

## US Supreme Court: Title VII Protection Extended to LGBT+ Employees

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On June 15, 2020, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees from discrimination based on their sexual orientation or gender identity. Justice Neil Gorsuch wrote the majority opinion for the 6-3 decision. Justice Gorsuch framed the issue simply: “[t]oday, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear.” The Court ruled:

*An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.*

*Bostock* involved statutory construction, not any particular Constitutional principles. Codified at 42 U.S.C. §2000e-2(a) (1), Title VII makes it “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 *Bostock* decision arose from three different cases which had triggered conflicting results in the lower courts. The 11<sup>th</sup> Circuit Court of Appeals (covering Florida, Georgia and Alabama) ruled in favor of an employer which acknowledged firing Gerald Bostock after he revealed that he is homosexual. Conversely, the 6<sup>th</sup> Circuit (covering Michigan, Ohio, Kentucky and Tennessee) and the 2<sup>nd</sup> Circuit (covering New York, Vermont and Connecticut) had ruled in favor of employees, finding that discrimination in employment on the basis of sexual orientation violated Title VII.

The court sidestepped any debate about whether the word “sex” refers to something beyond mere reproductive biology. Instead, the court noted that the litigants agreed that the word meant, at least, the “biological distinctions between male and female.” With that, the court inquired whether the pleadings averred that the individual plaintiff has been discriminated against “because of” their “sex.” The court noted that Congress could have taken a “parsimonious approach” to causation, but that it instead chose to make the “but-for approach” a “viable, if no longer exclusive” path to relief under Title VII. To interpret Title VII’s use of the “because of,” the court looked to its prior decisions in *University of Texas Southwestern Medical Center v. Nassar*, 70 U. S. 338, 350 (2013) and *Gross v. FBL Financial Services, Inc.*, 557 U. S. 167, 176 (2009). In the language of law, this means that Title VII’s ‘because of’ test incorporates the ‘simple’ and ‘traditional’ standard of but-for causation.

The court also noted that “[o]ften in life and law[,] two but-for factors combine to yield a result that could have also occurred in some other way.” Still, “[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.”

Applying its understanding of the statutory language of Title VII, the majority concluded that:

*The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.*

The court's causation standard exposes employers to liability for a firing that may be based on more than just the person's homosexuality and/or transgenderism. Additional causes for the employment termination do not "insulate the employer from liability." Metaphorically, the court wrote that "[i]ntentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view." Likewise, the court emphasized that the Title VII violation occurs at the individual level: if an employer were to discriminate against all transgender or homosexual persons, each such act of discrimination based on sex is "an independent violation of Title VII."

Citing prior Supreme Court Title VII decisions, the Court articulated three "familiar" lessons. First, "it's irrelevant what an employer might call its discriminatory practice...." Regardless of how the employer characterizes the matter, "[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability." Second, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action" in order to be actionable under Title VII. And third, "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups." An employer who fires all homosexual persons – whether they are male (gay) or female (lesbian) – "doesn't diminish but [rather] doubles its liability. [D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

The court distinguished discrimination against homosexuals and transgender persons from "countless" other scenarios, such as firing someone "for tardiness or incompetence or simply supporting the wrong sports team." Advocates for the employers had argued dire consequences should the court side with the employees – that same-sex bathrooms, locker rooms and dress codes might all be affected. The court expressly bypassed those hypotheticals: "The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'" The court likewise recognized that particular constitutional claims that might rise higher than its statutory interpretation of Title VII, but "none of the employers before us today [claim] that compliance with Title VII will infringe" on their First Amendment religious liberties "in any way."

The six-member *Bostock* majority for which Justice Gorsuch wrote includes Chief Justice Roberts, as well as Justices Ginsburg, Breyer, Sotomayor and Kagen. The majority rejected the contention that because Congress did not specifically address sexual orientation or transgender status in Title VII, the statute could not protect LGBT employees. Instead, Justice Gorsuch explained, if Congress establishes a broad rule without exceptions, "courts apply the broad rule."

A dissent by Justice Alito, in which Justice Thomas concurred, argues that the majority did not interpret Title VII as written in 1964, but rather legislated it anew. Justice Kavanaugh did not join in that dissent, but rather authored his own in which he argued that if Congress intended to include sexual orientation or gender identity, it should amend Title VII.

Although the majority opinion outlines why its result is patent in the plain language of the 1964 statute, at first blush, *Bostock* nevertheless seems extraordinarily significant, both to employers and LGBTQ+ employees. To avoid Title VII claims, the *Bostock* ruling and reasoning seems to counsel employers to promptly revisit their employment practices to ensure that no discriminatory factors are involved in their hiring and firing decisions.

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