LEGAL UPDATE

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UNITED STATES SUPREME COURT DECISION — EMPLOYMENT DISCRIMINATION PROTECTIONS FOR GAY AND TRANSGENDER EMPLOYEES

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Bostock v. Clayton County, Georgia
Issued June 15, 2020
590 U.S. ____ (2020)
www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

Factual and Procedural Background. *Bostock v. Clayton County, Georgia* is one of three cases that were argued before the United States Supreme Court (Court) in October 2019 concerning individuals who were terminated from their employment because they identify as either gay or transgender, and which were consolidated in the Court's decision issued June 15, 2020. The three cases are as follows:

1. Gerald Bostock was fired from his position as a child welfare advocate for Clayton County, Georgia, for conduct unbecoming a county employee after he began participating in a gay recreational softball league. On May 10, 2018, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court for the Northern District of Georgia's dismissal of Bostock's employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2(a)(1)(Title VII), for failure to state a claim (*Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. May 10, 2018)). Bostock filed a petition for writ of certiorari with the Court on May 25, 2018.

2. Donald Zarda, a skydiving instructor, was fired by Altitude Express after he disclosed his sexual orientation to a client. The United States Court of Appeals for the Second Circuit held that Title VII bars discrimination based on sexual orientation (*Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018)) and Altitude Express filed a petition for writ of certiorari with the Court on May 29, 2018.

3. Aimee Stephens (formerly known as Anthony Stephens), a funeral director, was fired by Harris Funeral Homes after she informed the owner that she was transitioning from male to female and would be presenting as a woman at work. Ms. Stephens filed a complaint with the Equal Employment Opportunity Commission (EEOC) and the EEOC subsequently filed suit against the funeral home alleging a violation of Title VII. The United States Court of Appeals for the Sixth Circuit reversed the United States District Court for the Eastern District of Michigan which had granted summary judgment in favor of the employer (*Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018)). The EEOC, and Ms. Stephens as an intervenor, filed a petition for writ of certiorari with the Court on July 20, 2018.

The Court granted all three petitions for writ of certiorari on April 22, 2019, and consolidated the cases for briefing and oral arguments. Oral arguments were held on October 8, 2019, and the Court's opinion was released on June 15, 2020.

Issue. Whether Title VII provides protection from discriminatory employment practices based on an individual's sexual orientation or gender identity.

Judgment. In a 6-3 opinion drafted by Justice Gorsuch, the Court held that an employer who fires an individual for being gay or transgender violates Title VII. The judgments of the Second (Zarda) and Sixth (Stephens) Circuits were affirmed. The judgment of the Eleventh Circuit (Bostock) was reversed and remanded.

Majority Opinion. The Court analyzed the ordinary public meaning of the language in Title VII that it is "unlawful …for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The Court's analysis was based on the ordinary public meaning of the phrase "because of . . . sex" in the context of 1964, the year in which Title VII became law. The Court proceeded with its analysis under the assumption that "sex" refers to either male or female as determined by an individual's reproductive biology. The Court determined that "because of" is a but-for causation standard, meaning that an employer would not have terminated an employee "but-for" the individual's sex, and that liability cannot be avoided even if other factors may have affected the employer's termination decision. The Court reasoned that because discrimination based on an employee's homosexuality or transgender status requires an employer to intentionally treat the employee differently because of their sex, an employer who discriminates against an employee because of their homosexuality or transgender status "inescapably intends to rely on sex in its decision-making."

The Court noted that under the plain terms of Title VII, an employer violates Title VII if the employer discriminates against an employee based in part on their sex, regardless of how the employer or other entities may describe either the employer's actions or the employer's other motivations for engaging in the discriminatory practice. In addition, an employee's sex does not have to be the sole or primary reason for the employer's action. Title VII focuses on discrimination against individuals, not groups, therefore, the Court noted, it is irrelevant that an employer treats women as a group the same as men are treated as a group. It is relevant, however, to consider whether changing an employee's sex would have resulted in the employer taking a different action. The Court also addressed whether the Title VII drafters had intended to provide protection for gay and transgender employees. The Court stated that "those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

The Court held that an employer who terminates an employee based on their sexual orientation or gender identity ". . . 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."

Dissents. Justice Alito filed a dissent in which Justice Thomas joined. Justice Alito asserted that the question is whether Congress, in 1964, outlawed discrimination based on sexual orientation and gender identity. Justice Alito stated that the 1964 Congress did not outlaw such discrimination, and bills that have been introduced in Congress in the last 45 years to add sexual orientation or gender identity as protected classes have failed to pass through both chambers of Congress. Justice Alito stated that in making employment-related decisions, an employer may rely on an employee's sexual orientation or gender identity without any consideration of the employee's biological sex, contrary to the majority's opinion, and that Title VII allows such decision-making. Justice Alito contended that the majority engaged

in legislation by updating a statute from 1964 to reflect current societal values. Justice Kavanaugh also filed a dissenting opinion in which he similarly asserted that the majority engaged in legislation. Justice Kavanaugh stated that the interpretation of a statutory phrase must involve an examination of the ordinary meaning of the phrase and not the ordinary meaning of each individual word in the phrase, as the phrase may have a more precise meaning than the individual words. Justice Kavanaugh opined that the majority analyzed the literal meaning of the individual words in the phrase "discriminate because of sex" and put the literal meanings back together, rather than analyzing the ordinary meaning of the phrase. In addition, he asserted that federal and state law, previous court cases, history, psychology, sociology, sports leagues, human resource departments, political groups, advocacy groups, common parlance, and common sense distinguish between the ordinary meanings of sexual orientation discrimination and sex discrimination. Justice Kavanaugh concluded, therefore, that the ordinary meaning of "discriminate because of sex" does not extend to discrimination based on sexual orientation or gender identity.

Iowa Law. Iowa Code section 216.6(1) prohibits unfair or discriminatory employment practices based on an individual's sexual orientation or gender identity. "Sexual orientation" is defined as actual or perceived heterosexuality, homosexuality, or bisexuality. "Gender identity" is defined as a gender-related identity of a person, regardless of the person's assigned sex at birth. Iowa added these protected categories in 2007 (2007 Iowa Acts, ch. 191 (SF 427)). This prohibition on unfair or discriminatory employment practices does not apply to employers that regularly employ less than four individuals; the employment of individuals who work within an employer's home if the employer or members of the employer's family live in the home while the individual is employed; the employment of individuals who provide personal service to the person of the employer or to members of the employer's family; and any bona fide religious institution or its educational facility, association, corporation, or society with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose.

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