June 16, 2020

Title VII of the Civil Rights Act of 1964

U.S. Supreme Court Holds That Title VII's Prohibition of Discrimination "Because of . . . Sex" Outlaws Discrimination Based on Sexual Orientation and Gender Identity

SUMMARY

On June 15, 2020, the Supreme Court held that Title VII's prohibition on employment discrimination "because of . . . sex" forbids employers from firing employees "simply for being homosexual or transgender."[1] In the Court's opinion, written by Justice Gorsuch for a 6-3 majority, the Court explained that "[an] employer who fires 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 decision resolved a conflict in the courts of appeals, which had split over the question of whether Title VII's prohibition on discrimination "because of . . . sex" encompassed discrimination on the basis of sexual orientation or gender identity. The Court acknowledged that, when Congress enacted Title VII, Congress likely did not contemplate that the provision would apply beyond differential treatment between men and women. But the Court reasoned that the text of Title VII can be read to apply beyond that context, and it is the text of the statute that governs. As a result of the decision, employers subject to Title VII's anti-discrimination provisions will be subject to liability if they make employment decisions "because of" an employee's sexual orientation or gender identity.

BACKGROUND

Title VII of the Civil Rights Act of 1964 provides, "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[2]

Until 2017, every federal court of appeals to consider whether Title VII's prohibition on discrimination in employment "because of . . . sex" also reached discrimination because of sexual orientation or gender identity concluded that it did not. In 2017, the U.S. Court of Appeals for the Seventh Circuit held that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."[3] The next year, the Second Circuit agreed with the Seventh Circuit, concluding that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'"[4] Also in 2018, the Sixth Circuit held that "discrimination on the basis of transgender and transitioning status violates Title VII."[5]

PROCEEDINGS BELOW

The Supreme Court's decision resolved three consolidated cases: *Bostock* v. *Clayton County, Georgia*, *Altitude Express, Inc.* v. *Zarda*, and *R.G. & G.R. Harris Funeral Homes, Inc.* v. *EEOC*.

Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate. After working for the County for ten years, Mr. Bostock joined a gay recreational softball league. Shortly thereafter, Mr. Bostock's employment was terminated for "conduct 'unbecoming' a county employee." Mr. Bostock brought a Title VII claim against the county. The Eleventh Circuit held that Mr. Bostock failed to state a claim because Title VII did not prohibit employers from terminating employees for being gay.[6]

Donald Zarda was employed by Altitude Express for several seasons as a skydiving instructor. A few days after he mentioned that he was gay, he too was fired.[7] He also brought suit under Title VII. The Second Circuit permitted Mr. Zarda's case to proceed, holding that discrimination on the basis of sexual orientation violates Title VII.[8]

Aimee Stephens worked for R.G. & G.R. Harrison Funeral Homes. Ms. Stephens presented as a male when she was hired, and two years into her employment received treatment for "despair and loneliness." She was diagnosed with gender dysphoria and received a recommendation to begin living as a woman. She wrote a letter to her employer in her sixth year of employment, stating that she planned to "live and work full-time as a woman" after returning from an upcoming vacation. Before she left for vacation, her employment was terminated and she too brought suit under Title VII.[9] The Sixth Circuit concluded that Title VII prohibits employers from terminating employees because of their transgender status, and permitted Ms. Stephens' case to proceed.[10]

THE SUPREME COURT'S DECISION

In a 6-3 opinion authored by Justice Gorsuch, the Supreme Court held that because "[a]n employer who fires 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," such actions discriminate "because of . . . sex." Accordingly, an employer may not "fire someone simply for being homosexual or transgender" under Title VII.[11]

The Court began by considering the "ordinary public meaning" of Title VII's prohibition on discrimination "because of . . . sex" when the statute was enacted in 1964. The Court explained that Congress's use of the phrase "because of" meant that "[s]o long as the plaintiff's sex was one but-for cause of [the challenged employment] decision, that is enough to trigger" Title VII liability, even if a defendant also points to "some other factor that contributed to its challenged employment decision." In other words, an employer who takes adverse action against an employee in part "because of . . . sex" "cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[12]

The Court concluded that "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 following example to illustrate: "Consider . . . an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge."[13]

The Court emphasized that it is irrelevant whether "other factors may contribute" to an employment decision, so long as an employer treats one employee worse than another because of the individual's sex. For example, the Court hypothesized that an employer that maintained "a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing 'because of sex' if the employer would have tolerated the same allegiance in a male employee." Similarly, "[w]hen an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies)." In such a situation, the Court explained, "Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach."[14]

The Court rejected the employers' arguments that employment decisions reached because of homosexuality or transgender status do not constitute discrimination "because of . . . sex."

- *First*, the Court disagreed with the argument that an employer does not discriminate "because of . . . sex" if it is "equally happy to fire male and female employees who are homosexual or transgender." In such a situation, the employer would have committed Title VII violations against *all* of those employees, rather than none of them, because "the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII."
- *Second*, the Court deemed it irrelevant that discrimination based on homosexuality or transgender status is not referred to as "sex discrimination in ordinary conversation," finding that "conversational conventions do not control Title VII's legal analysis."
- *Third*, the Court rejected the argument that an employer discrimination on sexual orientation or transgender grounds "doesn't intentionally discriminate based on sex." The Court explained that "an employer who discriminates against homosexual or transgender employees necessarily and

intentionally applies sex-based rules" because "[a]n employer that announces it will not employ anyone who is homosexual . . . intends to penalize male employees for being attracted to men and female employees for being attracted to women."

- *Finally*, the Court found that Congress's refusal to adopt several proposals to add sexual orientation to the list of protected characteristics was not dispositive, as "[t]here's no authoritative evidence explaining why later Congress adopted other laws referencing sexual orientation but didn't amend this one" and "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt."[15]

The Court also rejected the employers' arguments based on "assumptions and policy":

- *First*, as to the employers' assertion that "few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons," the Court explained that "when the meaning of the statute's terms is plain, our job is at an end," and "no ambiguity exists about how Title VII's terms apply to the facts before us."
- *Second*, responding to the employers' arguments that "complying with Title VII's requirements in cases like [these] may require some employers to violate their religious convictions," the Court noted that several doctrines protect religious liberty interests—including (i) Title VII's exemption of religious organizations, (ii) the First Amendment's prohibition on application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers," and (iii) the Religious Freedom Restoration Act. The Court noted that the ways in which these doctrines interact with Title VII "are questions for future cases."[16]

In conclusion, the Court explained that, "[i]n Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."[17]

Justices Alito and Kavanaugh each wrote opinions dissenting from the Court's decision. In a 107-page dissenting opinion, Justice Alito asserted that the majority's decision amounted to "legislation." He argued that neither sexual orientation nor gender identity explicitly appears on the list of characteristics protected by Title VII, despite numerous bills introduced over the years seeking to amend the statute to protect those characteristics, and that in 1964 when Title VII was enacted, "it would have been hard to find any [single living American] who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time." Justice Alito's dissent included four appendices, including one providing definitions of the word "sex" in various dictionaries and another containing citations to over 100 federal statutes prohibiting discrimination "because of sex" which Justice Alito claims may be impacted by the Court's decision.[18]

Justice Kavanaugh argued that although "[t]he policy arguments for amending Title VII are very weighty," "[a]s written, Title VII does not prohibit employment discrimination because of sexual orientation" and the Court's "role as judges is to interpret and follow the law as written, regardless of whether we like the result." He congratulated LGBT+ groups for their "important victory" and acknowledged that "[m]illions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law." He

further stated: "They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result." Nevertheless, he stated that he believed the question at issue was one for Congress.[19]

Interestingly, both the majority opinion and the dissents agreed that the text of Title VII should determine the issue. The difference between them is that the majority analyzed the text regardless of what may have been intended at the time the statute was enacted while the dissent believed it important to implement the text as intended then.

IMPLICATIONS

Broader Protections Afforded by Title VII. For employers in jurisdictions such as New York State, where state law already prohibited sexual orientation and gender identity discrimination and the Second Circuit Court of Appeals held in 2018 that Title VII prohibits that discrimination, the Supreme Court's decision provides certainty as to the scope of employment actions prohibited by federal law but will not affect the current legal landscape. On the other hand, for employers in the dozens of states where state law does not currently prohibit discrimination based on sexual orientation or gender identity, and the federal courts of appeals had not previously concluded that Title VII prohibits that discrimination, employment decisions may now be challenged on the ground that they impermissibly discriminate against an employee on the basis of sexual orientation or gender identity.

Employer Policies and Procedures. In light of this decision, employers may choose to undertake a review of their employment policies and procedures to confirm that sexual orientation and gender identity discrimination is prohibited and that procedures are in place both to train supervising employees on that policy and to prevent such discrimination from occurring.

Disparate Impact Analyses. Employers frequently conduct disparate impact analyses before making hiring, promotion, termination, and/or compensation decisions to reduce litigation risk based on the decisions' possible impact on employees of protected characteristics. Employers may now wish to include sexual orientation and gender identity as additional protected characteristics in such analyses (when known).

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ENDNOTES

1 *Bostock* v. *Clayton County, Georgia*, 590 U.S. __, No. 17-1618 (June 15, 2020).

2 42 U.S.C. § 2000e-2(a)(1).

3 *Hively* v. *Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc).

4 *Zarda* v. *Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc).

5 *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018).

6 Slip op. at 3.

7 *Id.*

8 *Zarda*, 853 F.3d at 351–52.

9 Slip op. at 3.

10 *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 574–75.

11 Slip op. at 3.

12 *Id.* at 5–6.

13 *Id.* at 9–10.

14 *Id.* at 10–11.

15 *Id.* at 11–23.

16 *Id.* at 23–33.

17 *Id.* at 33.

18 *Id.* at 1–3, 57–107 (Alito, J., dissenting).

19 *Id.* at 2, 27 (Kavanaugh, J., dissenting).

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