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Blog Post

It's Official: Discrimination on Basis of Sexual Orientation/Transgender Status is Prohibited

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Employers should take note that discrimination on the basis of sexual orientation or transgender status now clearly violates federal law. In a landmark decision issued on June 15th, in *Bostock* v. *Clayton County*, the Supreme Court held (6-3) that an employer who fires an individual for being gay or transgender violates Title VII of the Civil Rights Act of 1964.

Under Title VII, it has always been unlawful for an employer to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1). Writing for the majority in 33 pages of the 172-page opinion, Justice Gorsuch put it quite simply: "Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender 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,

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exactly what Title VII forbids. . .Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

Justice Alito, joined by Justice Thomas, wrote one dissent and Justice Kavanaugh another. In the latter, Justice Kavanaugh offered this conclusion: "Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment."

The Equal Employment Opportunity Commission has long taken the position that Title VII prohibits employment discrimination based on gender identity or sexual orientation, and issued guidance in 2015 on LGBT-related sex discrimination claims. However, sexual orientation and transgender status were not expressly included in the statute and not all courts agreed.

Many states and localities offered more protections to LGBT workers than federal law; others did not. This Supreme Court decision is particularly important for employers who operate in locations without state or local laws which explicitly bar employment discrimination on the basis of sexual orientation or gender identity. Twenty-two states, as well as the District of Columbia, have statutes protecting workers on the basis of sexual orientation; twenty-one states, as well as the District of Columbia, have statutes protecting workers from discrimination on the basis of gender identity. Those working in other localities were not previously guaranteed such protections.

In light of the recent decision, all employers should update their written workplace policies to forbid discrimination on the basis of sexual orientation or transgender status if they do not already do so. Savvy employers will also prohibit "gateway conduct," workplace incivility that does not rise to the level of discrimination, but can lead to it. Such policies should provide a clear procedure for employees to complain about violations of such policies and provide for prompt corrective action. In addition, now is the time for employers to train employees and, especially, managers about their important role in upholding such workplace policies. For help in drafting anti-harassment, discrimination, and retaliation policies and conducting workplace trainings, as well as for any other discrimination-related questions you may have, contact your Akerman attorney.
