

## Impact of SCOTUS Ruling On Sexual Preference and Gender Identity Discrimination

Having to tell prospective clients that they do not have a case is never an enjoyable experience. It has been one of the continuous, disappointing aspects of being a plaintiff's employment lawyer in North Carolina to have to tell members of the LGBTQ+ community that the law may not protect them. On June 15, 2020, a United States Supreme Court ruling changed that.

In a 6-3 decision, *Bostock v. Clayton County*, a Gorsuch-lead majority held that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual preference and gender identity. *Bostock* arose from three consolidated cases. A county employee in Clayton County, Georgia was fired after his employer learned he was gay. The Eleventh Circuit held that Title VII does not cover sexual orientation. The Second Circuit came out the other way on a case involving a skydiving instructor who was fired after the company learned that he was gay. In the third case, the Sixth Circuit held that Title VII protects discrimination against transgender individuals when an employee was fired after she told her employer that she would transition to living as a woman.

The road to *Bostock* was long, and the fight for many is still not over. These cases helped pave the way:

In *Oncale v. Sundowner Offshore Services*, (1998), the Supreme Court unanimously held that Title VII protections against workplace discrimination applied to harassment between members of the same sex. Next, in *Lawrence v Texas* (2003), the Court held that laws prohibiting homosex-

ual activity violated the Due Process Clause of the 14th Amendment. Justice Kennedy, for the majority, wrote "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."

*Obergefell v. Hodges* (2015) proved to be a watershed moment for LGBTQ+ rights. In a 5-4 decision, the Court held that denying marriage to same sex-couples violated the Due Process Clause. Writing that same-sex couples only sought "equal dignity in the eyes of the law," Justice Kennedy stated that marriage was a fundamental touchstone of our society that should not be denied to same-sex couples.

### IMPACT OF BOSTOCK

In *Bostock*, Justice Gorsuch—a former Kennedy clerk—wrote for the majority that it was impossible to discriminate against a person on the basis of sexual orientation or identity without discriminating against that individual "because of...sex," the operative statutory language.

The Court also endorsed a "but-for" causation test, noting that "if the employer relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."

*Bostock* also cut off the "group defense" argument, noting that Title VII protects and focuses on individuals rather than groups: "it doesn't matter if the employer treated women as

a group the same when compared to men as a group." In other words, an employer who fires a woman for being insufficiently female and a man for being insufficiently masculine cannot argue that it treats women the same as men and therefore can fire an individual stating it treats all the same. Either way, the employer fires the individual because of sex.

### CONCLUSION

While *Bostock* is a landmark victory for LGBTQ+ advocates, there are still large gaps in the protection of individuals. For example, Title VII protections do not cover businesses with less than 15 employees—leaving a large portion of employees across the nation without protection. Moreover, the Court declined to address the impact of this holding on bathroom access for transgender employees. Also, the expansion of the ministerial exception in two of the Court's other rulings this term means many employees of religious organizations will not benefit from the ruling in *Bostock*. Finally, there remains an open question on how this ruling impacts the N.C. Equal Employment Practices Act, which prohibits discrimination based on sex.

Based on our experience with employment issues, a client who believes they were fired on the basis of sexual preference or gender identity could be entitled to damages including lost wages, lost benefits, emotional distress, court and legal fees as well as punitive damages.

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