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Question of the Day: Sexual Orientation and Transgender Identity Discrimination

Legal Update
06.15.2020

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Question

What is the significance of today's U.S. Supreme Court ruling on sexual orientation and transgender identity discrimination and what steps should employers take in response?

Answer

In a landmark decision, *Bostock v. Clayton County,* the U.S. Supreme Court held today that an employer who fires an individual "merely for being gay or transgender" violates Title VII of the Civil Rights Act of 1964 (Title VII). In an opinion authored by Justice Neil Gorsuch, joined by Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor and Kagan, the Court held that Title VII's prohibition on sex discrimination also precludes discrimination based on homosexuality or transgender status because a decision based on homosexuality or transgender status "requires an employer to intentionally treat individual employees differently because of their sex."

Background

The decision today resolves a long-time split among the U.S. Circuit Courts of Appeal as to whether Title VII affords protection to employees discriminated against due to their sexual orientation or transgender status.

Today's decision actually addresses three separate cases. In each of these cases, a long-time employee alleged that they were fired due to their homosexual or transgender status. In the *Bostock* case, the Plaintiff was fired for conduct "unbecoming" a county employee after joining a gay recreational softball league. In *Altitude Express*, *Inc. v. Zarda*, the plaintiff was fired days after revealing to the employer that he was homosexual. In *R.G. & G.R. Harris Funeral Homes v. EEOC & Stephens*, the employee—who presented as male when hired—was fired after informing her employer that she would be living and working as a woman.

The employers—both public and private—did not dispute that they fired the employees for being homosexual or transgender. Rather, they argued that even intentional discrimination based on these characteristics is not a basis for Title VII liability. The Court rejected that argument, holding that even though Title VII does not use the words "transgender" or "sexual orientation," there is no escaping the conclusion that an employer relies on sex (a protected class) in its decision-making when firing an employee for being transgender or homosexual. In other words, the employer would not have taken the same actions against an employee of the opposite sex. For example, if an employer fires a man because he is attracted to, or in a relationship with, another man, the employer is relying on sex, at least in part, because the employer would not have taken the same action against a woman.

State Law

Minnesota, along with a number of other states, has long recognized sexual orientation as a protected class. The Minnesota Human Rights Act (MHRA) has one of the broadest definitions of sexual orientation of any state statute. Sexual orientation is defined to include "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."

The MHRA thus covers the status of being gay or transgender, in addition to many other aspects of sexual orientation. Depending on the nature and breadth of the protections under applicable state law, the *Bostock* decision may not have a significant impact on the employment practices of employers in such states, assuming those employers are already in compliance with state law.

Next Steps for Employers

This seminal case—which has been widely reported on by national and local news outlets and social media—presents an opportunity for employers to review their personnel policies, EEO policies and other anti-discrimination policies to ensure all protected classes are identified. Leadership and management training and protocols—and respectful workplace, harassment and other EEO training and protocols—should be reviewed and updated as needed to address areas raised by the decision. Human resources and other personnel who are responsible for investigating complaints of discrimination may need additional training or access to additional resources.

Further, employers should take steps to ensure proper pronoun usage for transgender employees in the workplace, along with inclusive restroom, and where applicable, locker and shower access, for all employees. Respectful workplace training in particular can be helpful in educating employees on how to respectfully interact with one another, including transgender employees, and helpful in providing

managers tools for addressing issues as they arise in the workplace.

Takeaway

The *Bostock* decision, and the media attention it has already received and will continue to receive, has once again thrust to the forefront a discussion of discriminatory employment practices and individual rights under federal law. Employers can expect that the discussions and inquiries will surface in the workplace in days and months ahead in a myriad of ways.

How We Can Help

The Employment and Labor team at Fredrikson & Byron regularly advises employers and provides leadership and other employee training on workplace issues, including those raised by the *Bostock* decision, and represents and defends employers in agency and litigation matters under Title VII and other federal and state human rights laws.