



## A Law Firm of Action

### SCOTUS Rules:

### Title VII Protects LGBTQ Employees from Discrimination in the Workplace

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In a 6-3 landmark decision on Monday, the Supreme Court ruled that Title VII protects gay and transgender workers from discrimination in the workplace. Justice Neil Gorsuch wrote the majority opinion with Chief Justice John Roberts joining the majority and Justices Alito, Thomas, and Kavanaugh dissenting. Prior to this decision, it was legal for employers in more than half of the states to discriminate against employees for being gay, bisexual, or transgender. That has now changed with Justice Gorsuch ruling that “[a]n employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules,” thus triggering the prohibitions of Title VII. According to the majority, “[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” The Court found that Title VII was unambiguous on its face, and therefore, interpreted the ordinary meaning of its terms at the time of its enactment. Due to this unambiguity, the Court refused to give weight to the legislative intent of the statute. The Court stated, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.” The Court also refused to credit considerations outside of the express

terms of the statute that the employers raised in the opinion’s three underlying cases,<sup>1</sup> stating “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”

Interpreting Title VII in accordance with the “ordinary public meaning of its terms at the time of its enactment,” the Court noted that the only statutorily protected characteristic at issue was “sex,” and that this term was the primary focus of the parties’ dispute. The Court adopted the assumption that “sex” means what the employers suggest (and the employees concede for argument’s sake), namely the biological differences between male and female. However, the Court instructed that this was only a starting point in the analysis and the question goes beyond what “sex” means. Rather, the focus is what Title VII says about it.

Title VII prevents employers from making certain employment decisions “because of” sex. Citing precedent, the Court instructed that this means but-for causation. As a result, where sex plays a part in any challenged employment decision, Title VII

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prohibits it. The Court acknowledged that Title VII does not prohibit all decisions that occur “because of” sex. Rather, it is limited to those decisions that discriminate against an individual, meaning “treating that individual worse than others who are similarly situated.” The Court further instructed that the employer’s adverse employment action must be intentional under Title VII, and the statute’s repeated use of “individual” directs focus on a specific person rather than a class of people.

According to the Court, Title VII is clear and simple: “If an employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee – put differently, if changing the employee’s sex would have yielded a different choice by the employer – a statutory violation has occurred.” The Court noted that it is impossible to discriminate against someone for being gay or transgender without discrimination based on sex. The Court provided examples in the context of a gay employee and a transgender employee in support of this conclusion.

In the first example, an employer has two employees, both of whom are attracted to men. One employee is a man and the other is a woman. If the employer fires the man for being attracted to men instead of women, the employer is making a discriminatory decision against the man “for traits or actions it tolerates in his female colleague.” Put another way, “the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.” This is equally true in employment decisions based on the transgender status of an employee. If an

employer fires an employee who identified as male at birth “for traits or actions that it tolerates in an employee identified as female at birth,” the Court found that “the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.” Inherently, in each of these employment decisions, the employer treated employees differently “because of” their sex. The Court ruled that this has “always been prohibited by Title VII’s plain terms – and that ‘should be the end of the analysis.’”

Justice Gorsuch went on, however, to discuss three of the Court’s leading sex discrimination precedents for additional support of Title VII’s plain meaning, particularly related to its but-for causation, its focus on the individual, and the role legislative intent plays. In Phillips v. Martin Marietta, Corp.,<sup>2</sup> the employer violated Title VII by refusing to hire women with young children. The employer argued that it had not engaged in discrimination “because of” sex because it favored women employees over men generally, and the employment action depended in part on other factors. The Court ruled, however, that neither of these other factors was a defense to Title VII prohibitions because sex discrimination need only constitute a factor for the adverse employment decision.

Next, the Court looked at its decision in Los Angeles Department of Water and Power v. Manhart,<sup>3</sup> where the employer required its female employees to make larger contributions to their pensions than its male employees on the basis that women tended to live longer and would need more pension funds. Here, the Court recognized that an employer’s rule facially appearing to be

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evenhanded in how it treated a group of employees was also discriminatory on an individual level. While the employer's pension policy was purportedly based on statistical evidence of the life expectancy of women as a whole, Title VII's clear focus is on the individual. As a result, the employer violated Title VII because its policy treated individual female employees differently than it did individual male ones.

Last, in deciding Oncale v. Sundowner Offshore Services, Inc.,<sup>4</sup> the Court noted that the case did not involve "the principal evil Congress was concerned with when it enacted Title VII." This case involved alleged discrimination by members of the same sex. In that case, the Court unanimously held that concerns of the legislators were not the primary focus. Instead, provisions of the relevant law governed the Court's analysis of whether the plaintiff had alleged a viable claim under Title VII. Because the plaintiff alleged that the discrimination would not have occurred had he been a female, the Court found that a triable Title VII claim existed.

Justice Gorsuch concluded that these cases provided several lessons that are instructive for the Court's decision in Bostock. "First, it's irrelevant what an employer might call its discriminatory practice, how others label it, or what else might motivate it . . . . When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex . . . . Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action . . . . Finally, an employer cannot escape liability by demonstrating that

it treats males and females comparably as groups."<sup>5</sup>

Justice Gorsuch declined to address how the Court's ruling would affect challenges based on religious freedom under the First Amendment because that specific issue was not before the Court<sup>6</sup> at this time. He noted that these are questions for future cases but also mentioned that the employer in the Harris Funeral Home case was unsuccessful at the circuit court level in raising a defense under the Religious Freedom Restoration Act (RFRA).<sup>7</sup> Certainly, there will be much litigation arising from the interplay between the Court's ruling in Bostock and employers who claim that adverse employment decisions involving LGBTQ employees are defensible due to their religious beliefs.

Justice Alito wrote a dissenting opinion (with Justice Thomas joining) where he accused the majority of legislating from the bench. He instructed that the plain language of Title VII expressly prohibits discrimination based on sex, and it does not mention sexual orientation or gender identity. Moreover, he noted that for years, there have been many attempts to amend Title VII to include these two additional protected classes, but all have failed. Justice Alito took issue with Justice Gorsuch's interpretation of "sex" to include these categories and stated that the ordinary public meaning of "sex" at the time of Title VII's passage included only biological males and females. According to Justice Alito, "Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, 'sex.'"

Justice Kavanaugh wrote a separate dissent, in which he also discussed failed legislative

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attempts to amend Title VII to include sexual orientation and gender identity. He too noted his belief that the majority overstepped its constitutional authority by expanding the scope of Title VII to include these two now-protected classes. Justice Kavanaugh instructed that the Court failed to follow the ordinary meaning of “sex” in Title VII at the time of its enactment. He admonished that “[b]oth the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.”

While it is now settled law that employers can no longer discriminate against workers

based on sexual orientation or gender identity, it remains to be seen how the expansion of Title VII protections plays out in the context of the exercise of religious freedom.

If you are an employer covered under Title VII (generally, employers with 15 or more employees), and protections for sexual orientation and gender identity are not already part of your equal employment opportunity and anti-harassment policies, incorporate them now. Equally important, be sure to train managers and employees on those policies.

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<sup>1</sup> This ruling decides three cases before the Court arising from three Circuit Courts of Appeal: Bostock v. Clayton County, Georgia (No. 17-1618) (from the Eleventh Circuit), Altitude Express, Inc., et al. v. Zarda et al., as Co-Independent Executors of the Estate of Zarda (No. 17-1623) (from the Second Circuit), and R.G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al. (from the Sixth Circuit). In Bostock, the Eleventh Circuit held that Title VII did not protect Mr. Bostock from his employer firing him for being gay. In the Altitude Express and Harris Funeral Home cases the Second and Sixth Circuits, respectively, ruled that Title VII bars an employer from firing an employee on the basis of his or her sexual orientation or transgender status. The plaintiffs in the latter two cases have since passed away.

<sup>2</sup> 400 U.S. 542 (1971).

<sup>3</sup> 435 U.S. 702 (1978).

<sup>4</sup> 523 U.S. 75 (1998).

<sup>5</sup> The Court went on to address the numerous arguments raised by the employers in the cases before it. This discussion can be found on pages 15-33 of the Court’s opinion located [here](#).

<sup>6</sup> Employers in the instant three cases before the Court raised concerns about the effect that the Court’s ruling would have on other federal and state laws prohibiting sex discrimination and on sex-segregated bathrooms, locker rooms, and dress codes. Again, the Court declined to address these issues because they were not relevant to the cases at hand.

<sup>7</sup> The Sixth Circuit ruled that the RFRA did not protect the funeral home employer because continuing to employ the transitioning employee would not, as a matter of law, substantially burden the funeral home owner’s exercise of his religion. Even if it did, the court ruled that the EEOC showed that enforcement of Title VII under the circumstances was the least restrictive means of furthering the government’s interest in preventing discrimination of transgender employees. See our [Client Alert](#) discussing the Sixth Circuit’s opinion in the Harris Funeral Home case for additional details.

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