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Supreme Court's landmark Pride month ruling: Title VII prohibits sexual orientation and gender identity discrimination in the workplace

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Sexual orientation and gender identity are now protected under federal law. In a landmark decision (*Bostock v. Clayton County, Georgia*) involving three consolidated cases, the U.S. Supreme Court held yesterday that it is illegal to make employment decisions based on an individual's sexual orientation or gender identity. At issue in the Court's 6:3 ruling was the meaning of the term "sex" used in Title VII of the Civil Rights Act of 1964—the federal statute that makes it illegal to discharge, refuse to hire, or otherwise discriminate against any individual "because of" that individual's "race, color, religion, sex, or national origin." Interpreting the plain meaning of the statute, the Court held that there was no other way to apply the phrase "because of … sex" except to hold that discrimination on the basis of sexual orientation or gender identity/transgender status are discrimination "because of … sex."

The historic ruling bestows the right to be free from such employment discrimination to employees in 27 states. Only 22 states plus the District of Columbia currently prohibit employment discrimination because of both sexual orientation and gender identity. One state covers sexual orientation discrimination but not discrimination based on gender identity. Another 10 states offer protection only to public employees (sexual orientation and gender identity in six states; sexual orientation only in another four states). The remaining 17 states, mostly in the South and Midwest, offer no protections from employment discrimination. As famously noted, an employee in those states could marry their same-sex partner on Saturday, post pictures to social media on Sunday, and be lawfully fired on Monday. The Court's ruling changes the law for millions of LGBTQ+ workers and their employers.

The three cases

Gerald Bostock

Gerald Lynn Bostock, a gay man, was hired by Clayton County, Georgia, in 2003 to serve as a child welfare services coordinator. Throughout his employment, Mr. Bostock received positive performance evaluations and professional accolades. In 2013, Mr. Bostock joined a gay recreational softball league. Shortly thereafter, during a meeting at which Mr. Bostock's supervisor was present,

at least one attendee disparaged Mr. Bostock's sexual orientation and participation in the softball league. One month later, Clayton County suddenly fired Mr. Bostock for "conduct unbecoming" a county employee.

Mr. Bostock filed a discrimination charge with the EEOC. Three years later, Mr. Bostock filed a pro se suit against the county in the U.S. District Court for the Northern District of Georgia, alleging discrimination on the basis of sexual orientation. The district court dismissed Mr. Bostock's suit for failure to state a claim. The court cited *Evans v. Georgia Regional Hospital*, a 2017 Eleventh Circuit Court of Appeals decision, for the proposition that Title VII does not prohibit discrimination on the basis of sexual orientation. Mr. Bostock appealed, the Eleventh Circuit affirmed the district court's dismissal, and Mr. Bostock subsequently petitioned the U.S. Supreme Court for a writ of certiorari.

Donald Zarda

Donald Zarda, a gay man, worked as a skydiving instructor with Altitude Express in New York. In this role, Mr. Zarda would often participate in tandem skydives in which he would be strapped to skydiving students. He occasionally told female students about his sexual orientation to allay any concerns they might have about being secured to a male instructor. After one such jump, a female student alleged that Mr. Zarda had inappropriately touched her; Mr. Zarda denied the allegation. Days later, Altitude Express terminated Mr. Zarda.

Mr. Zarda filed a charge with the EEOC alleging that he was fired due to his disclosed sexual orientation and gender. He then filed suit against Altitude Express in the U.S. District Court for the Eastern District of New York and moved for summary judgment. The district court granted partial summary judgment in favor of Altitude Express on Mr. Zarda's sex stereotyping Title VII claim. Prior to trial on his remaining claims, Mr. Zarda died in a skydiving accident. The executors of his estate were substituted in Mr. Zarda's place. Following a jury trial, Mr. Zarda's remaining claims were dismissed with prejudice. Mr. Zarda's estate appealed. The Second Circuit affirmed the district court's holding regarding Mr. Zarda's Title VII claim and later, en banc, vacated the district court's judgment on the Title VII claim and remanded for further proceedings. Altitude Express petitioned the United States Supreme Court for a writ of certiorari.

Aimee Stephens

In 2007, Aimee Stephens was hired by R. G. & G. R. Harris Funeral Homes ("Harris Homes") as a licensed funeral director and embalmer at its Garden City, Michigan, location. At the time she was hired, Ms. Stephens (who was assigned male at birth) presented as male and conformed her dress and appearance accordingly. Throughout her employment, she was an exemplary employee. Two years after she was hired, Ms. Stephens began treatment for despair and loneliness; her clinicians ultimately diagnosed Ms. Stephens with gender dysphoria and recommended that she begin living as a woman. After four years of treatment, Ms. Stephens decided that she could no longer delay her transition. In 2013, Ms. Stephens wrote a letter to Harris Homes explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. Before she left for her scheduled vacation, the funeral home told Ms. Stephens that her "services would no longer be needed." When asked for the specific reason for her termination, the owner of the funeral home stated that it was because Ms. Stephens "was no longer going to represent himself as a man…[h]e wanted to dress as a woman" and he objected to her use of the name "Aimee" because, "he's a man."

Ms. Stephens filed a discrimination charge with the EEOC alleging that Harris Homes violated Title VII by firing her because she is transgender and/or because she did not conform to her

employer's "sex- or gender-based preferences, expectations, or stereotypes." The EEOC filed suit against Harris Homes in U.S. District Court for the Eastern District of Michigan. Both the EEOC and Harris Homes moved for summary judgment. The district court found that while Ms. Stephens' manager's statements constituted direct evidence sufficient to support an employment discrimination claim, the Religious Freedom Restoration Act provided Harris Homes with a Title VII exemption. Following appeals, the Sixth Circuit ultimately held that Title VII bars employers from firing employees because of their transgender status. Harris Homes petitioned the U.S. Supreme Court for certiorari. Ms. Stephens died on May 12, 2020; her estate continued to press her claim on behalf of her heirs.

The ruling

Justice Neil Gorsuch—President Donald Trump's first nominee for the Supreme Court—authored the opinion, which was joined by Chief Justice John Roberts and the Court's liberal bloc, comprised of Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor. Justice Gorsuch's opinion is somewhat of a surprise in that it employs the very same textualist reasoning that is often used against the argument that Title VII protects against discrimination on the basis of sexual orientation and transgender status. According to Justice Gorsuch, Title VII's prohibition against discrimination "because of . . . sex" cannot be read to exclude discrimination due to one's sexual orientation or transgender status:

> 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.

While the employer-defendants in *Bostock* characterized their decisions as being motivated by each employee's sexual orientation or transgender status—which, according to the defendant-employers, is not the same as being motivated by each employee's *sex*—Justice Gorsuch found that it simply does not matter how the employers characterize their own actions. Rather, drawing on the Court's 1978 decision in *Los Angeles Department of Water and Power* v. *Manhart*, Justice Gorsuch wrote that there is a "simple test" for spotting discrimination "because of . . . sex," which merely asks, "whether an individual [] employee would have been treated the same regardless of [] sex." In applying that "simple test," Justice Gorsuch used the following hypothetical to illustrate why, in every case, instances of discrimination on the basis of sexual orientation and/or transgender status pass that "simple test" showing discrimination "because of . . . sex":

> Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

Justice Gorsuch found no support in Title VII's text for the proposition that the "simple test" should be amended or discarded in cases where the employer intends to discriminate on the basis of an employee's sexual orientation or transgender status. Justice Gorsuch concluded that "it is

impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The dissents

Three justices dissented from the majority decision. Justice Alito, joined by Justice Thomas, penned one dissenting opinion. Justice Kavanaugh penned the second one. The two dissenting opinions declare some support for the concept of fair and dignified treatment of gay, lesbian, and transgender individuals. But the dissenters opine that the majority crossed the line between interpreting Title VII (the judicial role) and amending Title VII (the legislative role). Both opinions observe that Congress has repeatedly considered amending Title VII to include a prohibition of sexual orientation discrimination and, more recently, a prohibition of gender identity discrimination, but failed to pass such amendments.

Justice Kavanaugh emphasizes that when Congress enacted Title VII's ban on sex discrimination and ever since, it has been commonly understood that "discrimination because of sex" and sexual orientation discrimination are two distinct forms of discrimination. "Seneca Falls [the site of the first women's rights convention in 1848] was not Stonewall [the famous uprising by LGBTQ individuals following a police raid of a New York City gay club]," he observes. He asserts that the majority's literal application of the operative language violates well-established rules of statutory interpretation. He closes his opinion by acknowledging that the decision is "an important victory for gay and lesbian Americans"; albeit one he thinks should have come from Congress and not the courts.

The Justice Alito and Justice Thomas dissent more sharply attacks the majority for usurping the legislative authority. The opinion declares, "There is only one word for what the Court has done today: legislation." It describes the majority's argument in support of its action as "arrogant" and "wrong." According to the dissent, it is indisputable that in 1964, when it passed Title VII, Congress did not outlaw discrimination on the basis of sexual orientation and gender identity. As a consequence of the ruling, the dissent predicts that the "entire Federal Judiciary will be mired in disputes regarding the reach of the Court's reasoning" in areas such as Title IX (prohibiting discrimination because of sex in federally funded education programs), health care, freedom of speech, and employment by religious institutions. The opinion concludes that "many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves." But the dissent insists that the place to make that happen—"to make new legislation"—is in Congress.

Next steps for employers

All employers, even those located in one of the 23 jurisdictions that already prohibited discrimination based on sexual orientation and gender identity, should consider taking the following actions to create a workplace that protects and welcomes all LGBTQ+ employees.

- Make sure your written policies incorporate protections based on sexual orientation, gender identity, gender expression, and transgender status. This is a good time to review your Equal Employment Opportunity policy and your Non-Harassment policy and complaint procedure to make sure they are current and comprehensive, incorporate best practices, and comply with state and federal law.
- Create a welcoming workplace. Company leaders and Human Resources staff should

become familiar with, and become comfortable using, the correct terminology and inclusive language. Leaders should be role models of appropriate behavior and should actively engage others who do not behave in accordance with the company's values. These values should not appear to be siloed only to the employees affected, or superficially applied or embraced, but should be communicated by the highest leadership of the company in a manner that demonstrates full C-suite and top management engagement and "buy-in."

- Training in equal employment opportunity/non-harassment should include information and examples of prohibited harassment related to sexual orientation and gender identity. All employees may not agree with the law or with their employer's policy, but they may not be permitted to discriminate against or harass others in the workplace.
- Review your benefits policies to ensure they provide coverage equally, regardless of gender identity or sexual orientation.
- Review your dress code. Make sure it is gender-neutral and that it is broad enough so that employees of any gender feel comfortable physically presenting themselves in the workplace.
- Incorporate best practices in your company procedures, such as offering all employees the option of adding pronouns to their email signatures, addressing employees by their preferred name and pronouns, using an employee's preferred name on internal communications and company websites, and encouraging the use of inclusive, non-gendered language in the workplace.

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