



ALERTS

In Historic Decision, U.S. Supreme Court Rules Title VII Prohibits LGBTQ Employment Discrimination

June 18, 2020

Highlights

Employment discrimination based upon sexual orientation or transgender status is now illegal under federal law

A half-century of precedent and the presumed intent of the drafters of Title VII could not overcome the application of the law to the facts

The impact of the decision is yet to be seen, but over 100 federal laws prohibit sex discrimination – including Title IX

The importance of this week's [U.S. Supreme Court decision related to LGBTQ rights](#) cannot be overstated. The full opinion in *Bostock v. Clayton Cty.*, including two dissents, spans 172 pages. In short, after 56 years, Title VII's prohibition on employment discrimination "because of" sex, now indisputably bars discrimination based upon sexual orientation and transgender status.

Certainly, there is great significance in the Court's decision being issued in the middle of Pride Month, more than 50 years after the Stonewall riots.

More specifically, the Court held as follows:

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“In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. 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.”

The reasoning of the Supreme Court’s decision and its direct reliance on the statutory language can literally be captured in a single sentence: If an employee is attracted to men, and that is acceptable if they are female yet becomes a terminable offense if they are male, there is discrimination “because of” sex. The majority opinion did not rest on policy or legislative intent, but instead focused on the language of the law. Notably, the majority opinion was drafted by Associate Justice Neil Gorsuch, President Trump’s first nominee to the Court and a well-known conservative, and was joined by Chief Justice John Roberts, a conservative appointee of President George W. Bush.

The Court’s decision painstakingly dismantled each of the counter-arguments raised over the last half-century. For instance, the decision made clear that Title VII is concerned with individuals as opposed to groups. As a result, discriminating against all gay employees – both male and female – is no defense and instead multiplies an employer’s liability.

Another common refrain in the argument against coverage is neither one’s sexual orientation nor transgender status was what Congress intended to protect in 1964 when it barred discrimination because of sex. This is almost certainly true. In fact, not only were these characteristics never part of the public debate at the time, there is evidence that sex discrimination itself was added to the proposed Civil Rights law in a failed attempt to undermine its passage. Again, the Court in *Bostock* also had no trouble dispensing with arguments related to Congressional intent. This decision cites various forms of discrimination that are now prohibited, yet were never envisioned in 1964, such as male-on-male sexual harassment, and even the application of the law to males at all. Further, the Court noted that Congressional intent is usually invoked to clarify an ambiguity, not to create one – as it would in this case.

Three justices dissented from the majority in two separate opinions. The dissenters rehashed the arguments above and decried legislating from the bench. Still, they could not overcome the law itself and the logic applying it to the facts before the Court. They did note – despite the majority’s assurances of a narrow holding – that the decision “is virtually certain to have far-reaching consequences” as “[o]ver 100 federal statutes prohibit discrimination because of sex,” Including Title IX. In doing so, they specifically confronted the unknown implications for bathroom and locker room access, assignment of college roommates, participation in women’s sports, and pronoun use. The impact on practical, cultural and legal issues remains to be seen. Similarly, the effect on employees, students and other groups, will also, undoubtedly, be widespread.

Employers should consider reviewing their workplace policies and practices to ensure compliance with the clarified new standard, and should consider training supervisors and Human Resource professionals



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