



Employment Practices Liability Consultant (EPLiC)

SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION: A LANDMARK CASE EXPLANATION AND BEST PRACTICES FOR COMPLIANCE

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The right to marry was recognized as a fundamental right guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution in the *Obergefell v. Hodges* Supreme Court opinion in June of 2015. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). However, in approximately half of states, employers could still lawfully terminate an employee because of his, her, or their sexual orientation and/or gender identity. This created a problematic situation in which, for example, a lesbian couple had the constitutional right to get married over the weekend but could legally lose their jobs on Monday as a result.

The United States had a patchwork quilt of laws on the issue with many holes. Twenty-two states' laws explicitly prohibited discrimination based on sexual orientation and gender identity.

Two states had interpreted existing state laws that prohibit sex discrimination to also prohibit sexual orientation and/or gender identity discrimination. One state explicitly prohibited discrimination based on sexual orientation but not gender identity. Twenty-five states had no explicit state law prohibitions of discrimination based on sexual orientation or gender identity. Two federal circuits (the Second Circuit and Sixth Circuit) interpreted Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on sexual orientation and gender identity, respectively. This legal landscape was explored in detail in a previous article on the subject in the Fall 2018 issue of *Employment Practices Liability Consultant* titled "[Let's Talk about Sex\[ual Orientation Discrimination\]: A Discussion of Recent Developments and Their Nationwide Implications.](#)"

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Landmark Opinion: *Bostock v. Clayton County, Georgia*

Overnight, the complicated patchwork of laws prohibiting sexual orientation and gender identity discrimination evolved into a single rule for all employers covered by Title VII nationwide. On June 15, 2020, the US Supreme Court issued a 6–3 opinion in *Bostock v. Clayton County, Georgia* that held that “[a]n employer who fires an individual merely for being gay or transgender violates Title VII.” *Bostock v. Clayton Cnty.*, No. 17–1618, 17–1623, and 18–107, 2020 U.S. LEXIS 3252 (U.S. June 15, 2020). Justice Neil Gorsuch authored the opinion, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan and Chief Justice Roberts. *Id.*

Title VII is a federal law that prohibits employment discrimination against employees based on race, color, religion, sex, or national origin. 42 U.S.C. Â§ 2000e-2(a). The Circuit Courts were split and disagreed whether employment discrimination based on sex included discrimination based on sexual orientation and gender identity. The Eleventh Court concluded that Title VII did not prohibit the county employer from discharging a gay county employee for his sexual orientation after he began playing in a gay recreational softball league. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018). The Second Circuit held that firing a gay skydiving instructor due to his sexual orientation was prohibited by Title VII. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018). The Sixth Circuit determined that a funeral home employer was prohibited from terminating the employment of a transgender woman because of her gender identity. *EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018). The Supreme Court granted review of these three cases on certiorari to resolve the circuit split. The Supreme Court framed the issue as “whether an employer can fire someone simply for being homosexual or transgender.” *Bostock*, 2020 U.S. LEXIS 3252.

Statutory Meaning Derived from Ordinary Use of Words

The Supreme Court began its analysis by interpreting the words used in the statute in accordance with the ordinary public meaning at the time the statute was enacted. *Bostock*, 2020 U.S. LEXIS 3252. In 1964, when Title VII was enacted, the word “sex” meant a person’s “status as either male or female [as] determined by reproductive biology.” *Id.* at *5. Title VII prohibits discrimination against individuals by employers “because of” sex, meaning “by reason of” or “on account of.” *Id.* An individual’s sex need not be the only reason for the decision and only needs to be one of the reasons. *Id.* at *5–6. In 1991, Congress clarified that a plaintiff can prevail on her Title VII claim “by showing that a protected trait like sex was a ‘motivating factor’ in a defendant’s challenged employment practice.” *Id.* at *6. In 1964, to “discriminate” meant to “make a difference in treatment of favor of one as compared with others.” *Id.* at *7. The Supreme Court concluded that “an employer who intentionally treats a person worse because of sex—such as by firing the person for action or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.” *Id.* at *7. A concise summary of the rule is instructive.

An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.

Id. at *9.

Examples and Reasoning

An illustrative example used by the Court involves two employees who are both attracted to men. *Id.* at *9. These two individuals are identical except that one employee is a woman and the other is a man. *Id.* If the employer terminates the employment of the male employee because he is attracted to men, then the employer is discriminating against the male employee by treating him differently from his female coworker. *Id.* at *9–10. In another instance, an employer discharged a transgender person who identifies as a woman but kept an identical employee who was identified as a female at birth. *Id.* at *10. This differing treatment intentionally penalizes an individual who identified as male at birth while tolerating that trait for an employee who identified as female at birth. *Id.* at *10. In both of these examples, the employee’s sex is the but-for reason for the discharge.

Moreover, the Supreme Court has consistently held that Title VII prohibits the discharge of an employee for “failing to fulfill traditional sex stereotypes.” Terminating the employment of a worker because she is gay or transgender similarly violates Title VII because she does not fulfill traditional sex stereotypes.

Scope of Prohibition of Sex Discrimination

Title VII applies to all federal employees and all private employers across the country with 15 or more employees. For states without legal protections against discrimination based on sexual orientation and gender identity, employers with fewer than 15 employees are not prohibited from such discriminatory conduct.

Title VII prohibits employers from discriminating against employees due to protected characteristics and applies in three situations: (1) hiring, (2) termination of employment,

(3) “or otherwise to discriminate against any individual.” While the first two are straightforward, the third is much broader and applies to the terms of conditions of employment. [According to the Equal Employment Opportunity Commission](#), this “means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning workstations, or setting any other term or condition of employment—however small.” For instance, if an employer provides health benefits to spouses of employees, this benefit should be provided to both opposite-sex and same-sex married couples. As another example, if a lesbian employee is disciplined for having a wedding photo with her spouse displayed in her office, and her female coworker displaying a wedding photo with her husband was not disciplined, that could be considered discriminatory based on sexual orientation.

Best Practices for Employers

For employers in states with explicit prohibitions of discrimination based on sexual orientation and gender identity, this new case does not change the law. For employers covered by Title VII and operating in states where there was no law explicitly condemning discrimination on the basis of sexual orientation and gender identity, we have provided a checklist to help you become compliant.

Small employers that are not covered by Title VII operating in states where there is no state law explicitly condemning discrimination on the basis of sexual orientation and gender identity may nevertheless want to consider voluntarily following these policies and practices to provide a diverse and inclusive work culture and in order to recruit and maintain top talent.

COMPLIANCE CHECKLIST—SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

- ◆ Review your **employee handbook** and other written policies to confirm that sexual orientation and gender identity are included as protected characteristics.
- ◆ Review and revise your **equal opportunity, sexual harassment, and retaliation policies** to add sexual orientation and gender identity as protected characteristics.
- ◆ Update your **dress code policy** to ensure that transgender employees are permitted to express their gender identity while at work.
- ◆ **Personnel forms** may need to be updated to be inclusive of transgender employees and employees in same-sex relationships.
- ◆ Ensure that policies permit transgender employees to utilize the **restroom and locker room** of the gender with which they identify.
- ◆ Confirm that employees with same-sex partners have the same **benefits** available as employees with opposite-sex partners, including health benefits.
- ◆ Review **hiring practices** to ensure that hiring decisions are not made based on sexual orientation, gender identity, and other protected characteristics.
- ◆ **Train** managers and Human Resources personnel about the new law and protections for employees based on sexual orientation and gender identity.
- ◆ Train managers and Human Resources personnel to **investigate complaints** of discrimination and harassment arising from sexual orientation, gender identity, and other protected characteristics.
- ◆ Train managers and Human Resources personnel to refrain from considering sexual orientation, gender identity, and other protected characteristics when making decisions about **furloughs, layoffs, and reductions in force**.
- ◆ Train managers and Human Resources personnel to ensure that sexual orientation, gender identity, and other protected characteristics are not relevant when making decisions about **discipline and termination** of employment.
- ◆ Train managers and Human Resources personnel to encourage all employees to respectfully respond to concerns regarding **bathroom use, locker room use, religious discrimination, and free speech** concerns.
- ◆ Train managers and Human Resources personnel to encourage all employees to create a culture of **mutual respect** and investigate complaints of sexual orientation and gender identity discrimination and harassment.

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