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EMPLOYMENT LAW UPDATE

Connie Cornell

Connie Cornell


Austin, TX
ccornell@cornellsmith.com
512.328.1540

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This paper provides an employment law update to provide an overview of recent changes of importance to employers, particularly those with employees in Texas. It highlights key court decisions, federal agency activity, new legislation, and legislative trends.

I. U.S. SUPREME COURT CASES

A. Sexual Orientation / Transgender Status Discrimination Is Sex Discrimination - *Bostock v. Clayton Cty., Ga.*, 590 U.S. ___, 140 S. Ct. 1731, --- L.Ed.2d --- (2020).

1. Background

Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e-2(a)(1), bars employment discrimination "because of … sex." Over the decades, the U.S. Supreme Court has expanded the concept of what constitutes discrimination "because of … sex." In 1986, sexual harassment was recognized as a form of unlawful discrimination. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986). In 1989, gender stereotyping was added. *Price Waterhouse Coopers v. Hopkins,* 490 U.S. 228 (1989). Then in 1998, the Court upheld a Title VII claim for same-*sex* sexual harassment. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998).

2. Case Histories and Facts

The Supreme Court granted certiorari in three cases, consolidated them, and on June 15, 2020 issued a 6-3 decision ruling holding that terminating an employee based on sexual orientation or transgender status is discrimination based on sex and prohibited by Title VII. *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, --- L.Ed.2d --- (2020).

a. Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), cert. granted sub nom. Bostock v. Clayton Cty., Ga., 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

Gerald Bostock worked for a decade as a child welfare advocate for Clayton County, Georgia and, under his leadership, the county won national awards for its work. Influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation after he began participating in a gay softball league. Soon thereafter, he was fired for conduct "unbecoming" a county employee. His claim was dismissed as a matter of law by the district court and the Eleventh Circuit affirmed the dismissal holding that Title VII does not prohibit employers from firing employees for being gay. *Bostock*, 723 Fed. App'x. 964, 965 (11th Cir. 2018).

b. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), cert. granted sub nom. Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. He alleged that he would tell female customers that he was gay to ease any discomfort about being strapped so closely to him when he was on a tandem dive. Mr. Zarda was terminated after a customer complained that Mr. Zarda had inappropriately touched her and he then disclosed his sexual orientation to excuse his behavior. The district court dismissed his claim but the Second Circuit concluded that sexual orientation discrimination does violate Title VII, allowing his case to proceed.

c. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, (6th Cir. 2018), cert. granted sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S.Ct. 1599, 203 L.Ed. 2d 754 (2019).

Aimee Stephens presented as male, under her birth name Anthony Stephens, when hired by a funeral home in Michigan. She was subsequently diagnosed with gender dysphoria and clinicians recommended that she begin living as a woman. After working for the company for more than five years, Ms. Stephens informed her employer that she planned to "live and work full-time as a woman" after returning from her upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out." The trial court dismissed the claim finding that the closely held, for profit funeral home, was entitled to an exemption from Title VII under the Religious Freedom Restoration Act (RFRA) due to the owner's religious beliefs. The Sixth Circuit rejected the RFRA defense and granted summary judgment to the EEOC holding that discrimination on the basis of transgender and transitioning status violates Title VII.

3. The Supreme Court's Analysis

Title VII provides that employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, *because* of such *individual's . . . sex*." 29 U.S.C. §2000e-2(a)(1) (emphasis added).

The Court's analysis begins with the assumption that the term "sex" refers only to biological distinctions between male and female. Title VII's "because of" test incorporates the standard of but-for causation, meaning the outcome

would not have happened "but for" the purported cause. If you change one particular thing, namely the plaintiff's sex, the outcome changes. There can be more than one "but for" cause. In 1991, Title VII's causation standard was expanded to include liability if a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, 42 U. S. C. §2000e-2(m).

The language of Title VII places the focus on the discriminatory treatment of individuals, not groups. An employer that fires a woman because she is insufficiently feminine and also fires a man for being insufficiently masculine may be treating men and women as groups more or less equally. In both cases, however, the employer fires an individual in part because of sex, thereby doubling liability under Title VII, rather than avoiding it.

An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It does not matter if other factors besides the plaintiff's sex contributed to the decision. It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. The Court provides two examples to demonstrate its point.

Example 1: Assume an employer employs two materially identical employees, both of whom are attracted to men, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

Example 2: Assume an employer fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth and still identifies as female, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.

It is not a defense for the employer to prove that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both men and women for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both men and women for being gay or transgender does the same.

4. <u>Consideration of Key Precedent</u>

The Court highlights three prior cases supporting its analysis.

In *Phillips v. Martin Marietta Corp.,* 400 U. S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971) (*per curiam*), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of " sex. The company also maintained that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Neither the existence of other causative factors in addition to sex, nor the fact that the employer favored women as a class, constituted a defense.

In *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978), an employer required women to make larger pension fund contributions than men based on the argument that women tend to live longer than men and thus, are likely to receive more from the pension fund over time. The employer insisted its actions were motivated by a wish to achieve class-wide equality between the sexes. However, the practice violated Title VII because the statute's focus is on the individual and any individual woman might make the larger pension contributions and still die as early as a man. *Id.*, at 708, 98 S. Ct. 1370, 55 L. Ed. 2d 657.

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

From these cases, the Court draws the following conclusions. First, it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. Second, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. Title VII is still violated even if there is another motivating factor, such as the sex the plaintiff is attracted to or presents, or even this other factor plays a more important role in the employer's decision. Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups.