

June 19, 2020 Publication

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US Supreme Court Says Sexual Orientation and Gender Identity Discrimination Violate Federal Law

Labor, Employment & Benefits Legal Update

Title VII, the federal law that prohibits discrimination on the basis of sex or gender, prohibits discrimination on the basis of sexual orientation and transgender status, according to a highly anticipated decision issued by the U.S. Supreme Court on June 15. The Court reasoned that sexual orientation or transgender status is a form of sex discrimination, stating, “[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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” A copy of the decision can be found [here](#).

The Court’s decision resolved three separate cases from different federal appellate courts, *Bostock v. Clayton County, Georgia*; *Zarda v. Altitude Express, Inc.*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. — In each case, the employer terminated the employment of a long-time employee soon after learning that the employee was gay or transgender. The Eleventh Circuit in *Bostock* held that Title VII does not prohibit employers from firing employees for being gay. In contrast, the Second Circuit in *Zarda*, and the Sixth Circuit in *R.G. & G.R. Harris Funeral Home*, found that discrimination based on sexual orientation or transgender status does violate Title VII.

Through its decision, the Court resolved a circuit split and set the standard for all circuits (and thus each state) that will now apply throughout the U.S. Plus, while these three cases involved a termination, the Court’s ruling applies equally to any unfavorable treatment in the workplace on the basis of sexual orientation or gender identity. The Equal Employment Opportunity Commission, the federal agency responsible for enforcing Title VII, has long interpreted Title VII as providing equal protection for the LGBTQ community, but this decision sets a controlling, rather than suggestive, precedent, which all federal courts throughout the U.S. must now follow.

Many states already have their own laws that prohibit discrimination on the basis of sexual orientation and gender identity, including Washington, Oregon, Illinois, California and New York. Many other states, such as Alaska, Florida, Idaho and Texas, have no state laws protecting against sexual orientation and gender identity discrimination. Because of the Court's ruling, employees who work in states without protective state laws will now have protection under federal law. Employers throughout the country will also be subject to the same federal law prohibiting such discrimination and this law will apply universally regardless of the state in which the employee works.

Potential Conflict With Employer's Religious Convictions

The Supreme Court also addressed the perception that employers might violate their religious convictions if they comply with Title VII's requirements. The Court pointed out that "worries about how Title VII may intersect with religious liberties are nothing new; . . . and therefore Congress included an express statutory exception for religious organizations." The Court also recognized that the Religious Freedom Restoration Act 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 left undecided how these doctrines protecting religious liberty would interact with its interpretation of "sex" under Title VII for other cases that come to it in the future.

Simple Take-Aways for Employers

All employers should review their policies to ensure that they properly prohibit discrimination, harassment and retaliation on the basis of sexual orientation and gender identity. Advocates for diversity and inclusion recommend that employers help their employees understand what these terms mean to avoid disputes and potentially uncomfortable discussions.

Because of recent protests and election-year politics, employers may want to take this opportunity to reaffirm their commitment to equal employment opportunities through training and other diversity and inclusion efforts.