

Defining Sex – The U.S. Supreme Court Finds That Sexual Orientation and Transgender Status Are Protected Under Title VII

In a much-anticipated decision, earlier this month, in *Bostock v. Clayton County, Georgia*, the U.S. Supreme Court (“Court”) held that an employer who fires an individual merely for being gay or transgender violates Title VII of the 1964 Civil Rights Act (“Title VII”). While *Bostock* will not have as much of an impact in states that already have state employment laws barring employment discrimination on the basis of sexual orientation and gender identity or expression, such as Rhode Island or Massachusetts, the ramifications of *Bostock* will certainly be felt in about twenty-seven (27) other states without such prohibitions.

Title VII prohibits employers from intentionally discriminating against any employee in whole or in part because of the employee’s race, color, religion, sex, or national origin. Title VII’s reach extends to employers with at least fifteen (15) employees. *Bostock* groundbreakingly clarifies that Title VII’s use of the term “sex” includes sexual orientation and transgender status.

The framework for *Bostock* was rather unique because it consisted of three cases. In each case, employees alleged violations of Title VII. The first case was brought by a gay employee who was fired by a county government; the second case was brought by a gay skydiving instructor who was fired just days after he mentioned to his employer that he was gay; and the third case was brought by the Equal Employment Opportunity Commission on behalf of a transitioning, transgender employee who was fired by a funeral home allegedly because of gender stereotypes. These cases made their way through the Eleventh, Second, and Sixth Circuit Courts of Appeals, respectively, and were argued before the Court in October 2019.

In the 60-plus page decision penned by Justice Gorsuch, the Court focused on what it called the “necessary” and “undisguisable” role that sex plays when employers make decisions on the basis of an employee’s homosexuality or transgender status. The Court explained that “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.” The Court further wrote that “homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” Accordingly, *Bostock* makes clear that an employment decision made on the basis of an employee’s homosexuality or transgender status is an employment decision made on the basis of an employee’s sex and is thereby prohibited by Title VII.

With this clarification as to sex, it is also important for employers to remember that Title VII violations could result in serious financial consequences, including a court awarding front-pay, back-pay, reinstatement, compensatory damages, punitive damages, attorneys’ fees, expert witness fees, and/or court costs.

The [Employment & Labor Practice Group](#) at [Partridge Snow & Hahn](#) is fully updated on this and other related issues and are available to answer to your questions.

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