

Bostock v. Clayton County, Georgia

A Synopsis of the Supreme Court's Decision to Protect Gay and Transgender Employees

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By Brooke D. Anthony

On Friday, June 12, the Trump Administration issued a final rule rolling back protections under the Affordable Care Act for homosexual and transgender individuals. The rule defines "sex discrimination" for purposes of the Affordable Care Act as discrimination on the basis of being a man or a woman and specifically excludes protection for gender identity or sexual orientation. The rule was announced on the anniversary of the Pulse nightclub shooting and at the beginning of Pride month. But as importantly, it came while the United States Supreme Court was weighing the very question the administration was purporting to answer – how one defines "sex" for the purposes of discrimination.

Three days later, in an opinion written by one of the Court's more conservative justices, we learned that the United States Supreme Court does not agree with the Trump Administration's definition. The Court found that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability."

The three cases consolidated in *Bostock v. Clayton County, Georgia* all arose from lawsuits initiated by employees who were fired shortly after informing their employers that he or she was homosexual or transgender. Each filed suit under Title VII alleging unlawful discrimination on the basis of sex. The Second and Sixth Circuits agreed that firing these employees on the basis of their



homosexual or transgender status was a violation of Title VII. The Eleventh Circuit split from that decision.

The Court's analysis of liability under Title VII is comprehensive. First, the Court focused on the definition of "sex" under Title VII. This is the thrust of the Trump Administration's rule, as well as the employers' arguments before the Court. "Sex," they said, is defined by the biological experience of being a man or a woman. The Court responded that even accepting that definition, however, it is only the first part of the inquiry. The second part is what Title VII says about "sex."

On that issue, the Court looks at two components of Title VII liability. First, the Court discussed the "but for" causation standard and noted that a defendant cannot avoid liability by citing some other factor for its employment decision if "sex" was also a "but for" cause. Then, the Court turned to the requirement that liability for discrimination under Title VII be examined at the individual level. In other words, it is no defense to liability for an employer to say that it discriminates against homosexual or transgender men and women equally. The question is whether the discrimination was "in part because of sex." The Court found that when discriminating

based on transgender or homosexual status, the employer necessarily does so "in part because of sex."

The Court rejected each of the employer-defendants' textual and extra-textual arguments in opposition. With respect to the employer's textual arguments, the Court observed that "at bottom" the employers seem to suggest that for liability to attach, sex must be the "sole or primary-cause of an adverse employment action." But, the Court explained, "that suggestion is at odds with everything we know about [Title VII]." The Court reiterated that discrimination on the basis of homosexuality and transgender status are intertwined with discrimination based on sex – "the first cannot happen without the second." On the arguments based on "assumptions and policy," the Court explained that it must read the plain language of the statute and be careful not to "displace the plain meaning of the law in favor of something lying beyond it." The Court left open the issue of separate religious-freedom based challenges to the law, finding that the issue was not presently before the Court.

The Court's analysis under Title VII is not particularly novel. It flows logically from the statute's language and Court precedent. But the consequences of the analysis are monumental for employees who now can take comfort that their homosexual and transgender status are protected under federal law.

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