PRESENTED AT

ESSENTIAL EMPLOYMENT LAW

August 20, 2021
Austin, Texas

EMPLOYMENT LAW UPDATE

Connie Cornell

Connie Cornell
CORNELL SMITH MIERL BRUTOCAO BURTON
Austin, TX
ccornell@cornellsmith.com
512.328.1540

EMPLOYMENT LAW UPDATE 2021*

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

I. U.S. SUPREME COURT CASES

A. Sexual Orientation / Transgender Status Discrimination Is Sex Discrimination - *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1734, 207 L. Ed. 2d 218 (2020); *see Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *aff'd sub nom. Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020); *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

1. Background

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.

2. 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. In its analysis, 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.

3. Employer Take-Aways

While discrimination based on sexual orientation inherently includes discrimination based on sex, the statutory language of Title VII prohibits discrimination based on sex. Therefore, for pleading purposes, it would be prudent to assert the claim as sex discrimination, identifying sexual orientation as part of the facts. This is not unlike a claim for sex discrimination in violation of Title VII in which sexual harassment is alleged in the facts.

Employers covered by Title VII should update their handbook policies. Policies should prohibit discrimination based on sexual orientation, gender identity, and transgender status. Best practice would be to incorporate these protected classes specifically in the harassment policy.

Consider amending policies to allow employees to follow the dress code and use the locker room / bathroom facilities of the gender to which they identify. It is less stressful for all parties concerned if such policies are adopted and questions answered outside the context of any particular transgender individual's request.

Employers covered by Title VII should incorporate these concepts into their discrimination and harassment training, particularly for managers, supervisors, and human resources staff.

B. Catholic School Teachers Are "Ministers" and Cannot Sue for Employment Discrimination - *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049, 207 L.Ed.2d 870 (2020).

1. Background

In 2012, the U.S. Supreme Court created a doctrine known as the "ministerial exception" which prohibits leaders of religious organizations from asserting claims under employment discrimination laws. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission, 565* U.S. 171 (2012). Cheryl Perich, a teacher at a Lutheran school, took a leave of absence after being diagnosed with narcolepsy. When she notified the employer that she would soon be medically released to return to work, she was replaced and told it would be best if she resigned. When she threatened to sue, she was terminated. The EEOC filed suit on her behalf alleging retaliation in violation of the Americans with Disabilities Act. Ms. Perich was an ordained minister in the Lutheran church who, in addition to extensive non-religious duties, led students in prayer and taught a religion class several days a week. The Court held that she performed "important religious functions." The Court held that her claims were barred based on First Amendment to the United States Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment Clause prevents the government from appointing ministers, and the Free Exercise Clause prevents the government from interfering with the freedom of religious groups to select their own ministers. In reaching its conclusion, the Court considered the employee's religious functions, title, training, and actions.

2. Case History and Facts

On July 8, 2020, the Court, by a vote of 7-2, held that the ministerial exception applied to two fifth grade teachers at Catholic elementary schools. The two 9th Circuit decisions regarding these two teachers, *Our Lady of Guadalupe School v. Morrissey-Berru*, 769 F. App'x 460 (9th Cir. 2019) and *St. James School v. Biel,* 911 F. 3d 603 (9th Cir. 2019) were consolidated. The Court found that while the teachers were not ordained ministers, they were found to play a key role in teaching religion to their students.

Agnes Morrissey-Berru taught at Our Lady of Guadalupe School where teachers were not required to be Catholic. She taught all subjects and provided religious instruction every day using a textbook designed for use in teaching religion to young Catholic students. All teachers at the school were considered catechists, teachers of religion responsible for the faith formation of their students. Ms. Morrissey-Berru prepared her students for participation in the Mass and for communion and confession. She was expected to take her students to Mass once a week and on certain feast days, and to take them to confession. She prayed with the students daily. When her contract was not renewed after nearly two decades at a teacher, she filed suit alleging age discrimination.

Kristen Biel taught at St. James School, performing very similar duties to that of Ms. Morrissey-Berru. Her position did not require that she be Catholic. When her contract was not renewed after she disclosed that she was being treated for breast cancer, she filed suit under the Americans with Disabilities Act.

Both trial courts dismissed the claims as barred by the ministerial exception. The U.S. Court of Appeals for the 9th Circuit reversed the lower court decisions, reasoning that Ms. Morrissey-Berru and Ms. Biel mostly taught "religion from a book," and the ministerial exception applied to employees in a "religious leadership" role. *Biel v. St. James School*, 911 F. 3d 603 (9th Cir. 2018); *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019).

3. The Supreme Court's Analysis

The Supreme Court noted that a variety of factors may be important in determining whether the ministerial exception applies. Whether a religious institution calls an employee a "minister" is not, standing alone, dispositive.

Title search: Employment Law Update

First appeared as part of the conference materials for the
2021 Essential Employment Law: A Practical Course in the Basics session
"Hot Topics"