Supreme Court Watch Today: Title VII Protects Homosexual and Transgender Employees

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Today, voting 6 to 3 in a single decision issued in three cases argued together last October 8th, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 protects individual employees from intentional employer discrimination because of the individual's homosexuality or transgender status. *Bostock v. Clayton County, Georgia; Altitude Express, Inc. v. Zarda; R. G. & G. R. Harris Funeral Home.*[1] Justice Neil Gorsuch wrote for the six-person majority that also included Chief Justice John Roberts.

The Three Employer Decisions To Terminate

Mr. Bostock, a long-term county employee and child welfare advocate, had led his office to national awards. Clayton County discharged him for "conduct unbecoming a county employee" after "influential members of the community made disparaging comments about [his] sexual orientation and participation in [a gay recreational baseball] league."

R. G. & G. R. Funeral Home in Garden City, Michigan, fired the late Ms. Stephens (who died on May 11th), a funeral director employed for six years, when she informed her employer in a letter that, after four years of therapy and treatment for gender dysphoria, she would return from vacation living and presenting as a woman, as her clinicians had recommended. The funeral home fired her before she left on vacation, saying that "this is not going to work out."

Altitude Express fired the late Mr. Zarda, a skydiving instructor for several seasons, after learning that he was homosexual from a female customer whom he tried to put at ease on her first jump – done in a close hold with an instructor – by reassuring her that she "didn't need to worry" because he was gay.

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Rejection of the Employers' Arguments

The employers in all three cases conceded that they had fired the employees simply because they were gay or transgender. They insisted that Title VII did not prevent them from intentionally discriminating against employees on the basis of homosexual or transgender status.

In particular, the employers argued that, when Title VII was passed, dictionaries defined "sex" in binary (i.e., a man and a woman) biological terms. Even assuming that dictionary definition in 1964, the Court focused on the specific language used in Title VII, which prohibits employers from discriminating against an "individual" on the basis of sex. Rejecting the employers' position, the Court announced:

> 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 employers also argued that it would surprise the drafters of Title VII and the Congress that passed the act to find that it included protection for homosexual or transgender employees. The Court felt that "the limits of the drafters' imagination supply no reason to ignore the law's demands" or the "written words" of the statute. Recognizing that transgender and homosexual statuses are distinct concepts from "sex," the Court pointed to "sexual harassment" as a distinct concept from "sex" accepted as falling within the scope of Title VII liability.

Reviewing its Title VII cases from 1971 forward, the Court noted its long history of remaining "unswayed" by employer arguments that their decisions had turned on generalized factors other than sex. In 1971, the Court rejected an employer's defense that it could presume the primary caretaker status of women with small children to justify not hiring such women. In 1978, the Court rejected the employer's contention that mortality statistics in the aggregate showing that women lived longer than men justified demanding higher pension contributions from women than men, and that its policy was even-handed as to all members in each group based on that factor. Instead, the Court cautioned today that an employer who fires a transgender or gay employee simply because the employer is transgender or gay violates Title VII - just like an employer who discriminates against an employee on the basis of sexual stereotypes, as the Court found in 1989 and 1998.

Next Steps: Lessons Yet to Be Learned

The Court's opinion contains example after example of potential liability under Title VII. The two dissenting opinions accept the employers' position on the statute and contain several examples of a potential collision of values in the workplace between LGBT employees and religious-based employers.

Recommendations: Some employers may have issued employment policies and procedures prohibiting employment discrimination on the basis of sexual orientation, transgender status, gender identity, and gender expression – particularly if they operate in states or localities that forbid such employment discrimination. Other employers may not. Employers should review their policies and procedures, as well as their training modules for managers, employees, and executives, in light of today's opinion.

As always, you are welcome to consult with the author of this Alert and any member of the Butzel Long Labor and Employment Practice Group on any questions or concerns raised by today's opinion.

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[1] *Bostock v. Compton County, Georgia* (No. 17-1658), on appeal from the Eleventh Circuit Court of Appeals; *Altitude Express, Inc. v. Zarda* (No. 17-1623), on appeal from the Second Circuit Court of Appeals); and *R. G. & G. R. Harris Funeral Home v. Equal Employment Opportunity Commission* (No. 18-107), on appeal from the Sixth Circuit Court of Appeals