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Viktoryia Johnson
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SCOTUS Delivers Major Victory to LGBTQ Employees

By Carly Stein, Tampa, and Aaron Tandy, Miami

On June 15, 2020, the Supreme Court of the United States (SCOTUS) issued a landmark decision regarding the scope of protections afforded under Title VII of the Civil Rights Act of 1964 to gay, lesbian, and transgender employees. In a 6-3 decision authored by Justice Neil Gorsuch in a trio of consolidated cases—*Bostock v. Clayton County, GA., Altitude Express, Inc. v. Zarda,* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*[1]—SCOTUS held that the plain meaning of Title VII's prohibition on discrimination against an individual employee "because of such individual's . . . sex"[2] is sufficiently broad to prohibit discharge of an employee merely for being gay or transgender.[3] In overturning the Eleventh Circuit decision in *Bostock*,[4] SCOTUS resolved a split among several circuits regarding the application of Title VII to workplace discrimination claims by gay, lesbian, and transgender employees. In doing so, SCOTUS provided federal protection for employees in Florida, who up until now have had to make due with a patchwork of county ordinances to redress employment discrimination claims based on sexual orientation and gender identification[5] or try to camouflage their claims for sexual orientation discrimination as claims based on gender non-conformity.[6]

In reaching its decision, the majority found that a violation of Title VII occurs when an employer fires an employee simply for being homosexual or transgender, because the employer in that instance is "fir[ing] 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."[7] And although the majority agreed that sexual orientation and gender identification are distinct concepts from "sex," it found that discrimination based on those concepts necessarily falls within the broad and sweeping prohibitions contained in Title VII language preventing "all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[8]

Facts and Holdings

In each of the three cases, the employers did not dispute that a long-time employee was fired shortly after the employer became aware that the employee was gay or transgender, and that was a contributing reason for the termination. Gerald Bostock had worked for more than a decade for Clayton County, Georgia, as a child welfare advocate. He was terminated shortly after the county learned he was participating in a gay recreational softball league. Donald Zarda worked for several seasons as a skydiving instructor for Altitude Express until he was fired days after mentioning that he was gay. Aimee Stephens was terminated in her sixth year with R.G. & G.R. Harris Funeral Homes after writing a letter informing her supervisor that, although originally presenting as male, she would be returning to work after vacation as a woman. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex.[9]

In *Bostock*, the Eleventh Circuit affirmed the lower court's dismissal of the employee's lawsuit alleging sexual orientation discrimination under Title VII, noting the dismissal was supported by Eleventh Circuit precedent.[10] In *Zarda*, the Second Circuit, sitting en banc, expressly overruled early circuit precedent to find that Title VII's prohibition covered claims of discrimination based on sexual orientation, reversing dismissal of the complaint.[11] While taking a more circuitous route, in *R.G. & G.R. Harris Funeral Homes*

the Sixth Circuit ultimately also ruled that firing Ms. Stephens for presenting as transgender violated Title VII.[12] To resolve the split among federal circuits as to the scope of Title VII's protections for gay, lesbian, and transgender employees, SCOTUS agreed to hear the appeal. The Court consolidated the cases for argument, which was heard in October 2019.

In affirming the Second and Sixth Circuits, and reversing the Eleventh Circuit, Justice Gorsuch— joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan—relied on a textualist "plain" reading of the statute and its terms (a claim challenged by the lengthy dissent offered by Justices Alito and Kavanaugh in separate opinions as discussed below), finding that Title VII has always prohibited employers from intentionally basing employment decisions on the sex of individual men or women, and that this illegal conduct occurs when an employer discriminates against employees for being gay, lesbian, or transgender, because the sex of the individual employee is necessarily part of that decision-making process.[13]

Justice Gorsuch opened his analysis for the majority by noting that the Court's duty was to determine the "ordinary public meaning of Title VII's command" not to discriminate against an individual on the basis of "sex."[14] In doing so, the majority observed that Title VII uses a traditional "but-for causation standard" in determining whether an employer engaged in a prohibited action—refusal to hire or promote or discharge—because of the sex of the individual employee: "So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law."[15] In other words, an employer may not "avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[16] Nor can an employer justify a sex-tainted decision regarding a particular employee by claiming that it has no discriminatory policies directed to a class as a whole, that it discriminates equally between men and women, or that it gives preferential treatment to one sex overall, because the law's focus is on individuals, not groups.[17] In other words, an employer who fires a woman for being "insufficiently feminine and fires a man . . . for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it."[18]

Relying on Court precedent, SCOTUS noted that it does not matter that the plaintiff's sexual orientation or gender identification was not the sole or primary cause of the employer's adverse action; what matters is only that the employer took intentional action in part because of the individual's sex, which necessarily occurs—as in each of the cases presented to the Court—when an employer terminates an employee for being gay, lesbian, or transgender.[19] In the Court's view, "an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules" in reaching the decision, which is all that is needed to violate Title VII.[20]

Finally, the majority opinion rejected each of the employer's arguments, and the dissent's commentary, that Title VII was never meant to be read so broadly and that any changes to Title VII should come from Congress. However, SCOTUS recognized that the First Amendment and claims under the Religious Freedom Restoration Act of 1993 "might supersede Title VII's commands in appropriate cases," none of which was presented on appeal.[21]

Significance

Bostock has resolved a dispute among federal circuits as to the reach of Title VII's protection offered to employees against discriminatory conduct on the basis of "sex." Practically speaking, the decision will have lasting effects, especially in those parts of the country—and here in Florida specifically—where gay, lesbian, and transgender employees have been without a remedy for intentional discrimination based upon their sexual orientation or gender identification. Of course, even the majority opinion recognizes that certain workplace issues regarding bathroom accommodations and other practices will not be resolved by *Bostock* and will have to await another day. However, it is likely that the decision will provide guidance in other areas such as housing and Title IX cases regarding sports and schooling.

Alito Dissent

Justice Alito opened his dissent with this statement: "There is only one word for what the Court has done today: legislation."[22] Joined by Justice Thomas, Justice Alito completely rejected the majority's presentation of its argument as textualist. Justice Alito's dissent continues for 54 pages, rebutting the overarching argument and individual points laid out by the

majority. Attached to the 54-page opinion is a 54-page appendix of citations to dictionaries, statutes, and forms in support his argument.

Justice Alito first discarded the majority's proposed interpretation of "sex" in Title VII, denoting it as an entirely separate concept from both "sexual orientation" and "gender identity."[23] Taking a literal page from Justice Scalia's book, the dissent asserted that the duty of the Court is to interpret terms in Title VII based on what the terms conveyed to reasonable people "*at the time they were written*," which the dissent presumed would exclude both sexual orientation and gender identity.[24]

Justice Alito began his Title VII analysis by recounting the primary definition of "sex" from *Webster's Dictionary* at the time Title VII was enacted: "Sex" is "[o]ne of the two divisions of organisms formed on the distinction of male and female."[25] Justice Alito then dismissed the lion's share of the majority opinion as a discussion of matters irrelevant to the issue before the Court. Justice Alito notably characterized as breathtakingly arrogant the majority's argument that Title VII cannot be interpreted in any fashion other than that sexual orientation and gender identity discrimination are inherently discrimination because of sex.[26]

Justice Alito went on to present a counter-hypothetical to the multitude of examples put forth by the majority, proffering the example of an employer with a blanket policy against the hiring of gays, lesbians, or transgender individuals. Justice Alito pointed out that, contrary to the majority's argument that discrimination on the basis of these categories necessarily considers sex, such a blanket policy has no consideration for an individual applicant's sex, nor does the employer even need to be aware of the applicant's sex to enforce the policy.[27]

Further, the dissent argued that the majority's reliance on the premise that sexual orientation and gender identity are necessarily intertwined is, in and of itself, contrary to the spirit of textualism espoused by the majority. Justice Alito wrote: "Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, 'sex.'"[28] Next, the dissent addressed the majority's hypothetical argument based on an example of an employer with two employees who are "attracted to men." "[T]o the employer's mind," according to the majority's hypothetical, the two employees are "materially identical" except that one is a man and the other is a woman. In the majority's analysis, if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. "After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?"[29] The dissent proposed a counter-hypothetical. In the dissent's example, the employees are: 1) a man attracted to men; 2) a woman attracted to men; 3) a woman attracted to women; and 4) a man attracted to women. In the case of an employer discriminating on the basis of sexual orientation, if the first and third categories of employees are discharged, the discharged employees would not share similarities on the basis of their sex, their attraction to men, or their attraction to women, but rather only on the basis of their sexual orientation. By this example, the dissent sought to undercut the majority's own arguments.[30] Justice Alito ended this portion of the dissent with a strong rebuke of the majority's determination that Title VII's text on this issue is unambiguous and therefore bears no further consideration of alternative interpretations.[31]

Justice Alito also addressed what he classified as unpersuasive arguments in the lower courts. First, he rejected the contention that discrimination on the basis of sexual orientation or gender identity constitutes discrimination on the basis of sex stereotypes, as Title VII does not prohibit discrimination on the basis of sex stereotypes.[32] On the contrary, said Justice Alito, the plurality in *Price Waterhouse* noted that sex stereotypes do not prove sex discrimination but can be used as *evidence* that sex played a part in the employment decision.[33]

The argument likening sexual orientation discrimination to race discrimination for interracial marriage was also rejected by the dissent through an analysis of the history of race discrimination itself.[34] Specifically, asserted Justice Alito, the bar on interracial marriages was based on a historical racist attitude towards one race, rooted in the subjugation of that race and concerns of "race-mixing."[35] The same historical attitude and concerns regarding comingling do not exist in the case of sex.[36]

In the second portion of the dissent, Justice Alito undertook an in-depth review of Justice Scalia's approach to textualism and its applications to the historical passage of Title VII of the Civil Rights Act.[37] As support for the argument that the phrase

"because of sex" was well understood in the historical context in which Title VII was enacted, Justice Alito provided—at length—examples of various other state and federal laws addressing discrimination based on sex. He undergirded this argument for historical understanding with an analysis of past treatment of homosexuality both in the workforce and in society. While lamenting the injustice of these past practices, Justice Alito stood by the textualist interpretation of the statute as enacted.[38]

Justice Alito further rejected the majority's reliance on Justice Scalia's opinion in *Oncale v. Sundowner Offshore Services, Inc.*[39] *Oncale*, he asserted, stands for the reasonable premise that statutes enacted to bar principle evils will also bar lesser included evils, and sexual orientation and gender identity do not fall under the principle concerns of Title VII when enacted.[40] Justice Alito used similar considerations in distinguishing prior precedents on sex, noting, with some concern, the majority's rejection of what he characterized as "50 years of uniform judicial interpretation of Title VII's plain text."[41]

In closing, Justice Alito admonished the majority for not "allow[ing] the legislative process to take its course" and warned that his colleagues' "irresponsible" actions will have far-reaching consequences, including potential litigation over bathroom usage for transgendered individuals, threats to women's sports under Title IX, concerns regarding housing under Title IX, questions over employment by religious organizations, disputes over healthcare benefits, and concerns about freedom of speech, none of which was addressed or even considered by the majority.[42] Justice Alito concluded that "[t]he entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning."[43]

Kavanaugh Dissent

Justice Kavanaugh, writing separately in dissent, sought to bring greater attention to what he views as judicial lawmaking.[44] Justice Kavanaugh conceded that firing a man for being attracted to a man but not firing a woman with the same attraction might be a literal representation of sex discrimination but asserted that courts are bound to follow a statute's ordinary meaning, not its most literal interpretation.[45] Justice Kavanaugh pointed to precedent throughout the Court's history where SCOTUS rejected a technical or literal definition in a statute in favor of its ordinary meaning.[46]

With this analytical approach in mind, Justice Kavanaugh rejected the assertion that the ordinary meaning of "sex" in Title VII would have included sexual orientation and gender identity.[47] Further, there is significant federal legislation identifying sexual orientation separate and apart from sex, indicating Congress's clear understanding of the distinction between the two concepts.[48] Justice Kavanaugh recounted years of prior decisions, which the majority now rejected, that did not consider sexual orientation as a subset of sex discrimination.[49] In closing, Justice Kavanaugh reiterated his concern for the judicial rewriting of Title VII and reflected on Congress's role in ensuring inclusion of sexual orientation under Title VII.[50]

Conclusion

While the majority's decision in this case has blazed a trail forward in employment law for the LGBTQ community, the future of other federal statutes is less clear. Justice Alito's criticism of the majority's approach to textualism is likely to resurface as further challenges to the outer limits of "sex" in Title VII arise across the country.

***Carly Stein** is an associate attorney in the Tampa office of Allen, Norton & Blue. Her work includes representing employers in both the public and private sector.*

***Aaron Tandy** heads Pathman Lewis, LLP's employment law practice, helping employers and employees navigate complex employment issues.*

Endnotes

1 *Bostock v. Clayton Cty.*, Nos. 17-1618 (*Bostock*), 17-1623 (*Zarda*), 18-107 (*R.G. & G.R. Harris Funeral Homes*), 2020 U.S. LEXIS 3252 (June 15, 2020).
2 42 U.S.C. §2000e-2(a)(1).
3 *Id.* at *2.
4 *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App'x 964 (11th Cir. 2018) (request for en banc review denied).
5 *See, e.g.,* Miami-Dade Cty. Code of Ordinances, § 11A-26 (making it illegal to discriminate in employment on "account of . . . sex, . . . gender identity, gender expression, sexual orientation").
6 *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1253 (11th Cir. 2017) (noting that "an LGBT person may properly bring a separate discrimination claim for gender non-conformity in this Circuit").
7 2020 U.S. LEXIS 3252, at *9.
8 *Id.* at *37.
9 *Id.* at *10–11. Both Ms. Stephens and Mr. Zarda passed away prior to SCOTUS' decision, and their estates continued the cases on behalf of their heirs. *Id.* at 12.
10 *Id.* at *11.
11 *Id.* at *12.

12 *Id.*
13 *Id.* at *25.
14 *Id.* at *13.
15 *Id.* at *15.
16 *Id.*
17 *Id.* at *18–19.
18 *Id.* at *19–20.
19 *Id.* at *29. In each of the cases presented, the employers conceded that the employee was discharged intentionally based upon homosexual or transgender status.
20 *Id.* at *32–33.
21 *Id.* at *57 (recognizing that R.G. & G.R. Harris Funeral Homes declined to seek review of the underlying decision rejecting its RFRA claim).
22 *Id.* at *59 (Alito, J., dissenting).
23 *Id.*
24 *Id.* at *59–60 (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (1st ed. 2012)).
25 *Id.* at *126.
26 *Id.* at *65.
27 *Id.* at *68–69.
28 *Id.* at *74.
29 *Id.* at *76.
30 *See id.* at *76–81.
31 *Id.* at *80–81.
32 *Id.* at *81–82.
33 *Id.* at *82–84 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion)).
34 *Id.* at *84–86.
35 *Id.* at *85.
36 *Id.* at *85–86.
37 *Id.* at *88–91.
38 *Id.* at *91–105.
39 *Id.* at *105–07 (citing 523 U.S. 75 (1998)).
40 *Id.*
41 *Id.* at *114.
42 *Id.* at *116–25.
43 *Id.* at *125.
44 *Id.* at *153–57 (Kavanaugh, J., dissenting).
45 *Id.* at *158.
46 *Id.* at *159–63.
47 *Id.* at *155, 169.
48 *Id.* at *169–70.
49 *Id.* at *174–75.
50 *Id.* at *175–82.

Looking Ahead!