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John Semmens, Editor

U.S. Supreme Court Expands Title VII Protections to Gay and Transgender Employees

By Justin Harkins

Employers should take note that any "employer who fires an individual merely for being gay or transgender violates the law." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020). On June 15, 2020, the United States Supreme Court issued its landmark opinion in *Bostock v. Clayton County, Georgia*, a major case interpreting 42 U.S.C. § 2000e-(2), a federal law that applies to employers with 15 or more employees, commonly known as Title VII of the Civil Rights Act of 1964 ("Title VII"). A 6-3 majority of the Supreme Court, in an opinion authored by Justice Gorsuch, held that Title VII protects employees against workplace discrimination on the basis of sexual orientation and gender identity. Under this new precedent, an employer cannot take any adverse action against an employee, up to and including termination, on the basis of those characteristics. Justice Gorsuch's opinion was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito wrote a dissenting opinion, which was joined by Justice Thomas, and Justice Kavanaugh wrote a separate dissenting opinion.

The three lead plaintiffs all had been terminated as a result of their sexual orientation or gender identity: Gerald Bostock was terminated after his employer learned that he was participating in a gay recreational softball league; Donald Zarda was terminated after his employer learned he is gay; and Aimee Stephens was terminated after sending a letter to her employer indicating that she intended to "live and work full-time as a woman" after previously presenting as a man. *Bostock*, 140 S.Ct at 1737-1738. Each plaintiff claimed that Title VII prohibited the actions their employers took, with Zarda

and Stephens prevailing at the circuit-court level and Bostock failing to convince the Eleventh Circuit Court of Appeals. *Id*., at 1738.

Title VII provides in pertinent part that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-(2)(a)(1). The primary question at issue in *Bostock* was whether the prohibition on discrimination on the basis of "sex"—generally understood to prohibit discrimination on the basis of biological distinction between male and female—covers sexual orientation and gender identity.

The Supreme Court ruled that it does, explaining that "[a]n 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." *Bostock*, 140 S.Ct. at 1741.

Under Title VII, the Court explained, an employer unlawfully discriminates against an employee if it takes an adverse employment action against the employee due to sexual orientation or gender identity because it is refusing to tolerate behavior from one sex that it would tolerate from another. *Id*. In other words, in the case of sexual orientation, if an employer tolerates male employees who are attracted to women, it also must tolerate female employees who are attracted to women because the sole difference between the two categories of employees is biological sex. Similarly, in the case of gender identity, if an employer tolerates employees who identify as female who were born biologically female but does not tolerate employees who identify as female but were born biologically male, it also violates Title VII on the same basis. Again, the Court explained, the sole difference between the two categories of employees is biological sex. *Id*. at 1741-1742. As the Court put it, "[a]n 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, exactly what Title VII forbids." *Id*., at 1737.

Justice Alito's and Justice Kavanaugh's dissents both argued the Supreme Court did not have the power to include sexual orientation and gender identity among the list of traits protected by Title VII and rather that it is Congress's job to amend the law if it wants to protect those traits. Justice Alito argued that the meaning of the word "sex" in Title VII would not have contemplated sexual orientation or gender identity at the time the law was passed, and Justice Kavanaugh argued that protecting those traits violated the separation of powers between the judicial branch and Congress.

Practical Effects on Employment Practice

Employers may have questions regarding how *Bostock* will affect their employment practices. While the decision is very new and its over-riding effects on employment law may not be known for many years, we can decipher some immediate consequences from the decision itself.

First, it is clear that employers cannot discriminate against employees on the basis of sexual orientation or gender identity. An employer violates Title VII if it considers these traits *at all* in taking an adverse employment action. In other words, an employer is not aided by the fact that sexual orientation or gender identity played only a small part in the adverse employment action. In

such a situation, an employer still will have violated Title VII, no matter how many other reasons it may provide or how large in proportion those other reasons were considered when compared to sexual orientation and gender identity.

An employer also need not maintain a general policy of discriminating on the basis of sexual orientation or gender identity in order to violate Title VII. Rather, an adverse employment action taken against any single employee is sufficient to violate the law.

The *Bostock* decision is specific to Title VII of the Civil Rights Act, prohibiting discrimination against employees on the basis of sex, and therefore does not affect any other state or federal law that may govern sex discrimination. Employers certainly should be cautious about considering sexual orientation and gender identity when making employment decisions after *Bostock*, but, at least at this point, the holding is limited to actions governed by Title VII.

Next, it is unclear at this point how *Bostock* will affect the religious liberty of employers. The Supreme Court specifically discussed the Religious Freedom Restoration Act ("RFRA"), explaining "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Id.*, at 1754. That issue was not before the Supreme Court in *Bostock*, however, and the Court did not identify any particular facts that might justify a departure from the holding in *Bostock* based on religious conviction.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to Title VII and the U.S. Supreme Court's recent *Bostock* decision. If you would like more information on these topics, please contact Crowley Fleck's Employment Practice Group.

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NLRB Restores Employers' Right To Limit Employees' Personal Use Of Company Email

By Gabrielle Gee and Kim More

Employers may once again restrict their employees' personal use of employment-related email accounts, according to a recent National Labor Relations Board ("the Board") decision. *See Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino and International Union of Painters and Allied Trades, District Council 16, Local 159, AFL-CIO*, 368 N.L.R.B. No. 143 (Dec. 16, 2019). In *Caesars Entertainment*, the Board squarely overruled its controversial 2014 decision in *Purple Communications*, which held that employers who had chosen to give employees access to their email systems must permit employees to conduct self-organization and union activities during non-work hours on those systems. *See Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014). Under current federal law, employers may prohibit employees from using workplace email accounts for non-business activities, as long as the policy is facially neutral and the workplace offers other adequate means for self-organization communications.

In *Caesars Entertainment*, the employer asked the Board to consider the importance of an employer's property right to control its email server. Caesars Entertainment issued each of its employees a company handbook that included the following restrictions on computer usage:

"Computer resources may not be used to . . .

- Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom
- Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
- Send chain letters or other forms of non-business information

. . .

- Solicit for personal gain or advancement of personal views
- Violate rules or policies of the Company."

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.

This broad policy implicitly prohibited protected activities under Section 7 of the National Labor Relations Act. Section 7 guarantees employees the right to organize and engage in concerted activities for their mutual protection. Section 8 makes it an unfair labor practice for an employer to interfere with an employee's rights guaranteed under Section 7. The administrative law judge in *Caesars Entertainment* initially concluded the computer usage policy, particularly the ban on sending chain letters or other forms of non-business information, was presumptively unlawful under *Purple Communications*.

On appeal, the Board reconsidered its holding in *Purple Communications*. After a review of historical decisions dealing with an employer's right to reasonably restrict the use of its property – including televisions, copy machines, bulletin boards, public address systems, and telephones – the Board concluded that an employer's email system is indeed its property. Ultimately, the Board's holding turned on its analysis that an employer's property rights are as important as an employee's right to organize, and the two competing rights must be weighed to determine an outcome that least intrudes on either right. If employees have access to other adequate avenues to organize and communicate, such as intermingling in an office break room or cafeteria, an employer may restrict its employees' use of email for nonbusiness purposes. Under this standard, "employees have no statutory right to use employer equipment, including IT resources, for Section 7 purposes" unless such a policy deprives employees of their only reasonable means of communicating with each other.

Caesars Entertainment makes clear that employers may place restrictions on employees' use of employer email, even during nonworking hours. However, this decision assumes that employees have alternative communication methods, such as on-premises intermingling, smart phones, social media, and personal email accounts. Employers still should use caution in implementing a restrictive email policy, especially if they adjusted their traditional workplace in response to COVID-19.

If you are interested in re-evaluating your existing employment policies in light of *Caesars Entertainment*, or drafting new employment policies, please contact Crowley Fleck's Employment Practice Group.

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Amy Oster
Employment Practice Group
(701)223-6585
aoster@crowleyfleck.com

Scott Hagel
Employment Practice Group
(406) 752-6644
shagel@crowleyfleck.com

John Semmens
Employment Practice Group
(406) 449-4165
jsemmens@crowleyfleck.com

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