

Labor and Employment Alert
June 18, 2020

Expansion of Federal Protections for LGBT Workers

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On June 15, 2020, the Supreme Court of the United States handed down a historic 6-3 decision authored by Justice Neil Gorsuch, in which the Court held that employers cannot discriminate against an individual on the basis of the individual's sexual orientation or gender identity. This case, Bostock v. Clayton County, was a consolidation of three cases, involving two gay men, who were terminated based on their sexual orientation, and one transgender woman, who was terminated based on her gender identity.

Although many states—including Massachusetts—had previously prohibited employers from discriminating against individuals for their sexual orientation or gender identity, more than half of the states in the United States had not enacted statutory protections against these forms of discrimination. Further, several lower courts had held that such discrimination was beyond the purview of federal statutory protections. As a result, yesterday's decision by the Court is momentous because it created a *national* decree barring an employer from failing to hire, refusing to hire, or discharging an individual based on an individual's sexual orientation or gender identity.

The Court's decision is rooted in how it interpreted Title VII of the Civil Rights Act—a landmark piece of federal legislation that largely derived from the efforts of leaders from the Civil Rights Movement and advocates from the Women's Rights Movement. In part, the Civil Rights Act of 1964 became law due to a surge of legislative support after the assassination of President John F. Kennedy, who had introduced the bill to Congress in 1963.

Title VII prohibits covered employers from engaging in discriminatory employment decisions on the basis of race, color, religion, sex, and national origin. Legal advocates within the LGBTQ community and the Equal Employment Opportunity Commission (EEOC), the federal agency tasked with investigating Title VII employment discrimination claims, sought to include sexual orientation and gender identity within the definition of the protected classification of "sex."

The theory for this inclusion is that it is "impossible" to untangle someone's sexual orientation or gender identity from that person's sex. In its opinion, the Court agreed with this logic. Writing for the majority, Justice Gorsuch wrote that the plain statutory text of Title VII was sufficient to find that sexual orientation and gender identity fell within the purview of "sex." Because of the broad usage of the word "sex," Justice Gorsuch wrote that it is "a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

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Though this decision addresses only employment discrimination, it raises questions regarding the legitimacy of exclusions based on gender identity and sexual orientation in a number of areas of the law. For example, the Court's decision calls into question the narrowness of the Department of Education's reading of Title IX to exclude transgender and gender non-conforming students from protections against sex-based discrimination by educational entities. Other areas, like healthcare protections, may also be subject to legal challenge. For example, the Court's decision calls into question the Final Rule issued on June 12, 2020 by the Office for Civil Rights of the United States Department of Health and Human Services under Section 1557 of the Patient Protection and Affordable Care Act that rescinds certain protections afforded to LGBTQ individuals.

Employers should take this case as an opportunity to review their policies and practices to ensure that sexual orientation and gender identity are included in their anti-discrimination employment policies and that their anti-harassment training is updated, as necessary.

This Client Alert was prepared by Brendan Collins and reviewed with Katherine Hesse, Regina Williams Tate, and Rachel Mills. If you have any questions about this issue, please contact Kathy Murphy, Mike Maccaro, Sarah Spatafore, or the attorney responsible for your account, or call (617) 479-5000.

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