

Supreme Court Rules that Title VII Prohibits Discrimination Based on Sexual Orientation and Transgender Status

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On June 15, 2020, the U.S. Supreme Court ruled that federal civil rights law protects employees from discrimination based on sexual orientation and transgender status. The question before the Court was whether the prohibition of discrimination based on “sex” under Title VII of the Civil Rights Act (“Title VII”) prohibits discrimination based on sexual orientation and transgender status. In a landmark decision in three consolidated cases, with Neil Gorsuch writing for a 6-3 majority, the Supreme Court held that both sexual orientation and transgender status were included in the term “sex.” A lengthy dissent argues that if Congress intended for the term “sex” to include “sexual orientation” or “gender identity,” then it would have drafted Title VII to say so explicitly. The cases are *Bostock v. Clayton County, Ga.*, No. 17-1618; *Altitude Express Inc. v. Zarda*, No. 17-1623; and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107.

The Supreme Court’s Decision. In reaching its decision, the Court consolidated cases from three different circuits involving the terminations of long-time employees based solely on their sexual orientation or gender identity. In *Bostock v. Clayton County* and *Altitude Express Inc. v. Zarda*, both employees revealed that they were gay and were fired shortly thereafter. In *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, a case about transgender rights, an employee was terminated after she informed her employer that she would like to “live and work full-time as a woman.”

All three employees brought suit under Title VII and alleged unlawful discrimination on the basis of sex. The employers did not dispute that they fired their employees for being gay or transgender. Instead, they argued that even intentional discrimination based on sexual orientation or gender identity was not protected under Title VII. The Eleventh Circuit held that the law did not prohibit employees from being fired because of their sexual orientation. But the Second and Sixth Circuits held that Title VII’s prohibition on sex discrimination included discrimination based on sexual orientation. Certiorari was granted to resolve the split between the lower courts regarding the scope of Title VII.

The Court ultimately held that the term “sex” does encompass sexual orientation and transgender status for the purposes of Title VII protections against workplace discrimination. Specifically, the Court held that “an employer who fires an individual

merely for being gay or transgender violates Title VII.” Justice Gorsuch wrote, “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.”

In a dissent joined by Justice Thomas, Justice Alito argued that the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed, but rather whether Congress outlawed this kind of discrimination in 1964, when Title VII was enacted. According to Justice Alito’s dissent, Title VII, when enacted, made clear that prohibiting discrimination “because of . . . sex” meant discrimination because of “the genetic and anatomical characteristics that men and women have at the time of birth.” Justice Alito also wrote that, in his opinion, the Court has essentially enacted legislation and “abuse[d]” its “authority.”

Justice Kavanaugh also dissented, arguing that the question of whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation is the responsibility of Congress and the President, and not of the Supreme Court. Justice Kavanaugh acknowledged that this is an “important victory” for gay and lesbian Americans, as many of them have “worked hard for many decades to achieve equal treatment in fact and in law,” but reiterated his view that Congress should have been the source of this result and not the Supreme Court.

Implications. Many states already protect employees from discrimination on the basis of sexual orientation and gender identity, including New York and California. But many other states do not have laws prohibiting employment discrimination based on sexual orientation or gender identity, and many federal courts have ruled that Title VII also does not prevent employment discrimination on those bases. The Court’s ruling changes the landscape, providing that LGBT employees throughout the country are protected from employment discrimination under federal law.

The Court did not address whether employers may seek a religious exemption from the prohibition on employment discrimination based on sexual orientation and gender identity. That issue remains an open question, and Justice Gorsuch wrote that “how [] doctrines protecting religious liberty interact with Title VII are questions for future cases.”

Looking Forward. In light of the Court’s decision, businesses should carefully consider their employment policies and practices to ensure compliance. Although many businesses’ policies already prohibit discrimination on the basis of sexual orientation and gender identity, other businesses’ policies simply track applicable law, which, until

now, prohibited such discrimination only within certain geographies. Employers should consider taking the following actions:

- **Review policies to ensure they are consistent with this development.** Anti-discrimination and harassment policies should now include express language stating that discrimination and harassment on the basis of sexual orientation and gender identity is prohibited. If your business operates in multiple states, it is important to make sure that your policy prohibiting this kind of discrimination is extended to employees and employment activities in all states.
- **Communication is key.** Effective employee communications can often mitigate legal risks. Consider taking steps to communicate this development to managers in the field and to reiterate employee policies and clear points of contact for employees and managers to direct questions and concerns.
- **Incorporate this development into discrimination and harassment trainings.** In many jurisdictions, anti-harassment trainings are mandatory on a periodic basis. Even if harassment and discrimination trainings are not mandatory in your jurisdiction, employers should consider conducting regular anti-discrimination and harassment trainings and covering discrimination based on sexual orientation and gender identity in the training content to mitigate legal risk.

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Please do not hesitate to contact us with any questions.



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