

# Supreme Court Holds That Title VII's Prohibition On Discrimination Because Of Sex Includes Sexual Orientation And Transgender Status Discrimination

Client Alert | June 15, 2020

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Decided June 15, 2020

***Bostock v. Clayton County, Georgia*, No. 17-1618;**

***Altitude Express, Inc. v. Zarda*, No. 17-1623; and**

***R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107**

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Today, the Supreme Court held 6-3 that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses employment discrimination because of a person's sexual orientation or transgender status.

## Background:

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Donald Zarda was a former skydiving instructor at Altitude Express. Gerald Bostock worked as a child welfare services coordinator for Clayton County, Georgia. Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes and originally presented as a male, but later told her employer that she planned to live and work as a woman. All three were fired allegedly because of their sexual orientation or transgender status, and they initiated sex discrimination claims against their former employers under Title VII. In Zarda's case, the Second Circuit held that discrimination based on sexual orientation is a "subset of sex discrimination." In Bostock's case, the Eleventh Circuit held that Title VII does not apply to discrimination based on sexual orientation and affirmed the dismissal of Bostock's Title VII claim. And in Stephens' case, the Sixth Circuit held that Title VII applies to discrimination on the basis of transgender status.

## Issue:

Whether discrimination against an employee because of sexual orientation or transgender status constitutes prohibited discrimination within the meaning of Title VII.

## Court's Holding:

Yes. Title VII's prohibition on discrimination based on sex encompasses sexual orientation and transgender status. An employer violates Title VII when it discharges an employee in part because of sexual orientation or transgender status.

*"[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."*

Justice Gorsuch, writing for the majority

## What It Means:

- Justice Gorsuch's majority opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, was grounded in the text and the ordinary public meaning of the statutory terms at the time of enactment. Justice Gorsuch reasoned that Title VII's prohibition on employment discrimination "because of . . . sex" necessarily encompasses discrimination on the basis of sexual orientation or transgender status because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," slip op. 9, and therefore an employer who fires an employee based on sexual orientation and transgender status "inescapably *intends* to rely on sex in its decisionmaking," *id.* at 11.
- Justice Gorsuch acknowledged that Title VII's prohibition on discrimination "because of . . . sex" may have been originally *intended* to cover only gender-based discrimination, not discrimination based on sexual orientation or transgender status. Echoing the late Justice Scalia's reasoning in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court held that same-sex sexual harassment can violate Title VII, Justice Gorsuch explained that even if Title VII's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address, the fact that a statute is applied in a new context does not render its meaning ambiguous.
- In dissent, Justice Alito, joined by Justice Thomas, emphasized that there is no evidence that the members of Congress who voted for Title VII in 1964 would have contemplated that it prohibited discrimination based on sexual orientation or transgender status. In a separate dissent, Justice Kavanaugh stated that he believed the majority's interpretation violated the separation of powers because the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not the courts.
- The Court's opinion expressly cabins its reach to Title VII, perhaps reducing the likelihood that the decision will have an impact in other areas involving different statutes, such as Title IX or the Americans with Disabilities Act. The Court also noted that it was not addressing questions about "sex-segregated bathrooms, locker rooms, and dress codes." Slip op. 31. And the Court acknowledged that the Religious Freedom Restoration Act of 1993 "might supersede Title VII's commands in appropriate cases." *Id.* at 32. These issues are likely to arise in future cases.

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The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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