Today, the United States Supreme Court issued its much-anticipated ruling as to whether Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on sexual orientation and gender identity. The Supreme Court’s ruling came on three separate cases—two addressing sexual orientation and one addressing gender identity, all consolidated by the Supreme Court in its decision in *Bostock v. Clayton County, Georgia* [1]. The Supreme Court’s decision was that the answer to these questions was clear. In a 6-3 opinion written by Justice Neil Gorsuch, the Supreme Court held that an employer who fires an employee for being gay or transgender violates Title VII because “[s]ex plays an necessary and undisguisable role in the decision.”

**Sexual Orientation**

In *Altitude Express v. Zarda* and *Bostock*, the Court addressed the issue of whether Title VII’s prohibition of discrimination on the basis of “sex” extends to include
Altitude Express involved a male sky-diving instructor who habitually disclosed his sexual orientation to female clients to alleviate concerns about being strapped to a man for tandem dives. The instructor alleged he was fired solely because of his sexual orientation in violation of Title VII after a female client complained of inappropriate touching and claimed he informed her of his sexual orientation to excuse his behavior. While the district court ruled that Title VII does not prohibit discrimination on the basis of sexual orientation, the Second Circuit Court of Appeals held that sexual orientation discrimination is motivated, at least in part by “sex,” and is thus covered under Title VII’s prohibition of sex discrimination.

Along similar lines, in Bostock, a male child welfare services coordinator who received criticism for participating in a gay softball league and for his sexual orientation, was terminated for “conduct unbecoming of its employees.” The employee filed a lawsuit under Title VII, alleging sex discrimination based on sexual orientation. The district court dismissed for failure to state a claim, and the Eleventh Circuit affirmed in accordance with its rule that it cannot overrule prior Eleventh Circuit panel precedent.

**Gender Identity**

In R.G. & G.R. Harris Funeral Homes v. EEOC, the Supreme Court addressed Title VII’s coverage of gender identity, as an extension of its prohibitions of “sex” discrimination (including sex stereotyping). In Harris Funeral Homes, the employer terminated an employee shortly after the employee, who had previously presented as male, notified her employer that she intended to transition to and present as female. After the district court granted summary judgment in favor of the employer, the Sixth Circuit reversed, holding that the termination based on the employee’s transgender status and gender identity violated Title VII.

**The Decision**

In these three cases, long-term employees were fired shortly after revealing they were homosexual or transgender, and the employers did not dispute that they fired for that reason. In deciding the scope of Title VII’s protections, the Supreme Court relied on ordinary public meaning of Title VII’s prohibition of discrimination because of sex to determine that an employer who discriminates on the basis of sexual orientation or transgender status violates Title VII. The Court explained that homosexuality and transgender status are inextricably linked to sex and that discrimination on such bases thus requires an employer to treat an individual differently because of their sex. Put another way, the Court articulated that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

The Supreme Court’s decision bring federal law in line with the more than 20 states (and numerous additional municipalities) that currently prohibit discrimination on the basis of sexual orientation and gender identity. With this new ruling, employers should review, and potentially revise, policies to ensure coverage of sexual orientation and gender identity as protected characteristics to comply with new
federal law. Employers should also consider engaging their employees with renewed anti-discrimination, harassment, and retaliation training. Finally, all employers should also recognize the potential for additional charges of discrimination and lawsuits, and be prepared to respond to the same.

[1] Bostock v. Clayton County, Georgia, October 2019

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