

## LABOR AND EMPLOYMENT

# ALERT

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## *Bostock v. Clayton County*: Supreme Court Protects Sexual Orientation and Gender Identity in the Workplace

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On June 15, 2020, the U.S. Supreme Court ruled that the federal law prohibiting “sex” discrimination in the workplace also protects against bias based on sexual orientation and gender identity. In a 6-3 decision<sup>1</sup>, Justice Neil Gorsuch wrote for the majority that “sex” necessarily served as the reference point for bias based on sexual orientation or gender identity and thus sexual orientation and gender identity are protected traits under Title VII of the Civil Rights Act of 1964 (“Title VII”). “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,” Gorsuch wrote in *Bostock v. Clayton County*.<sup>2</sup>

The Supreme Court’s decision means that, nationwide, employers subject to Title VII – private employers and state/local governments with 15 or more employees, federal agencies, employment agencies, and labor unions with hiring halls or at least 15 members – are now prohibited from discriminating against employees because of sexual orientation or gender identity. Although *Bostock* addressed discrimination in em-

ployment, the decision likely will influence the reach of anti-discrimination provisions in other federal laws.

Until the *Bostock* decision, workplace discrimination protections for the LGBTQ community had been varied, limited mostly to local laws adopted by some big cities and fewer than half the states. For example, twenty-two states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity, according to the Human Rights Campaign, an advocacy group. Wisconsin law prohibits employment discrimination based on sexual orientation but not on gender identity. Protection for public employees had been limited to ten states, with six prohibiting discrimination based on both sexual orientation and gender identity, and four prohibiting discrimination based on sexual orientation but not gender identity.

### THE UNDERLYING FACTS

In *Bostock*, the Supreme Court resolved a split among federal appellate courts on whether Title VII protects individuals from discrimination based on sexual orientation and gender identity. In issuing the *Bostock* decision, the Supreme Court considered three cases: *Bostock v. Clayton County* from the Eleventh Circuit; *Altitude Express, Inc. v. Zarda* from the Second Circuit; and *R.G. & G.R. Harris Funeral Home, Inc. v. EEOC* from the Sixth Circuit.

At the appellate level, the Eleventh Circuit rejected *Bostock*’s argument that Title VII covered his claim that he was fired because of his sexual orientation when his employer learned that *Bostock* had participated in a recreational softball league for gay men.

<sup>1</sup> *Bostock v. Clayton County, Georgia*, No. 17-1618, (U.S. Jun. 15, 2020).

<sup>2</sup> Justice Gorsuch drafted the opinion for the 6-3 majority, composed of Chief Justice John Roberts and Justices Elena Kagan, Sonya Sotomayor, Ruth Bader Ginsburg and Stephen Breyer. Justice Samuel Alito wrote one dissent that Justice Clarence Thomas joined. Justice Brett Kavanaugh wrote a separate dissenting opinion.

Similarly, Zarda's employer fired him from his skydiving instructor position shortly after discovering that he was gay. The Second Circuit ruled for Zarda and concluded that Title VII's reach extended to sexual orientation. In *Harris Funeral Homes*, the employer fired employee Aimee Stephens after she transitioned from male to female.

#### THE COURT'S REASONING

In the majority opinion, Justice Gorsuch engaged in a textual analysis regarding the meaning of the phrase "because of sex" in the context of Title VII. A key anchor point in Justice Gorsuch's discussion was the idea of "but-for" causation and recognition that in the context of sex discrimination, any time "sex" is involved in a workplace decision, Title VII recognizes the decision as being unlawfully discriminatory. Justice Gorsuch quickly cut to the heart of the issue and concluded that individuals could not be discriminated against based on sexual orientation or gender identity without "sex" serving as a reference point:

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.

In making a similar analogy for transgender employees, Justice Gorsuch wrote:

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 majority opinion drew upon prior decisions to make its point that Title VII's statutory language necessitated finding certain acts by employers to be unlawful even though the acts in question were not literally "because of sex" but necessarily involved the decision-maker's consideration of sex. In *Phillips v.*

*Martin Marietta Corp.*,<sup>3</sup> the Supreme Court ruled in 1971 that refusing to hire mothers of young children while not similarly refusing to hire fathers of young children was discrimination "because of sex" since a similar practice was not applied to fathers. In *Los Angeles Dept. of Water and Power v. Manhart*,<sup>4</sup> the Supreme Court found that it was sex discrimination for a public utility to charge women more for pension contributions than men based on a woman's longer life expectancy. Gorsuch found further support in the Supreme Court's more recent decision in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>5</sup> a 1998 decision in which then Justice Antonin Scalia, writing for the majority, found that Title VII prohibited same-sex sexual harassment.

#### THE LIMITS OF THE DECISION

While the *Bostock* decision is certainly a landmark case, it left unresolved issues such as locker room access and bathroom usage, two highly contentious issues. In 2019, the Supreme Court declined to hear a case challenging a Pennsylvania school district's bathroom policy allowing transgender students to use bathrooms of their choice. Furthermore, Justice Gorsuch observed that the Religious Freedom Restoration Act ("RFRA") could limit the reach of the *Bostock* decision. The RFRA permits employers to object to practices that otherwise burden an employer's religious beliefs. ♦

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<sup>3</sup> 400 U. S. 542 (1971)

<sup>4</sup> 435 U. S. 702 (1978)

<sup>5</sup> 523 U. S. 75 (1998)

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