

CLIENT ALERT: Sexual Orientation and Gender Identity Added to Title VII's List of Protected Classes

In a landmark 6-3 decision issued on June 15, 2020, *Bostock v. Clayton County*, 590 U.S. ____ (2020), the Supreme Court of the United States ruled that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or transgender status. The decision involved three different cases, all of which concerned long-time employees who were fired after revealing their sexual orientation or transgender status. The question before the Court was the meaning of Title VII's prohibition on discrimination "because of sex," and whether "sex" encompasses sexual orientation and transgender status.

Writing for the majority, Justice Gorsuch stated, "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." He explained that when an employer takes an adverse action against an employee because of the employee's sexual orientation or transgender status, that action is made, at least in part, because of that individual's sex. If an employer terminates an individual for being homosexual or transgender, then the employer is terminating that individual for certain traits that it would not have questioned in members of the opposite sex. Therefore, sex plays an "undisguisable role" in that adverse decision.

Importantly, the Court majority reviewed the "but-for" causation standard in the statute and the significance of an employer's intent. The Court explained that an individual's sex does not have to be the sole cause of the adverse action, but rather the employer still violates Title VII if it intentionally relies in part on the individual's sex when making the decision. The majority reasoned that because discrimination on the basis of sexual orientation or transgender status requires the employer to intentionally treat the individual differently because of his or her sex, then the employer is violating the statute.

The Court explained that its decision is narrow and explicitly recognized that it was not answering every question that will arise due to its opinion—including issues regarding single-sex bathrooms and locker rooms. The Court further explained that religious free exercise arguments were not before the Court and, therefore, were not considered. As a result, this decision leaves the door open for the Court to hear more broad sexual orientation cases, including transgender access to bathrooms and locker rooms.

Justices Thomas, Alito and Kavanaugh all dissented from the majority. Justices Alito and Thomas called the decision "legislation," and Justice Kavanaugh agreed, arguing that Title VII, when it was written, did not prohibit discrimination because of sexual orientation or gender identity, and it is the role of Congress, not the Court, to amend the statute.

Although Massachusetts state law already prohibits discrimination on the basis of sexual orientation and gender identity, to the extent that employers do not already include sexual orientation and gender identity as protected categories in anti-discrimination and anti-harassment policies in states

without that coverage, those should be updated to reflect the Court's decision. Moreover, this decision opens up employers to federal discrimination claims before the Equal Employment Opportunity Commission or federal courts based on sexual orientation and gender identity.

Employers should consult their MBJ attorneys for assistance regarding how this change in federal law affects your workplace.

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