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Newsflash
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United States Supreme Court Decides Landmark Case—Employers May Not Discriminate Against Gay or Transgender Employees

By Attorney Rema A. Ina

Gay and transgender workers are now protected against discrimination in the workplace. On Monday, June 15, 2020, the United States Supreme Court issued its decision in *Bostock v. Clayton County, Georgia*, (Supreme Court Case No. 17–1618) and ruled that employers may not fire employees "merely for being gay or transgender." Up until this point, LGBTQ employees were not afforded this protection. The Supreme Court's 6-3 decision is viewed as an important development in the advancement of civil rights and equal opportunity in the workplace. Justice Neil Gorsuch delivered the historic decision and was joined by Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan for the majority opinion.

Influenced by Dr. Martin Luther King, Jr.'s powerful movement, Congress enacted the Civil Rights Act of 1964. Title VII of the Civil Rights Acts of 1964 is one of the most significant pieces of legislation in the employment law context. Under Title VII, it is "unlawful… for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual… because of such individual's race, color, religion, sex, or national origination." 42 U.S.C. 2000e-2(a)(1). The range of individuals protected under this Act has expanded through the years and grown to include pregnant women and male survivors of sexual harassment. Before this decision, Federal Circuit Courts were split in deciding whether homosexual and transgender individuals were entitled to protection under the Act. The *Bostock* decision has brought clarity to this area of the law.

With this decision, the Court considered three different cases which all involved an employee who was fired because the employee was homosexual or transgender. The first was Gerald Bostock who worked for Clayton County, Georgia. Bostock participated in a gay recreational softball league and was fired for conduct "unbecoming" a county employee. Donald Zarda worked as a skydiving instructor in New York. He was fired within days of disclosing that he was gay. Aimee Stephens worked at a funeral home in Michigan. When she commenced work with her employer, Ms. Stephens presented as male. After years with the funeral home, and at the recommendation of her doctors, she began to live and work as a woman. The funeral home fired her for this. All three filed suit under Title VII and received different outcomes in the Federal Circuit Courts. The United States Supreme Court accepted the appeals in order to resolve the conflicting decisions in the federal appellate courts. Mr. Zarda and Ms. Stephens had passed away during the course of this litigation but their cases continued on.

The Court's decision is very straight-forward. Previously, courts had interpreted the word "sex" to reflect the biological differences between male and female. However, the Supreme Court ruled in *Bostock* that employers who intentionally treat employees differently on the basis of homosexuality or transgender status also discriminate on the basis of sex. The Court ruled that sex is a part of the decision-making process when an employer discriminates against homosexual or transgender employees stating:

> "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." *Bostock*, page 2.

The Court observed that an employer who fires an employee merely because of their sexual orientation or gender identity inevitably relies on the employee's sex when making that decision and that is against the law.

Justice Gorsuch, likely to be a swing vote in future related matters before the Court, did leave the door, and a potential loophole, open in connection with employers who may choose to advance arguments regarding free exercise of religion. None of the employers in *Bostock* argued that compliance with Title VII infringed upon their religious liberties.

What does this decision mean for you and your business?

Employers must treat employees' gay or transgender status as a protected class, just as they do with their employees' race, sex, religion, etc. Employers may not make employment decisions based on an employee's sexual orientation or gender identity.

This is a great time for employers to review their employee handbooks and policies to ensure they include protections for gay and transgender people. It is important for employers to properly train their employees on anti-harassment and anti-discrimination procedures and to foster a working environment that is inclusive and offers equality for all employees.

If you need help reviewing your handbook, conducting an employee training, or discussing how this decision affects your business, do not hesitate to give us a call.

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