Monday, June 15, 2020

Earlier today, the U.S. Supreme Court held that discrimination based on sexual orientation or transgender status is sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The Court’s opinion in Bostock v. Clayton County, Georgia resolves a circuit split and makes adverse employment actions against gay, lesbian, or transgender people illegal across the nation.

The Court’s Decision

The plaintiffs in Bostock were Gerald Bostock, Donald Zarda, and Aimee Stephens, two gay men and a transgender woman, respectively. Each plaintiff was a long-time employee of their employer and each was fired when they revealed their homosexual or transgender status and brought Title VII claims alleging unlawful discrimination on the basis of sex.

The federal courts of appeals have interpreted Title VII differently, with some finding that sexual orientation or gender identity are included in Title VII’s
protections, and others finding that they are not. The Supreme Court has now resolved the disagreement among the courts.

According to the majority opinion, any adverse employment action against someone who is homosexual or transgender necessarily involves disparate treatment based on sex: in the case of a homosexual man, because a man in a relationship with a man is treated differently than a woman in a relationship with a man; and in the case of a transgender woman, because an individual who identified as male at birth but now identifies as female is treated differently than an individual who identified as female at birth and who continues to identify as female.

The Court’s decision follows a line of cases broadly interpreting Title VII’s prohibition of sex discrimination. In Phillips v. Martin Marietta Corp. and Oncale v. Sundowner Offshore Services, Inc., the Court previously held that refusing to hire women with young children, and same-sex sexual harassment, respectively, were violations of Title VII because similarly situated members of the opposite sex are treated differently. The majority opinion noted that though the drafters of Title VII may not have anticipated that sex discrimination would encompass those behaviors, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”

**Impact on Employers**

*Bostock* is limited to application of Title VII’s sex discrimination protections to gay, lesbian, and transgender employees, and holds that employers cannot take adverse employment actions against someone because of their sexual orientation or gender identity. The decision expressly does not address issues relating to bathroom or locker room use, and does not consider the implications of the Religious Freedom Restoration Act of 1993 on Title VII in appropriate cases.

Many state civil rights laws already protect employees based on sexual orientation or gender identity. Employers in such states may have already enacted policies to prohibit discrimination on those bases, and employers there and elsewhere may have chosen to enact such policies regardless of whether there was a legal obligation to do so. *Bostock* makes clear it is no longer discretionary. Employers should review their policies for compliance with this ruling.

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