U.S. Supreme Court Holds that Title VII Prohibits Employment Discrimination on the Basis of Sexual Orientation and Transgendered Status

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Since 1964, Title VII of the Civil Rights Act has prohibited discrimination in employment "because of" sex. Over the years, 21 states and numerous local jurisdictions have enacted laws prohibiting employment discrimination on the basis of sexual orientation, gender identity and/or gender expression. Many employers, both large and small, have voluntarily adopted similar protections for their applicants and employees.

On June 15, 2020, the United States Supreme Court held for the first time that Title VII prohibits discrimination on the basis of sexual orientation and transgendered status. The case, *Bostock v. Clayton County*, involves three separate lower court decisions from Georgia, Michigan, and New York in which an employer allegedly fired a long-time employee simply for being gay or transgender. The Court's 6-3 majority opinion by Justice Gorsuch was joined by Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayer, and Kagan. In short, "in Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

The Court began its analysis by determining "the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." In 1964 when Title VII was adopted, "sex" referred "only to biological distinctions between male and female" and "homosexuality and transgender status are distinct concepts from sex."

But, the Court continued, "that's just a starting point. The question isn't just what 'sex' meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of"

sex." From this language, the Court found it a "straightforward rule" that "an employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex [like being gay or transgendered] contributed to the decision." "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." "Discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex." This is forbidden by Title VII.

The fact that Congress "might not have anticipated this result" when it enacted Title VII is irrelevant. "Likely, they weren't thinking about many of [Title VII's] consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees." "At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms."

The employers in these cases also raised concerns that "sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable" and that protecting LGBT employees will conflict with employers' religious convictions. The Court refused to address these issues, noting that they are not currently before the Court. In fact, there is ongoing litigation over these matters, so it is likely that the Supreme Court will have the opportunity to address them in the future.

In an interesting dissent, Justice Kavanaugh said he dissented because ensuring these protections "was Congress's role." At the same time, however, "it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result."

Contact your Vorys lawyer if you have questions about sexual orientation, gender identity, or gender expression discrimination or other equal employment opportunity issues in your workplace.