# Bostock v Clayton County, Georgia: What the U.S. Supreme Court Decision on LBGT Employee Rights Means For Your Practice

**By Scott Hickman, J.D.**

On June 15, 2020, the United States Supreme Court issued its opinion on a trio of consolidated cases regarding discrimination against LBGT employees in the workplace. In *Bostock v. Clayton County, Georgia,* the Court held in a 6-3 decision that Title VII, the federal law that generally prohibits discrimination in the workplace based on sex (among other characteristics), bans discrimination against gay, lesbian and transgender employees.

The Court did not address, except to note that these issues were not present in the cases before them, the effect of its decision on the application of Title VII to religious

organizations, or how Title VII is to be applied to workplace dress codes, locker rooms and bathrooms. Without doubt, these important and sometimes difficult issues will be addressed in subsequent litigation and regulations, but we now know an "employer who fires an individual merely for being gay or transgender defies the law."

The cases came to the Court based on three different fact patterns. In two of the cases, a skydiving instructor and a child-welfare-services coordinator sued their former employers alleging that they were fired because they were gay. The third case involved a lawsuit brought by the United States Equal Employment Opportunity Commission against a Michigan employer after it terminated the employment of a transgender funeral director and embalmer who announced that she would begin living as a woman. Justice Gorsuch, who authored the majority opinion, framed the issue as follows: "Today, we must decide whether an employer can fire someone simply for being homosexual or transgender." On behalf of the Court, Justice Gorsuch concluded that when an employer takes an adverse employment action against an employee "for being homosexual or transgender," that employer "fires 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."

*Bostock* has rightly been given significant media attention and is a landmark case for the LBGT community, which has long argued that it was entitled to protection under Title VII against discriminatory employment actions based on their identity. But what does the decision mean for employers, and what do you need to do as an employer to remain in compliance with the law? The answer may be "less than you might think." I believe this is the case for two, related reasons. First, the Court's opinion is consistent with the position that has been taken by the EEOC for years: that LBGT employees are protected by Title VII. Several federal courts agreed with this position, and LBGT employees were also protected under state law in some jurisdictions. The EEOC already had in place regulations protecting LBGT employees, and, as noted above, it brought the case on behalf of the transgender employee that was addressed in *Bostock* and argued on behalf of the employees in all three cases. Second, because this has been the EEOC's position for some time (and because they thought it was the right thing to do for their business and their employees), most employers have already amended their policies to offer protection to LBGT employees, especially as to sexual orientation.

In light of the *Bostock* decision, I will be encouraging my clients to review their formal EEO policies to insure that – if they did not already – their policies explicitly prohibit discrimination for being gay, lesbian and/or transgender. Employers should then take steps to apply those policies appropriately across a range of situations that may implicate discrimination based on sex, including:

- Hiring, promotion, compensation, performance evaluation and discipline;
- Sexual harassment;
- Pregnancy discrimination;
- Making employment decisions based on stereotypes about how men or women

should appear or act;
- Terminating an employee because they are transgender or plan to transition from presenting as one sex to presenting as another sex;
- Treating an employee married to a same-sex spouse differently than an employee married to a different-sex spouse; and
- Discrimination in employment benefits, such as healthcare coverage, based on LBGT status or the sex of an employee's spouse.

Then, with respect in particular to transgender employees, employers should be aware of the behaviors that have already been identified by the EEOC as inconsistent with Title VII. These include:

- Taking an adverse employment action against a transgender individual because the person is transgender or because the person expresses an intention to transition from one sex to another sex;
- Offering a job to an applicant who initially presents as one sex but rescinding the offer when the employer learns that the applicant plans to or transitions to the other sex;
- Hostility to transgender or gender-nonconforming individuals because they do not look or act like the employer thinks a man or woman should act;
- Refusing to allow a transgender individual to wear the clothing associated with the gender the individual identifies with;
- Refusing to allow a transgender individual to use the restroom appropriate for the gender the individual identifies with; and
- Failing or refusing to use a transgender employee's correct name and pronoun if such conduct is sufficiently severe or pervasive to create a hostile work environment.

Finally, it should be noted that nothing contained in *Bostock* or in the existing EEOC guidance changes the employment-at-will doctrine or prevents an employer from making workplace decisions for any legitimate and non-discriminatory reason. For example, dress codes remain enforceable if they promote legitimate business purposes such as the safety of employees or others (and employers are already wisely moving away from having sex-specific dress codes in favor of policies that simply comply with general concepts of professionalism). All employees are still subject to discipline and discharge for failure to comply with an employer's legitimate job performance expectations. Employers can – and should – however, use *Bostock* as a reminder that all policies and workplace decisions should be implemented on a non-discriminatory basis and without reference to an employee's identity or characteristics. And as always, should you have any issues that arise as you deal with employment issues for LBGT employees or others, you should obtain and follow legal advice from an attorney experienced in employment matters.

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