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U.S. Supreme Court Rules that Title VII Applies to Sexual Orientation and Gender Identity

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Yesterday, the U.S. Supreme Court (the "Court"), in a landmark 6-3 decision, held that Title VII of the Civil Rights Act of 1964 ("Title VII") protects employees from discrimination based on sexual orientation and gender identity. The Supreme Court ruling came on three cases—two addressing sexual orientation and one addressing gender identity: *Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp't Opportunity Comm'n*. Justice Gorsuch, relying on legal precedent and statutory text, delivered the majority opinion, joined by Justices Ginsburg, Kagan, Sotomayor, Breyer, and Chief Justice Roberts. Justices Alito, with Justice Thomas joining, and Kavanaugh each wrote dissenting opinions.

The relevant facts in each of the three cases are as follows: "[a]n employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender–and allegedly for no reason other than the employee's homosexuality or transgender status." Gerald Bostock was fired from a county job in Georgia after he joined a gay softball team. Donald Zarda, a sky-diving instructor, was terminated after he told a female client not to worry about being tightly strapped to him during a jump, because he was "100 percent gay." Aimee Stephens was terminated after she informed the Funeral Home's owner and operator that she intended to transition from male to female. All three claimed protection under Title VII, which prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin.

The issue before the Court was whether "on the basis of sex" applies solely to biological sex or extends to sexual orientation and gender identity. "Today," wrote Gorsuch for the majority, "we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fired 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

The Court premised its decision on two rules: first, that an "employer violates Title VII when it intentionally fires an individual employee based in part on sex;" and, second, that it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." "There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking." Therefore, if the employer would not have fired the employee but for the employee's sex, the statute's "causation standard is met."

Justice Gorsuch noted that the “message” of Title VII is “simple but momentous” and a logical reading of the text includes protection against discrimination based on sexual orientation and gender identity. "Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees," wrote Gorsuch in his 43-page opinion, adding, "But the limits of the drafters' imagination supply no reason to ignore the law's demands. When 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."

The Court’s majority opinion also made clear that the fact that an employer generally treats both men and women the same is not a defense, as the statute protects *individuals* as opposed to groups. Further, that the employer had other motivating factors for firing a given employee also does not provide a defense to an employer. An employee’s gender identity or sexual orientation “need not be the sole or primary cause of the employer’s adverse action” and an employer “cannot avoid liability just by citing some other factor that contributed to its challenged employment decision.” Additionally, the Court rejected the employers’ argument that “discrimination on the basis of homosexuality and transgender status aren’t referred to as sex discrimination in ordinary conversation” because “these conversational conventions do not control Title VII’s legal analysis, which asks simply whether sex was a but-for cause.”

In Justice Alito’s view, the majority was simply legislating from the bench, as opposed to interpreting the law, and Congress, not the judiciary, is the appropriate branch to enact this kind of sweeping change to the law. In his 54-page dissent, Justice Alito argued that the statute does not contain the phrases “sexual orientation” or “gender identity” and, therefore, does not prohibit discrimination on those bases. He also noted the potential “far-reaching” consequences on colleges and universities. As an example, Justice Alito referred to protections under Title IX and the impact of this decision on athletics and dorm assignments and/or bathroom use designations based on biological sex. Applying the same Title VII definition of “sex” to Title IX could “undermine one of that law’s major achievements, giving young women an equal opportunity to participate in sports.” Justice Alito also disagreed with the majority’s premise that it is impossible to discriminate on the basis of sexual orientation or gender identity without discriminating on the basis of sex. "Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute's terms were understood to mean at that time" wrote Justice Alito.

Justice Kavanaugh, in his dissent, endorsed this view that the issue should have been settled by Congress, not the Supreme Court, and emphasized that the Court should have focused on the ordinary meaning of “discrimination because of sex” as opposed to the literal meaning.

While some states have enacted laws prohibiting LGBTQ employment discrimination, nearly half of U.S. states do not afford gay, lesbian, and transgender employees legal protections in the workplace, and, prior to yesterday’s ruling, there was no protection at the federal level prohibiting an employer from terminating or otherwise taking adverse employment action against employees based on their sexual orientation or gender identity. This issue became particularly apparent in 2015, when the U.S. Supreme Court held in *Obergefell v. Hodges*, 576 U.S. 644

(2015), that no state could deny same-sex couples the right to marry or fail to recognize same-sex marriages granted in other states. Specifically, the U.S. Supreme Court ruled in that case that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. As many rejoiced in front of the Court and the White House after the decision was rendered, many also noted that regardless of the victory for same-sex couples at the Supreme Court regarding the right to marry, many federal employment anti-discrimination statutes, at that time, did not adequately protect employees that are married to someone of the same sex. In other words, an employee could legally marry a same-sex partner but could also be terminated, in some states, for being gay.

The Court's decision yesterday extends federal workplace protections to gay, lesbian, and transgender employees across the country. Particularly in states that do not afford gay, lesbian, and transgender employees legal protections, federal law now prohibits termination and other adverse employment decisions based on sexual orientation or gender identity.

In the aftermath of this landmark ruling, employers should review and revise their policies, handbooks, and training materials, if necessary, to prohibit discrimination on the basis of sexual orientation and gender identity. The Court's ruling may also have wide-ranging impacts on the interpretation of other federal laws with respect to LGBTQ individuals and employers should keep themselves apprised of any changes in this regard. Employers should also provide regular training on how to properly recognize, prevent, and respond to claims of discrimination, harassment, and retaliation. As of yesterday, employees are now able to bring claims against employers based on gender identity and sexual orientation under federal law and as such, all employers should expect an increase in potential liability.

For more information on this decision and how it affects your business, or any other employment related issue, please contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

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