Overdue Protection for LGBTQ Workers

By Jeff Kosbie

The U.S. Supreme Court's decision this year in *Bostock v. Clayton County* finding that Title VII of the Civil Rights Act of 1964 includes discrimination based on sexual orientation and gender identity is monumentally important.[1] Before this decision—which covers three Title VII cases—advocates frequently lamented that in much of the country, lesbians and gays could be "married on Sunday, fired on Monday." Now, at least, the Court has said that they have a cause of action if that happens.

Title VII. Under Title VII, it is illegal to discriminate in employment "because of . . . sex."[2] Early cases consistently concluded that Title VII did not protect transgender employees, explaining that the plain meaning of the term "sex" referred to the "traditional meaning" of sex and that Congress intended only to make sure that men and women are treated equally.[3] Similarly, courts relied on the traditional meaning of sex and congressional intent in concluding that Title VII did not extend to discrimination based on sexual orientation.[4]

Relying in part on a theory of gender stereotyping—that a person was treated differently because their appearance or behavior did not conform to gender stereotypes—federal courts began protecting transgender plaintiffs under Title VII in the mid-2000s, becoming a near-consensus leading up to *Bostock*.[5]

Jeff Kosbie is an attorney at Gibbs Law Group in Oakland, Calif., and is cochair of the Bay Area Lawyers for Individual Freedom. He can be reached at jbk@classlawgroup.com.

More of a patchwork emerged with respect to sexual orientation. Some courts extended the gender stereotyping theory to discrimination based on sexual orientation, but many continued to exclude gays and lesbians from Title VII's protection on the ground that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"[6] Courts engaged in a seemingly arbitrary line-drawing exercise between discrimination based on sexual orientation that did or did not rely on gender stereotypes.

Bostock, Zarda, *and* R.G. & G.R. Harris Funeral Homes. The questions before the Court in these cases were whether Title VII's prohibition on discrimination because of sex encompasses discrimination based on an individual's sexual orientation and whether Title VII prohibits discrimination against transgender employees based on their status as transgender or based on gender stereotyping.

All three cases involved long-term employees with positive reviews who were fired shortly after their employers learned about their sexuality or gender identity. In *Bostock*, the Eleventh Circuit reaffirmed existing precedent that Title VII did not encompass discrimination based on sexual orientation.[7]

In contrast, the Second Circuit, sitting en banc in *Zarda v. Altitude Express, Inc.*, overruled its own precedent and concluded that Title VII's prohibition against discrimination because of sex necessarily includes discrimination because of sexual orientation.[8] In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit concluded that discrimination against a transgender person, including discrimination based on transitioning, violates Title VII.[9]

In its consolidated opinion, the Court concluded that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[10] Writing for the majority, Justice Neil Gorsuch said Title VII is clear—if an employment action would not have occurred but for an employee's sex, that constitutes sex discrimination.

Critically, the Court's formalistic approach confirmed that a defendant cannot avoid liability by identifying other explanations for its action. The Court also explained that because the statute itself is clear, it does not matter if Congress was thinking about LGBTQ people when it passed Title VII.

The majority opinion did not mention gender stereotyping except in passing, declined to take up the meaning of sex, and explicitly did not address issues such as dress codes and locker rooms. Because the opinion leaves no ambiguity that discrimination against transgender, lesbian, and gay people constitutes sex discrimination, there likely is a strong argument under *Bostock* for extending Title VII to all discrimination based on

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gender nonconformity or sexuality, but practitioners need to pay attention to these issues.

The Religious Freedom Restoration Act (RFRA). This statute applies strict scrutiny to laws that substantially burden a person's exercise of religion. In a potentially huge carve out, the Court described RFRA as a "super statute" that might supersede Title VII in certain cases and stated that it was not addressing any potential defenses that employers might have related to RFRA.[11]

This is particularly concerning given the Court's continued exclusion of religious organizations from neutral nondiscrimination laws, including in the recently decided *Our Lady of Guadalupe School v. Morrissey-Berru*,[12] when the Court expanded the ministerial exception. Moreover, this October Term, the Court will consider *Fulton v. City of Philadelphia*,[13] which asks whether the Court should revisit its precedent concluding that neutral laws do not violate the First Amendment when applied to religious organizations.

Continued need for the Equality Act. *Bostock* is monumental, but its limitations point to the continued need for the Equality Act[14] and state-level counterparts. Such legislation would add gender identity, gender expression, and sexual orientation to existing nondiscrimination laws, including those related to employment, housing, credit, and federally funded programs. These laws could further strengthen Title VII protections and eliminate any remaining ambiguity about the scope of nondiscrimination laws. T

Notes

1. 140 S. Ct. 1731 (2020). For more on these cases, see Amy Brogioli, *Focus on 2020*, Trial 56 (Jan. 2020).
2. 42 U.S.C. §2000e-2(a) (Westlaw through P.L. 116–148).
3. *See, e.g.*, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984).
4. *See, e.g.*, *DeSantis v. Pac. Tel & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979).
5. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).
6. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005).
7. 723 F. App'x 964 (11th Cir. 2018).
8. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112–13 (2d Cir. 2018).
9. 884 F.3d 560, 574–75 (6th Cir. 2018).
10. *Bostock*, 140 S. Ct. at 1741.
11. *Id.* at 1754.
12. 2020 WL 3808420 (U.S. July 8, 2020). The exception bars application of employment nondiscrimination laws to a religious institution's employment of "ministers."
13. 140 S. Ct. 1104 (cert. granted Feb. 24, 2020).
14. H.R. 5, 116th Congress (2019).