LEGAL UPDATES

PUBLISHED: JUNE 16, 2020

Supreme Court Declares Sexual Orientation and Gender Identity Are Protected By Title VII

Services

Higher Education

Labor & Employment

Industry

Education

Professional

BRIAN J. ZICKEFOOSE
KANSAS CITY:
816.983.8125
BRIAN.ZICKEFOOSE@
HUSCHBLACKWELL.COM

Key Points:

Title VII of the Civil Rights Act of 1964 expressly prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." Neither "sexual orientation" nor "gender identity" appears on that list.

An employer violates Title VII when it adversely affects the employment of an individual employee based in whole or part on sex.

According to the Supreme Court, although sexual orientation and gender identity are distinct concepts from sex, discrimination based on sexual orientation or gender identity status necessarily entails discrimination based on sex; the first cannot happen without the second.

According to the Supreme Court, because discrimination on the basis of sexual orientation or gender identity requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee because of sexual orientation or gender identity also violates Title VII.

Because religious infringement was not at issue, religious freedom arguments were not considered by the court. But the court noted that "other employers in other cases may raise free exercise arguments that merit careful consideration ."

On June 15, 2020, the Supreme Court of the United States issued a landmark decision affecting the rights of LGBTQ individuals in the workplace. In *Bostock v. Clayton County*, the question before the Supreme Court was whether Title VII of the Civil Rights Act of 1964 prohibits employers from taking adverse employment action against employees because of their sexual orientation or gender identity. In a 6-3 decision, the Supreme Court held that because discrimination on the basis of sexual orientation or gender identity requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee because of sexual orientation or gender identity also violates Title VII. Therefore, employers are prohibited from adversely affecting the employment of their employees because of their sexual orientation or gender identity, as they necessarily entail discrimination based on sex.

Express terms of Title VII protect against discrimination because of an individual's sex

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." According to the Supreme Court, it "normally interprets a statute in accord with the 'ordinary public meaning' of its terms at the time of its enactment." In this case, the court was tasked with determining the ordinary public meaning of Title VII's prohibition against employment discrimination based on sex. In particular, because neither "sexual orientation" nor "gender identity" appears on that list, are they protected categories afforded protection under Title VII?

The court noted that sexual orientation and gender identity are distinct concepts from sex.The court ruled, however, that discrimination based on sexual orientation or gender identity necessarily entails discrimination based on sex; the first cannot happen without the second. Because discrimination on the basis of sexual orientation or gender identity requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee because of sexual orientation or gender identity violates Title VII. The court further found that sexual orientation or gender identity does not have to be the only factor the employer relied upon in making the decision. If the action was taken because of sexual orientation or gender identity, even if other factors played a part in the decision, the employer will have violated Title VII.

What this means for you

The *Bostock* decision means that employers must not discriminate against an employee because of that employee's sexual orientation and/or gender identity when making employment decisions, just as they must not discriminate because of any of the categories explicitly enumerated in Title VII. Further, although *Bostock* was decided in the context of discrimination, where an adverse employment action is required, this ruling undoubtedly applies to a hostile work environment, where an adverse employment action may not have occurred, but an employee suffers harassment because of the employee's sexual orientation or gender identity.

As of the date of this decision, many states have some form of LGBTQ-related protection against discrimination, often in the context of sexual orientation. *Bostock* adds a federal remedy to these state-based protections and prohibits discrimination because of sexual orientation and transgender status in all 50 states, via Title VII, regardless of or in addition to these state-based protections. Further, this case extends to discrimination on the basis of gender identity, which is protected in fewer states and localities than sexual orientation.

Religious institutions

In its opinion, the court acknowledged the increased complexity of squaring its ruling with the promise of free exercise of religion. The court noted several statutory examples that may merit consideration: (a) Congress included an express statutory exception for religious organizations in Title VII in the context of religious discrimination; (b) 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 (c) the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. The court stated that because the "RFRA operates as a kind of "super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." Because religious infringement was not at issue, however, religious freedom arguments were not considered by the court. But the court noted that "other employers in other cases may raise free exercise arguments that merit careful consideration." Given the Supreme Court's acknowledgement of the open issue, we expect that the question of how *Bostock* applies to religious institutions will be the subject of future litigation.

Contact us

If you have any questions regarding this landmark decision, please contact Brian Zickefoose, Kate Leveque or your Husch Blackwell attorney.