

LEGAL UPDATES

PUBLISHED: JUNE 15, 2020

## Services

Employment  
Litigation Defense

Labor & Employment

## Professional

TIMOTHY A. HILTON

KANSAS CITY:

816.983.8294

TIM.HILTON@

HUSCHBLACKWELL.COM

# Supreme Court Declares LGBT Community Is Protected From Discrimination in the Workplace

## Key Points:

The express terms of Title VII forbid employment decisions which take into account an individual's sex.

An employer violates Title VII when it intentionally relies in part on an individual employee's sex when deciding to discharge an employee.

An adverse employment action based on sexual orientation or gender identity is a decision based in part on an individual's sex and violates Title VII.

On June 15, 2020, in the middle of Pride Month, the Supreme Court of the United States issued a landmark decision on the rights of LGBT individuals in the workplace. The Court issued its opinion in the *Bostock v. Clayton County* case, which also applies to the *Zarda v. Altitude Express* and *R.G. & G.R. Harris Funeral Home v. EEOC* cases. The question before the court was whether Title VII of the Civil Rights Act of 1964 prohibited an employer from taking an adverse employment action against individuals merely due to their sexual orientation or gender identity.

In a 6-3 decision, the Supreme Court held that sexual orientation and gender identity are so intertwined with sex that it is not possible to consider this status without also considering the individual's sex. Therefore, an employer cannot take action against individuals because of their sexual orientation or gender identity, because these traits are covered by Title VII.

## A split in the lower circuits

The underlying cases arose in much the same way. Mr. Bostock, a child welfare advocate, was terminated after he began participating in a gay recreational softball league. Mr. Zarda, a sky-diving instructor, was terminated after he attempted to comfort a female client by telling her he was gay. Ms. Stephens, a funeral care attendant, was terminated after informing her employer that she planned to work as a female. In a sad turn of events, both Ms. Stephens and Mr. Zarda passed away before the Supreme Court released their decision.

The circuit level decisions created a split, with the Eleventh Circuit finding there was no protection against discrimination because of sexual orientation and the Second and Seventh Circuits finding sexual orientation and gender identity discrimination were prohibited under Title VII. Additionally, two separate executive agencies, the EEOC and the DOJ, filed opposing amicus briefs in the *Zarda* case. The Supreme Court granted certiorari to resolve this circuit split.

### **Express terms of Title VII protect against discrimination because of an individual's sex**

The court's decision relied on the "ordinary public meaning" of the terms of Title VII. The court determined that it was not possible to isolate "sex" from sexual orientation or gender identity. The court further stated sexual orientation or gender identity does not have to be the only factor the employer relied upon in making the decision. If the action was taken because of sexual orientation or gender identity, even if other factors played a part in the decision, the employer will have violated Title VII.

Prior to this decision, approximately half of states have some form of protection against discrimination for the LGBT community, either sexual orientation and/or gender identity in public or private employment. *Bostock* expands on the status quo in multiple important ways. First, this decision prohibits discrimination because of LGBT status in all 50 states via Title VII, interpretation of which is likely to be very influential on state court decision on state law. More importantly, this case provides protection against discrimination on the basis of gender identity, which was protected in comparatively few jurisdictions before today's decision.

### **What this means for you**

The *Bostock* decision means that employers must not consider an employee's gender identity and/or sexual orientation when making employment decisions, similar to the lack of consideration given to race, religion or any other characteristic protected by Title VII. Though not at issue in these cases expressly, employers must also prevent a hostile work environment on the basis of gender identity and/or sexual orientation and take steps to investigate complaints of discrimination and/or harassment on those bases, the same as any other complaint. It remains to be seen how today's decisions will comport with religious freedom decisions and statutes on the federal and state level, whether for religious institutions or not. That is an issue likely to be litigated in future years.

## Contact us

If you have any questions regarding this landmark decision, please contact Timothy Hilton, Jessica Barranco or your Husch Blackwell attorney.