FOULSTON
ATTORNEYS AT LAW

ISSUE ALERTS

SUPREME COURT RULES TITLE VII PROHIBITS LGBTQ DISCRIMINATION

June 15, 2020

By: Teresa L. Shulda

The Civil Rights Act of 1964, which includes Title VII, prohibits employment discrimination against employees because of race, color, national origin, religion, and sex. Today, the Supreme Court issued its long-awaited decision in a trio of cases that tested the question of whether Title VII's existing ban on discrimination "because of… sex" includes discrimination because an employee is gay or transgender. A six-justice majority of the Court ruled that an employer indeed violates the law when it impermissibly considers an employee's LGBTQ status in making employment decisions.

In the cases at issue, the Court heard three similar fact patterns, representing a split among the federal appellate courts. In the title case, *Bostock v. Clayton County, Georgia*, a long-time gay male county employee alleged that he was terminated for conduct "unbecoming" of a county employee shortly after he joined a gay recreational softball league. In that case, the Eleventh Circuit Court of Appeals, covering Georgia, Florida, and Alabama, ruled that Title VII's prohibition against discrimination based on sex did not include sexual orientation discrimination.

The Second Circuit Court of Appeals, covering Connecticut, New York, and Vermont, gave an opposite ruling in *Altitude Express, Inc. v. Zarda*. In that case, Zarda, a gay male skydive instructor, alleged that he was terminated because he was openly gay and referenced his sexual orientation to clients and coworkers. The Second Circuit concluded that an employer cannot consider or define a person's sexual orientation without considering the person's sex. Thus, sexual orientation discrimination is discrimination because of sex, and violates Title VII.

Finally, the Sixth Circuit Court of Appeals, which covers Kentucky, Michigan, Ohio, and Tennessee, considered whether discrimination based on an employee's transgender status was discrimination because of sex. In *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, the employee was hired by the employer when the employee presented as a male, her biological gender. However, years later, the employee informed her employer that she was transgender and intended to transition and present as a woman while at work. There was no dispute that the employer fired the employee specifically because she was transgender. However, the employer put forth two defenses: 1) that Title VII did not cover discrimination based on an employee's transgender status; and 2) the funeral home owner's religious objections to employing a transgender employee was supported by and permissible

under the Religious Freedom Restoration Act ("RFRA"). The Sixth Circuit held that Title VII's ban on sex discrimination included discrimination based on an employee's transgender status. And, the Court held that the RFRA defense was inapplicable because the employer need not facilitate an employee's transition nor endorse the employee's transgender status. Rather, compliance with Title VII's antidiscrimination mandate was not a substantial burden on the employer's exercise of religion.

The Supreme Court heard all three cases together and issued its ruling today, focusing on the plain language of Title VII. Justice Neil Gorsuch wrote the opinion for the majority, which included Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan. In the opinion, the Court conceded that the Congress and Senate that passed Title VII in 1964 likely did not have LGBTQ employees in mind when they drafted the law. But the Court noted that the drafters of the law also likely did not imagine that Title VII would prohibit discrimination on the basis of motherhood, sex-based stereotypes, and sexual harassment of male employees – all conduct courts have long recognized as violative of Title VII. The Court held that by focusing on the express terms of the statute, which prohibits discrimination "because of… sex," there is "one answer" – LGBTQ discrimination is sex discrimination because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The Court gave the example of a male employee who is attracted to men, and a female employee who is likewise attracted to men. If the male employee is fired because of his attraction to men while the female employee is retained, the employer has made the termination decision because of sex. Likewise, an employer who terminates a female employee who identified as male at birth but who now identifies as female, but does not penalize a female employee who identified as female at birth, again takes sex into consideration. "The individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Notably, the Court did not consider the RFRA defense in the funeral-home case, nor did it consider whether its holding might run contrary to First Amendment religious freedoms. The funeral home had abandoned its RFRA defense by the time the case reached the Supreme Court, and only presented the question of whether the employee's transgender status was protected under Title VII. But, the Court left the door wide open for future disputes on this issue, noting "while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."

For employers, today's decision should trigger handbook and anti-discrimination and harassment policy reviews to ensure that sexual orientation and transgender status are included among the protected categories. Employers should likewise update EEO training materials to include these categories, and to educate employees that Title VII's prohibitions include discrimination against LGBTQ employees.

FOR MORE INFORMATION

If you have questions or want more information regarding the Supreme Court ruling on Title VII prohibiting LGBTQ discrimination, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Teresa Shulda** at 316.291.9791 or tshulda@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston provides a full range of legal services to clients in the areas of administrative & regulatory; antitrust & trade regulation; appellate law; banking & financial services; business & corporate; construction; creditors' rights & bankruptcy; e-commerce; education & public entity; elder law; emerging small business; employee benefits & ERISA; employment & labor; energy; environmental; ERISA litigation; estate

planning & probate; family business enterprise; franchise & distribution; government investigations & white collar defense; governmental liability; government relations & public policy; healthcare; immigration; insurance regulatory; intellectual property; litigation & disputes; long-term care; mediation/dispute resolution; mergers & acquisitions; Native American law; oil, gas & minerals; OSHA; privacy & data security; private equity & venture capital; product liability; professional malpractice; real estate; securities & corporate finance; supply chain management; tax exempt organizations; taxation; trade secret & noncompete litigation; water rights; and wind & solar energy.

RESOURCES

Sign up to receive these issue alerts straight to your inbox **here**.

PRACTICE AREAS

- Employment & Labor