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# INSIGHT: A 'Simple and Momentous' Title VII Opinion—What Employers Need to Know

By Jamila Mensah and Carolyn Webb, *Bloomberg Law* — June 19, 2020

**The U.S. Supreme Court's *Bostock* opinion simply—but momentously—says an employer who fires an individual for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Norton Rose Fulbright attorneys examine the decision and impact and say employers should consider training and clarifying language in some written policies.**

On June 15, the U.S. Supreme Court issued its long-awaited opinion in *Bostock v. Clayton County, Georgia,* and held that Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against an employee because of their sexual orientation or gender identity.

In the words of Justice Neil Gorsuch, who authored the majority opinion, the court's holding is "simple and momentous:" An employer who fires an individual for being gay or transgender violates Title VII.

As a result, employers may want to consider adding clarifying language to their anti-discrimination policies and provide training to managers and employees, among other things.

## Looking at the Opinion

The *Bostock* opinion actually addresses three cases that reached the court from the Second, Sixth, and Eleventh Circuits: *Altitude Express Inc. v. Zarda*, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, and *Bostock*. In *Altitude Express*, the Second Circuit held that sexual orientation discrimination violates Title VII.

In the *Harris* case, the Sixth Circuit held that the Equal Employment Opportunity Commission (EEOC) was entitled to bring a Title VII discrimination claim on behalf of a transgender employee who claimed her employer terminated her based on her gender identity. In contrast, the Eleventh Circuit held in *Bostock* that Title VII does not prohibit discrimination based on sexual orientation.

Other circuit courts had issued similarly conflicting opinions regarding whether Title VII prohibits discrimination based on homosexuality or transgender status.

All of these cases centered around one question: What does Title VII's prohibition against discrimination "because of . . . sex" actually mean? To answer this question, the court first determined that defining the term "sex" was unnecessary because the "question isn't just about what 'sex' mean[s], but what Title VII says about it."

In response to the argument that Title VII seems to "concern[s] itself simply with ensuring that employers don't treat women generally less favorably than they do men," the court repeatedly noted that the plain language of Title VII expressly prohibits discrimination against *individuals*—not groups—and that to discriminate under Title VII simply means "treating that individual worse than others who are similarly situated."

The opinion further reasoned that Title VII "works to protect individuals of both sexes from discrimination, and does so equally."

Putting these factors together, the court concluded that the result was "straightforward:" an employer violates Title VII by discriminating against an employee because of their sexual orientation or gender identity because in doing so, the employer necessarily and intentionally discriminates against that individual in part because of sex.

The court provided a variety of hypotheticals to illustrate how it is "impossible" to discriminate against an individual based on either of these categories without also discriminating against that individual based on their sex because "homosexuality and transgender status are inextricably bound up with sex."

For example, the court discussed a hypothetical employer that has a policy of firing any employees who are gay. If an employee brings their wife to the company holiday party, the court reasoned, whether or not that employee is ultimately terminated depends entirely on whether they are a man or a woman.

This is so regardless of whether the employer claims they only fired the employee because of their sexual orientation or transgender status—the employer still took the employee's sex into consideration, and for that reason, has violated Title VII.

Gorsuch's description of this decision as an "elephant" among Title VII jurisprudence is not hyperbole. While homosexual and transgender employees previously brought Title VII sex discrimination claims pre-*Bostock*, most notably under the theory of "sex stereotyping," such claims were often rejected by courts as improper attempts to expand the "sex" protections provided by Title VII.

## Realities and Moving Forward

Moving forward, aggrieved homosexual and transgender claimants can simply check the box for "sex" when filing a charge of discrimination with the EEOC. We can also expect to see courts applying the well-developed case law regarding sex discrimination to claims based on homosexuality or transgender status since *Bostock* held that these characteristics are plainly protected by Title VII's prohibition against discrimination "because of" sex.

The actual increase in administrative charges and lawsuits based on these newly protected categories is difficult to predict. Many employment lawyers have been advising clients for years to consider sexual orientation and gender identity as protected categories in both policy and practice.

Moreover, while employers may want to consider adding clarifying language to their anti-discrimination policies in light of *Bostock*, the court's directive ensures that policies which list "sex" as a protected category necessarily include sexual orientation and gender identity in those protections.

Employers may also want to consider providing training to managers and other employees explaining the practical implications of the *Bostock* opinion. Again, while many employers have been treating sexual orientation and gender identity as protected categories in practice, a refresher training will remind employees and managers of their obligations under Title VII.

Hypothetical examples can help illustrate how jokes and comments about gay or transgender employees may not only be inappropriate and offensive, but might also subject the employer to liability under the express language of Title VII and the *Bostock* opinion.

Finally, the *Bostock* opinion will play a pivotal role in how courts decide the question of whether employers can legally refuse to cover transgender-related medical treatments such as hormone-replacement therapy and gender transition surgery. The recognition of gender identity as a protected category under Title VII makes it difficult for employers or benefit plans to argue otherwise when seeking to deny coverage for transition-related medical treatments. Employers should review their plans for language excluding such treatments and consult with counsel to determine whether any revisions are necessary in light of *Bostock.*

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

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