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Practical Implications for Employers on Recent SCOTUS Ruling Giving Title VII

After the Supreme Court's decision, employers in every state must now understand that Title VII protections from sex discrimination also prohibit discrimination against LGBT+ employees.

By John R. Richards and Nicholas Corsano| June 25, 2020 | Corporate Counsel

In a groundbreaking 6-3 opinion by Justice Neil Gorsuch, President Donald Trump's first U.S. Supreme Court appointee, the Supreme Court of the United States held that an employer who fires an individual for being homosexual or transgender violates Title VII as a form of sex discrimination, in *Bostock v. Clayton County*, Georgia, 590 U.S. _____ (2020). And although societal understanding of what is "sex" discrimination may have evolved since Title VII passed in 1964, the plain words of the statute have not: "At bottom, these cases involve no more than the straight-forward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms."

Significantly, Gorsuch wrote, "those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. … But the limits of the drafters' imagination supply no reason to ignore the law's demands. When express terms of a statute give us one answer and extratextual considerations suggest another, there is no contest. Only the written word is the law, and all persons are entitled to its benefit." Pointedly, the court stated, "as enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them." Thus, although

homosexuality and transgender status are distinct concepts from sex, discrimination based on these characteristics necessarily entails discrimination based on sex—"the first cannot happen without the second." Citing *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), and *Phillips v. Martin Marietta,* 400 U.S. 542 (1971), the court referred to "sexual harassment" and "motherhood" as being conceptually distinct from sex discrimination, but recognized these too fall within Title VII's broad sweep.

Practical Implications for Employers and Next Steps

Before the court's June 15 decision, 21 states had laws explicitly mentioning sexual orientation and/or gender identity in their anti-discrimination statutes. After the Supreme Court's decision, employers in every state must now understand that Title VII protections from sex discrimination also prohibit discrimination against LGBT+ employees.

Employers should invest resources to ensure LGBT+ employees are afforded—in practice—the legal protection the law now undisputedly affords. Employers may want to consider offering Respectful Workforce Training—now mandated in many jurisdictions—with an express LGBT+ component. To be effective, LGBT+ issues should be presented in a clear and comprehendible way, so workforces will understand the concepts and the company's legal obligations—irrespective of their own personal, religious or political views. An employee who claims to "have trouble" calling a transgender co-worker by his or her new preferred name may begin to appreciate the issue when you present it in a more familiar way: "remember when you asked your co-workers to now call you by your married name after going by your maiden name for the last five years?" Whether related to accommodation requests, harassment allegations, gender transitioning issues, dress codes or bathroom use, all levels of management must: (1) recognize the subconscious and conscious bias that may exist toward the LBGT+ community; (2) learn to acknowledge how they manifest at work; and (3) train management and employees to ensure policies are enforced in a manner that is inclusive of the LGBT+ community.

This is especially important as the COVID-19 pandemic has forced many businesses to pivot and increase remote working for the health and safety of their employees. As employers are faced with new challenges associated with teleworking, businesses should seize this moment to bring diverse employees together to be seen, heard and remembered during this time of separation. In doing so, employers will not only mitigate legal risk but will achieve the diverse solutions necessary to sustain success during these trying times.

In addition to maintaining policies protecting LGBT+ employees, businesses should also continue to invest in efforts to promote LGBT+ visibility while working remotely. Set up virtual affinity group meetings with invitations to straight allies and C-suite/leadership members; plan virtual happy hours and/or social events; develop formal mentoring/buddy programs that provide for check-ins and strengthen connectivity; and continue to recruit diverse talent and build diverse teams by attending targeted conferences and seminars—albeit virtually. These efforts will seize an opportunity to bring various employees together to achieve progress and diverse solutions under unique circumstances. Five percent of the United States' workforce identifies as a member of the LGBT community (source: The Williams Institute). Twenty-one percent of those LGBT employees have reported feeling discriminated against in the workplace in, among other things, hiring, promotions and pay (source: The Williams Institute). Indeed, efforts like these will foster an environment where more employees may feel safe to self-identify as LGBT+ and bring their entire self to work knowing they now have the law on their side.

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