual orientation (a person's emotional, romantic, or sexual attraction to other people) or transgender status (a person whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth).[1]

In *Bostock v. Clayton County, Georgia*, the U.S. Supreme Court, in a 6-3 opinion delivered by Justice Neil Gorsuch, resolved that question and held that employers are prohibited from discharging employees on the basis of their sexual orientation or transgender status under Title VII of the Civil Rights Act of 1964. Chief Justice John Roberts and Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in the opinion. Justice Samuel Alito wrote a dissenting opinion, in which Justice Clarence Thomas joined, and Justice Brett Kavanaugh authored a second dissenting opinion. The Court's decision interprets Title VII's language, which prohibits discrimination "because of" sex, to include a prohibition of discrimination based on sexual orientation and gender identity, explaining that as long as sex is a factor in the adverse employment decision—specifically, a decision to terminate an individual's employment—federal liability is triggered. The Court also explained that employers may not claim as a defense that the employer terminates both men and women based on their sexual orientation or transgender status because Title VII addresses discrimination against an individual employee, not just classes of employees. The Court left open the question of whether employer actions other than firing may amount to unlawful discrimination under Title VII (although it stands to reason that other negative employment actions based on an employee's sexual orientation or transgender status will also run afoul of Title VII) as well as how its ruling may interact with "doctrines protecting religious liberty."

This decision comes on the heels of Black Lives Matter protests, specifically protests surrounding the protection of black transgender persons' lives, during Pride month. It also came three days after the U.S. Department of Health and Human Services finalized a rule that declared discrimination on the basis of sex in certain health programs or activities did not include discrimination based on sex stereotypes or gender identity such that health providers and health insurance plans could deny care and claims for individuals based on gender identity.[2] It is unclear how the Court's ruling will affect this new rule, but it is likely that those who oppose the rule will use the Court's ruling as precedent to argue that discrimination against sex under the Affordable Care Act includes discrimination on the basis of gender identity.

Circuit Split Leading to Supreme Court Decision

The U.S. Courts of Appeals for the Second, Sixth, and Seventh Circuits have held that discrimination based on sex includes discrimination based on sexual orientation and gender identity. Further, some state and local jurisdictions have passed statutes that expressly prohibit employers from discriminating on the basis of sexual orientation or gender identity.

The U.S. Courts of Appeals for the Fifth and Eleventh Circuits, by contrast, have held that Title VII does not prohibit employers from firing employees for being gay. The Court's June 15, 2020, decision resolves the split of authority between these circuits.

Facts Presented to the Supreme Court and the Supreme Court's Analysis

The Supreme Court considered three separate cases involving three long-term employees who were discharged for being gay or transgender. Specifically, the Court considered the cases of Gerald Bostock, who was fired after his employer learned that he was participating in a gay recreational softball league; Donald Zarda, who was fired after mentioning to a client that he was gay; and Aimee Stephens, who presented as a male when she was hired, but was fired after she told her employer she planned to "live and work full-time as a woman." Each employee alleged unlawful sex discrimination under Title VII after they were fired.

Rather than disputing that they fired their employees for being gay or transgender, each of the employers argued that intentional discrimination against employees based on their sexual orientation or transgender status is not a basis for liability under Title VII.

The Supreme Court disagreed, explaining that "[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." The Court went on to explain,

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. 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.

The Court found the cases before it were distinguishable from countless other cases where Title VII has nothing to say. For example, if an employer fires a female employee for incompetence or poor attendance and would not have tolerated the same trait in a male, then "Title VII stands silent." However, unlike those other traits,

"homosexuality and transgender status are inextricably bound up with sex...because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

Moreover, it is not a defense for an employer to say it discriminates against both men and women on the basis of sex; Title VII focuses on discrimination against *individuals*, not groups. The Court explained, "An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII." In other words, an employer cannot avoid Title VII liability by treating men and women comparably as groups by firing both lesbians and gay men equally.

Importantly, the Court explained that the employee's "sex need not be the sole or primary cause of the employer's adverse action." It is irrelevant if another factor—such as the sex that the employee is attracted to or presents as—might also play a role in the employer's decision. Title VII's legal analysis asks simply whether sex was a "but-for" cause.

Issues the Supreme Court Did Not Address

The Court considered possible concerns resulting from its decision. The Court declined to address concerns regarding sex-segregated bathrooms, locker rooms, and dress codes, explaining that "none of these other laws are before us... and we do not prejudge any such question today."

The Court also acknowledged employers' fears that complying with Title VII's requirement in cases involving sexual orientation or transgender status may require some employers to violate their religious convictions, but declined to further address the issue, noting "how these doctrines protecting religious liberty interact with Title VII are questions for future cases too." The Court further noted that there are numerous laws that may protect employers including Title VII's express carveout for religious organizations, the First Amendment, and the Religious Freedom Restoration Act of 1993.

What Does This Mean for Employers?

In light of this decision, employers should take the following steps:

- Ensure equal employment opportunity policies make clear that discrimination or harassment based on sexual orientation or gender identity is prohibited
- Update or provide trainings to encompass the prohibition of discrimination based on sexual orientation and transgender status
- Meet with managers to discuss this decision and what it means in the workplace

Endnotes

[1] Human Rights Campaign, Glossary of Terms, definitions of "sexual orientation" and "transgender;" available at <https://www.hrc.org/resources/glossary-of-terms>. Note that being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.

[2] Office for Civil Rights, Fact Sheet: HHS Finalizes ACA Section 1557 Rule, at 3 (June 12, 2020); available at: <https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf>.

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