Supreme Court Holds that U.S. Civil Rights Act Prohibits Discrimination On Basis of Sexual Orientation/Gender Identity & Legal Remedies Therefor

In a majority opinion – by a margin of 6-3 – the U.S. Supreme Court has held that the prohibition on employment discrimination "because of . . . sex" in Title VII of the U.S. Civil Rights Act of 1964 (Title VII), includes discrimination based on an employee or prospective employee's "sexual orientation" and "gender identity." Bostock v. Clayton County, Georgia, No. 17-1618, 590 U.S. ___ (June 15, 2020). While the Court's rationale is puzzling to this practitioner – as it runs counter to the *legislative* amendments to various State civil rights acts – such as New Jersey's Law Against Discrimination – which have **expressly** added "sexual or affectional orientation" and "gender identity or expression" to the types of "unlawful discrimination" they prohibit, *i.e.*, in addition to "sex" (see N.J.S. 10:5-12a), the U.S. Supreme Court has now effectively amended Title VII of the federal Civil Rights Act to make it equivalent to those State statutes which expressly prohibit discrimination on those bases. [1]

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[1] In his eloquent dissent, Justice Kavanaugh persuasively argues that it is *not* a proper judicial prerogative for the Supreme Court to amend laws enacted by Congress, especially in an instance where both Houses of Congress – at different times – have passed legislation expressly prohibiting discrimination "because of sexual orientation," but have never jointly enacted same. His Honor writes, as follows:

> Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation. . . .
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> Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination. . . .

Notwithstanding this author's jurisprudential concerns as to the reasoning of the majority opinion written by Justice Gorsuch, it is now the law of the land. His Honor writes plainly, as follows:

> Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: **An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender**—and allegedly for no reason other than the employee's homosexuality or transgender status. . . .
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> The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "**sex**" in 1964 referred to "status as either **male or female** [as] determined by reproductive biology." . . .

> **In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand**. After all, even back in 2007—a veritable lifetime ago in American attitudes about sexual orientation— the House voted 235 to 184 to prohibit sexual orientation discrimination in employment. H. R. 3685, 110th Cong., 1st Sess. In 2013, the Senate overwhelmingly approved a similar bill, 64 to 32. S. 815, 113th Cong., 1st Sess. In 2019, the House voted 236 to 173 to amend Title VII to prohibit employment discrimination on the basis of sexual orientation. H. R. 5, 116th Cong., 1st Sess. It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.
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> (Emphasis added).

> The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of . . . sex." . . . In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U. S., at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause.
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> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. . .
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> . . . **Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected**.
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> In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: **An employer who fires an individual merely for being gay or transgender defies the law**.

(Emphasis added).

In practical terms, what this Supreme Court opinion means is that, even in States where State law does not expressly prohibit employment discrimination on the basis of sexual orientation or gender identity, employees who are discriminated against by their employer or prospective employer on those bases may now be able to bring suit under federal law, *i.e.*, Title VII of the Civil Rights Act of 1964. (It is not known nor can this author confidently predict whether State civil rights laws prohibiting discrimination "because of sex" will now be interpreted by State Courts in accordance with Justice Gorsuch's opinion in Bostock., *i.e.*, to include discrimination on the basis of sexual orientation and gender identity.)

It must also be noted that the jurisdictional basis for Title VII is Congress' constitutional authority to regulate interstate commerce. More specifically, before you can bring an action pursuant to Title VII, you must show that the employer is "engaged in an industry affecting commerce who has **fifteen or more employees** for each working day in twenty or more calendar weeks in the current or preceding calendar year . . ." 42 U.S.C. § 2000e (b) (Emphasis added). Thus, if an employee is employed with or seeks employment with an employer who employs fewer than fifteen (15) employees, s/he will **not** be protected by Title VII. Depending upon how State law may hereafter be interpreted, *i.e.*, post-Bostock, some employees and prospective employees may still not be able to bring legal action for discrimination on the basis of sexual orientation and gender identity. The issue of "an industry affecting commerce," (with "commerce" further defined as "trade, traffic, commerce . . . among the several States" 42 U.S.C. § 2000e (g)) is beyond the scope of this article due to its technical nature; however, it is noted that same is usually construed broadly, and, although there are exceptions, they are not common.

In short, if you are employed with an employer who employs fewer than fifteen (15) employees, you may only pursue legal action for employment discrimination under State law, in State or federal Court (if employed with an out-of-state employer) *or* with a State administrative/investigative agency. In New Jersey, State law expressly allows for administrative *and* judicial complaints for discrimination on the basis of sexual orientation and gender identity. In Pennsylvania, State law does not expressly make such provision; therefore, presently, you may *or* may not (see below) have such protection – although one

would expect to see litigation seeking to challenge the existing construction of the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq*., and have it interpreted to include same, along the lines set out in Bostock. Also, although the Pennsylvania Human Relations Act does not *expressly* prohibit discrimination based on sexual orientation and gender identity, a "Guidance" published on August 2, 2018 by the Pennsylvania Human Relations Commission (PA HRC) defines "sex" to include "sexual orientation" and "gender identity." Therefore, you can file a complaint with the PA HRC of discrimination on those bases within one hundred eighty (180) days of an alleged act of discrimination.

You may also now initiate a Charge with the EEOC (if you meet the "industry affecting commerce" *supra,* and 15-employee prerequisites), and if that Charge is not satisfactorily mediated, thereafter in U.S. District Court. See below. It is further noted that in Philadelphia, Harrisburg, Lancaster, Allegheny County (including Pittsburgh), State College and York, local ordinances prohibit discrimination on the basis of sexual preference/orientation and complaints may also be filed with the respective local human relations commissions therefor.

For those seeking to pursue legal remedies for **sexual orientation/gender identity discrimination under Title VII**, it is noted that you **must** first initiate your claim (Charge) with the U.S. Equal Employment Opportunity Commission (**EEOC**). If the State in which you were employed or applied for employment has a comparable civil rights act, you must file your Charge within three hundred (300) days of the most recent act of

discrimination; if the State in which you were employed/applied for employment does not have such a comparable civil rights act, you must file your Charge **within one hundred eighty (180) days of the most recent act of discrimination**.

In light of the uncertainty of the law – with the Supreme Court's Opinion issued just six weeks ago – it is recommended that you err on the side of caution and file any such Charge on the basis of sexual orientation or gender identity within the one hundred eighty (180) day period. Under **New Jersey** law, you are not required to initiate your complaint with the applicable agency, *i.e.*, Division on Civil Rights (DCR), and **may file directly in Superior Court within two years** of the date of the most recent act of discrimination. However, if you choose to start with a verified complaint before N.J. DCR, same must be initiated within one hundred eighty (180) days of the most recent act of discrimination.

Disclaimer of Advice or Opinion as to Specific Case

The above is intended only as an overview of the recent U.S. Supreme Court decision relative to sexual orientation/sexual identity discrimination and its ramifications on existing law – procedural and substantive – and not as advice or a formal opinion with respect to the specific circumstances and facts presented in any individual case or in any proposed or pending legal action. If you believe that you have suffered unlawful discrimination by an employer or prospective employer, you should contact an attorney (including this author) to discuss same at length. Only upon review and discussion of those facts and circumstances and

also of any available documentary proof of your claim, can an opinion on the viability of legal action in a specific case be made.

By Kenneth A, Sandler, August 4, 2020