CLIENT NEWS BRIEF

U.S. Supreme Court Holds that Title VII of the Civil Rights Act of 1964 Prohibits Workplace Discrimination Based on Gender Identity and Sexual Orientation

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On June 15, 2020, the Supreme Court of the United States reached a landmark decision in *Bostock v. Clayton County Georgia* (2020) ___ U.S. __ [(U.S., June 15, 2020) 139 S.Ct. 1599] (*Bostock*) to extend protections against employment discrimination based on sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits workplace discrimination because of race, sex, religion or national origin.

Relevant Facts

The Supreme Court agreed to review three separate cases "to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons."

All three cases alleged discrimination based on sex under Title VII, after the employers admittedly fired long-time employees after the employees identified as homosexual or transgender. First, the County of Clayton, Georgia, fired Gerald Bostock after he joined a gay recreational softball league. Mr. Bostock had been an employee of Clayton County for a decade before he was fired for conduct "unbecoming" of a county employee. Second, Donald Zarda was fired from his position as a skydiving instructor in New York after working there for several seasons shortly after mentioning he was gay. Third, Aimee Stephens, who was born biologically male, was fired from her position at a funeral home in Garden City, Michigan, after six years of employment, once she informed her employer that she wanted to "live and work full-time as a woman."

The Supreme Court's Opinion

Until *Bostock*, whether the category of "sex" afforded federal protection against employment discrimination to LGBTQ persons was debated. And while individual states, including California, enacted laws to include LGBTQ individuals as a protected class against employment discrimination, *Bostock* conclusively finds that employers who fire, or otherwise discriminate against employees because they are homosexual or transgender violate federal law—Title VII—because of sex.

In reaching its decision, the Court reasoned: "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." For example, the Court described an employer who fires a male employee because he is attracted to men. In doing so, the employer discriminates against the male employee based on his sex because the employer has fired the male employee for the same traits it accepts from his female colleagues. Put differently, "If changing the employee's sex would have yielded a different choice by the employer, a statutory violation has


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occurred." This is true even if an employer tries to refuse to hire a gay or transgender individual without learning that person's sex. By intentionally setting out a rule that makes hiring turn on sex, the employer violates the law regardless of their knowledge of individual applicants.

In reviewing employer actions relative to its holding, the Supreme Court clarified:

- It is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it;
- An employee's sex need not be the sole or primary cause of the employer's adverse action. So long as an employee's sex was one of the reasons for the employer's decision, that is enough to trigger the law;
- An employer's discrimination must be intentional; and
- An employer cannot escape liability by demonstrating that it treats males and females comparably as groups, such as subjecting both female and male homosexuals or transgender employees to the same rule.

In conclusion, because discrimination on the based on sexual orientation or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender violates Title VII.

Bostock's Implications on Employment Policies and Practices

Bostock may not significantly change policies already in place for public agencies in California. But this ruling undoubtedly removes any ambiguity regarding whether homosexual and transgender persons are federally protected from employment discrimination. In light of the Supreme Court's opinion, public agencies should review employee handbooks and agency policies and update them if needed.

The court noted that the only issue before it was whether an employer who fires someone simply for being homosexual or transgender violates Title VII. Nonetheless, the court discussed "penalization" and "discrimination" throughout its decision. Public agencies should consider other workplace policies that can more easily be challenged in light of *Bostock*. For example, sex-segregated bathrooms and locker rooms, and workplace dress codes.

Implications on Title IX in Federally Funded Institutions

While the Court's opinion in *Bostock* is based upon the review and interpretation of Title VII, the opinion's rationale and textual analysis may lend to the opinion's possible application to Title IX of the Education Amendments of 1972 (Title IX), which provides that "no person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

While current guidance and the stated interpretation from the United States Department of Education (DOE) takes the more narrow, traditional view on the definition of "sex" under Title IX, students and litigants around the country may now look to *Bostock* as directly impacting the meaning of "on the basis of sex" under Title IX. In fact, the United States Commission on Civil Rights, created by Congress in 1957 "as an independent, bipartisan, fact-finding federal agency . . ." with the "mission . . . to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws," has already called on the current Administration to apply the *Bostock* holding to the application of Title IX. Specifically, on June 19, 2020, the United States Commission on Civil Rights requested that the DOE Office for

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Civil Rights rescind a May 15, 2020 letter of impending enforcement action against some Connecticut public school districts for allowing the participation of transgender youth in school athletics. It further asked the Office of Civil Rights to cease any regulatory or enforcement actions, including guidance issuance and adoption of litigation positions that conflict with *Bostock's* decision. This request comes shortly after the Office of Civil Rights withdrew guidance and rejected the interpretation of Title IX protection against discrimination "on the basis of sex" to include sexual orientation and gender identity.

In the meantime, in California, the Education Code's definition of sex and policies based upon same are already consistent with the understanding of the term "sex" as articulated in *Bostock*. (See 2020 Client News Brief No. 48.)

All told, school districts may want to contact their legal counsel to discuss impacts on policies and practices relative to employees and students as result of the *Bostock* opinion.

If you have any questions *Bostock*, and its implications on Title VII or Title IX, please contact the author of this Client News Brief or an attorney at one of our nine offices located statewide. You can also subscribe to our podcast, follow us on Facebook, Twitter and LinkedIn or download our mobile app.