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Supreme Court Extends Title VII Protections to Gay and Transgender Employees in Bostock v. Clayton County

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In a landmark ruling that is both one of the most important employment-discrimination cases in years and a watershed victory for LGBTQ rights, on June 15, 2020 the United States Supreme Court held by a 6-3 vote that "an employer who fires an individual for being homosexual or transgender" violates Title VII of the Civil Rights Act of 1964. Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." In writing for the Court, Justice Gorsuch held: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in a member of a different sex." Thus, "sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

Before the Court were three cases from three different federal circuit courts of appeals, consolidated under the heading Bostock v. Clayton County. In two of the cases, the plaintiffs -- Gerald Bostock and Donald Zarda -- had been discharged due to their sexual orientation, and in the third, the plaintiff Aimee Stephens, born biologically male, was terminated after announcing that she intended to live and work as a female. In Mr. Bostock's case, the United States Court of Appeals for the Eleventh Circuit held that Title VII did not prohibit employers from terminating employees due to their sexual orientation, whereas in Mr. Zarda's case, the Second Circuit held that it did. Similarly, in Ms. Stephens' case the Sixth Circuit held that Title VII proscribed the discharge of employees for being transgender.

Despite the extraordinary import of Bostock – a decision that will undoubtedly trigger significant reverberations and spark much controversy -- Justice Gorsuch's opinion is not particularly complex. Similarly, his prose is not especially spellbinding or majestic – no Cicero he. Even a couple of the analogies he employs are, as Justice Alito notes in his scathing dissent, clunkers. Nonetheless, to paraphrase architect Mies van der Rohe's well-known maxim, less can be more, and there is something in the simplicity of the majority's

formulation that makes it difficult to refute.

The Court begins by considering what the term "sex" would have meant in 1964, accepting the employers' argument that it referred "only to biological distinctions between male and female." This is an issue on which Justice Alito focuses a significant part of his dissent, contending that it is inconceivable that in 1964 "sex" would have meant anything more than this biological distinction, and that it certainly would never have been considered applicable to sexual orientation or gender identity. Therefore, Title VII's proscriptions also could not be said to be applicable. Justice Gorsuch, however, moves rather swiftly to consider what is perhaps more important than what "sex" meant, which is "what Title VII says about it."

Specifically, "the statute prohibits employers from taking certain actions 'because of' sex." As such, it created what is known as "but-for causation," which means that a "particular outcome would not have happened 'but for' the purported cause." That is not to say that sex must be the only cause of the adverse employment action, or even the primary one. In the wake of the Civil Rights Act of 1991, it is sufficient for it to be *one* motivating cause of that action. Nonetheless, writes Justice Gorsuch, even when applying a heightened, but-for standard, firing an employee due to his or her sexual orientation or gender identity implicates Title VII's prohibition against sex discrimination.

Having iterated the foundational elements of gender-based discrimination under Title VII, Justice Gorsuch methodically builds the substance of the majority's opinion. He does so by inextricably linking the employee's sex with sexual orientation or gender identity, rejecting the employers' – and dissents' -- attempts to sever these factors into two, distinguishable elements. Essentially, the employers argued that so long as employees of one gender were not treated differently than employees of the other, there was no violation of Title VII. In other words, if an employer chose to discharge all gay or transgender employees, regardless of their sex, they engaged in equal-opportunity intolerance and thus were not discriminating on the basis of sex.

Justice Gorsuch, however, flatly rejects that contention, writing that "homosexuality and transgender status are inextricably bound up with sex," and thus, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." He reasons that "if changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred." To elucidate this point, the Court uses a practical example: If the employer does not discharge a female employee for being married to, or dating, or attracted to a male, but discharges a male employee for being married to, or dating, or attracted to a male, then an employer "necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability." Furthermore, the fact that the employer might apply the same paradigm to the discharge of a female employee – again referencing the employers' peculiar equal-opportunity-offender argument -- "doubles rather than eliminates Title VII liability."

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The Court applies similar reasoning to transgender employees, noting that if an employer subjects an employee to an adverse employment action simply because the gender with which the employee identifies does not correspond to that individual's birth gender, then that negative treatment is part and parcel of the employee's sex. Specifically, when, , say, a transgender female employee is discharged for having the same "traits or actions" as a cisgender female employee of equivalent experience and performance who is retained, "the employer intentionally penalizes a person identified as male at birth."

Although Justice Alito's lengthy, occasionally witty, dissent is impressively detailed in its analysis, his repeated references to the late Justice Scalia's textualism seem at times to be more a jab at Justice Gorsuch, who, of course, replaced Justice Scalia on the Court; a kind of reprise of the famous Lloyd Bentsen "you are no Jack Kennedy" riposte to Dan Quayle. Justice Alito's characterizations of what he considers the calamitous consequences of the Court's decision are also weakened by the immediate citation to shared bathrooms and locker rooms, the anti-transgender trope that is apparently intended to signal the end-times.

The Court majority acknowledges that its decision in Bostock may stoke fears that employers will be required to violate their religious convictions. It goes on to note, however, that Title VII contains an exception for religious organizations, that under the Court's precedent "the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers,'" and that the Religious Freedom Restoration Act of 1993 "might supersede Title VII's commands in appropriate cases."

Regardless of how claims arising within the context of religious organizations are adjudicated, in Bostock the Supreme Court has extended to gay and transgender employees of secular employers the protections of one of the most important civil rights enactments ever passed by Congress. Perhaps most noteworthy is that the Court arrived at this remarkable moment with two Justices – Justice Gorsuch and Chief Justice Roberts – who are generally viewed as part of the Court's "conservative block" voting with the majority, and, even more unexpectedly, with one of Justice Scalia's jurisprudential "heirs" actually delivering the Court's opinion.

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