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Bostock and Related Cases: A Landmark Decision for the LGBTQ Community and Employment Law Alike

On June 15, 2020, the Supreme Court of the United States held in a series of related cases (***Bostock v. Clayton County***; ***Altitude Express, Inc. v. Zarda; R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC***.) that Title VII of the Civil Rights Act of 1964, which makes it unlawful to discriminate "because of [an employee's] race, color, religion, sex, or national origin," prohibits employment discrimination against LGBTQ workers. Before the decision, employers in most states could discriminate on the basis of sexual orientation or gender identity.

As co-chair of BR Pride, Blank Rome's LGBTQ+ affinity group, I eagerly awaited this decision and hoped that the Supreme Court would bring good news this Pride Month. When the Court delivered, I turned to Stephanie Gantman Kaplan, my friend and partner in Blank Rome's Labor & Employment practice group to learn more about the decision and what it means for LGBTQ employees and their employers. Our conversation is reproduced below.

Beth: The recent Supreme Court ruling in *Bostock* and the related cases is clearly a momentous outcome being celebrated by the LGBTQ community, as it means that employees cannot be fired because of their sexual orientation or gender identity. Is it a significant decision within the landscape of employment law as well?

Stephanie: The decision is undoubtedly a monumental victory for the LGBTQ community. From the employment law perspective, the holding was not a surprise, particularly after the 2018 Supreme Court decision in *Masterpiece Cakeshop*. We have been discussing with employers for many years now that even if they operate in states that did not legally protect LGBTQ rights in the workplace, companies should not be subjecting employees to differential treatment on that basis. With that said, it provides employers and employees alike with clarity on the issue, which is important. I think for those of us closely following the cases, what was interesting, and perhaps unexpected for many, was that the majority included two conservative justices, with President Trump appointed Justice Gorsuch authoring the decision.

Beth: Yes, many people were surprised that Justice Gorsuch would author an opinion supporting this result. Can you explain Justice Gorsuch's reasoning in finding that Title VII protects LGBTQ employees?

Stephanie: Justice Gorsuch used a textualist approach to reach the decision. That means, he looked only at the meaning of the words of the law, not the intention of those who drafted the law. Here, Title VII prohibits discrimination "because of . . . sex." Justice Gorsuch reasoned that "if changing the employee's sex would have yielded a different choice by the employer," then the employer has violated Title VII. He examined a few hypotheticals to support his finding. First, Justice Gorsuch explained that where an employer fires a male employee only because he is attracted to men while retaining an otherwise "materially identical" female employee who is also attracted to men, the employer has made the decision based on the employee being a male and has thus discriminated against him because of his sex. In the second example, if an employer fires a transgender employee who was identified as male at birth but now identifies as female, but retains an otherwise "materially identical employee" who was identified as female at birth, that employer has made a discriminatory decision based on the transgender employee's sex.

Beth: Does the Supreme Court's ruling protect LGBTQ employees from discrimination in other types of employment decisions beyond just being fired?

Stephanie: Yes. While the Court analyzed a group of three cases where employees were terminated for being LGBTQ, the law protects against discrimination in any adverse action because of a protected characteristic. An adverse action is one that is significant enough to alter an employee's compensation, terms, conditions, or privileges of employment. Certainly, termination would rise to the level of an adverse action, but other acts may as well, such as a demotion, discipline, or pay reduction. Therefore, put simply, as a result of this decision, an employer cannot take any adverse action based on a person's sexual orientation or gender identity.

Beth: Less than half of U.S. states already protected LGBTQ employees from discrimination in the workplace under their own state laws. What does this mean for the 26 states who did not already have those protections? Will they need to update their state laws accordingly?

Stephanie: Great question—the short answer is, no. The recent Supreme Court holding is based on Title VII, which is a federal law that applies to U.S. employers with 15 or more employees. It does not speak to state anti-discrimination laws, which importantly often apply to employers with less than 15 employees that would not be subject to the federal law. As a practical matter, however, based on the Supreme Court's decision most employees nationwide are now legally protected from sexual orientation and gender identity discrimination under federal law.

Beth: What should employers be doing within their companies to make sure they comply with the new ruling?

Stephanie: First and foremost, employers should review their handbooks to confirm their anti-discrimination and equal employment opportunity policies are fully up to date and compliant based on this development in the law.

But there is more for employers to consider. This decision comes at a unique time in the history of the Unites States, during a pandemic and while the nation is grappling with issues of disparate treatment based on race. With issues of equality at the forefront and when facing unprecedented circumstances, employers can engage with employees on new levels. We have been working with our clients to develop innovative employee training programs addressing these issues, which are uniquely tailored based on each company's culture and business.

Beth: Supreme Court decisions can be known to raise more questions than they answer. Are there questions about employment discrimination that the decision raises but does not answer and which will be open for interpretation until addressed by the legislature or the courts going forward?

Stephanie: I think there are a lot of interesting open questions. Still to be decided, for example, is the impact of the ruling on religiously affiliated employers. Also, be on the lookout for the practical impact of this decision on workplace practices, such as gender-based bathrooms and locker rooms and dress codes, and beyond in areas such as public accommodations, service providers, and retail. For now, we will have to stay tuned…

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