THE SUPREME COURT'S LANDMARK DECISION IN BOSTOCK AND ITS IMPACT ON EMPLOYERS

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In June 2020, the U.S. Supreme Court issued a landmark decision interpreting federal workplace anti-discrimination laws concerning LGBTQ rights. In a 6-3 decision, the Supreme Court concluded that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of their sexual orientation and gender identity. In doing so, the Supreme Court resolved a Circuit court split and confirmed that Title VII's prohibition of discrimination based on "sex" is properly interpreted to include sexual orientation and gender identity.

The question was presented to the Court in three separate cases which were then decided in one consolidated opinion. Donald Zarda (a skydiving instructor) and Gerald Bostock (a child welfare services coordinator) both claimed they were fired because they were gay. The Equal Employment Opportunity Commission filed the third suit alleging that Aimee Stephens (a funeral director) was fired because she was transgender and notified her employer she would begin living as a woman. Two of the three plaintiffs behind this landmark decision did not live to see the Court's iconic decision. For purposes of this discussion, the trio of cases will be referred to as "Bostock".

The Landscape Pre-Bostock

Title VII is the preeminent federal civil rights legislation protecting employees or prospective employees from workplace discrimination. Title VII prohibits discrimination based on "color, national origin, race, religion and sex." Before Bostock, federal Circuit courts were split in the interpretation of "sex" and specifically whether "sex" included sexual orientation and gender identity. In Zarda, the Second Circuit concluded that Title VII's prohibition against discrimination based on sex prohibited discrimination based on sexual orientation. In the underlying Bostock case, the Eleventh Circuit concluded that Title VII's prohibition of discrimination based on sex did not prohibit discrimination based on sexual orientation.

Before Bostock, several states and localities already had antidiscrimination laws prohibiting discrimination based on sexual orientation and gender identity. Many of these state and local statutes also provide broader protection than their federal counterpart. For example, Title VII is only applicable to employers with more than 15 employees. Several state and local antidiscrimination statutes cover employers with fewer employees. To invoke Title VII, an individual must exhaust administrative remedies within 300 days of the alleged violation of Title VII. Several state and local antidiscrimination laws have longer statutes of limitations providing employees with several years to file a claim. Twenty-two states had already enacted discrimination statutes protecting employees on the basis of sexual orientation and gender identity. However, while twenty-eight states do not have independent statutory protection for employees on the basis of sexual orientation and gender identity, many employers already protect against LGBTQ discrimination voluntarily through more expansive employer policies and practices.

The Bostock Decision

Justice Neil Gorsuch wrote the opinion for the majority and was joined by Chief Justice John Roberts, the late Justice Ruth Bader Ginsburg and Justices Stephen Breyer, Sonia Sotomayer and Elena Kagan. Gorsuch framed the question: "Today, we must decide whether an employer can fire someone simply for being

homosexual or transgender." He concluded that when an employer terminates someone for being homosexual or transgender, that employer "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." Gorsuch found that where an employer terminates a male because he is attracted to men, and would not terminate a female for being attracted to men, the employer is making a decision based on sex because "changing the employee's sex would have yielded a different choice by the employer." The Court concluded that an "employer who fires an individual merely for being gay or transgender defies the law."

The Impact of Bostock on Employers

The approximately 3,600,000 LGBTQ employees[1] in states that do not have state statutory protection for sexual orientation and gender identity discrimination may now look to federal law for this protection. Employers that were not previously subject to state anti-discrimination statutes prohibiting discrimination based on sexual orientation and gender identity should work with their counsel to review and determine if updates are required to their policies and employee benefit programs post-Bostock. Policies should explicitly provide that discrimination and harassment on the basis of sexual orientation and/or gender identity is prohibited. Employers should consider whether to provide training to their employees on the new policies and training to their management teams to make sure management is effectively enforcing these new policies. These actions, coupled with the advice of counsel, are important steps towards mitigating the risk of Title VII claims.

What's Next?

While it is too early to predict whether many states will take Bostock and expand upon it to apply to employers with less than 15 employees, or broaden it to non-employment contexts, Kansas has done just that. Following the Bostock decision, The Kansas Human Rights Commission advised that it will begin hearing claims from people who allege they are being mistreated because of their sexual orientation or gender identity. The commission further expanded the protections for sexual orientation and gender identity to housing and public accommodations.

1 https://williamsinstitute.law.ucla.edu/publications/state-nd-laws-after-bostock/