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SCOTUS: FEDERAL LAW NOW PROHIBITS EMPLOYMENT DISCRIMINATION BASED SOLELY ON SEXUAL ORIENTATION OR BEING TRANSGENDER

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DECISION/RULING:

The U.S. Supreme Court has, on June 15, 2020, determined that a 1964 law ***now precludes discriminating against employees if the sole reason is that employee's sexual orientation/preference and/or transgender status***. Justice Neil Gorsuch wrote the majority opinion and was joined by Chief Justice John Roberts (both Trump appointees) in holding that a purely textual/literal interpretation of Title VII of the Civil Rights Act of 1964 means that the answer to the question of whether "an employer can fire someone simply for being homosexual or transgender" is unequivocally "no." It is unclear, at this time, how much further this SCOTUS decision may in the future be extended/expanded by lower courts as new issues (e.g., whether exclusively male and female restrooms are now permitted in the workplace) are litigated moving forward.

IMPACT:

Many if not most employers have existing anti-discrimination and other employment policies and practices that include references to legally protected classes such as race, religion, national origin, sex, age, genetic information, etc. While SCOTUS has now decided that the term "sex" in Title VII includes transgender identity and sexual orientation/preference, many employers (especially those employers in areas of the country that had not already passed local and/or state regulations on point) have not yet adopted employment policies and/or practices designed specifically to avoid discrimination against, and/or harassment of, homosexual, bisexual, and/or transgendered employees and/or candidates for employment. This is now a critical consideration for most employers.

This decision by SCOTUS may be one to which some employers may object; however, as SCOTUS is the highest-ranking court in the country, we are constrained to recommend strongly that all employers covered by Title VII re-examine their employment practices and procedures and, if concerned, to consult an employment attorney for guidance if they have specific questions concerning how to comply with this decision from our nation's final court of appeal. **Failure to do this could place employers at significant legal and financial risk**.

NOT ALL EMPLOYERS COVERED/AFFECTED:

It is important to remember that Title VII does not impact all (just most) employers. It defines an "employer" subject to its restrictions as: "…a person [or entity] engaged in an industry affecting commerce who has **fifteen [15] or more employees** for each working day in each of twenty [20] or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does **not** include (1) the United States, a corporation wholly owned by the [federal government], an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 [United States Code]), OR (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 [the Internal Revenue Code of 1986], except that during the first year after March 24, 1972 [the date of enactment of the Equal Employment Opportunity Act of 1972], persons having fewer than twenty-five [25] employees (and their agents) shall not be considered employers."

As noted by the EEOC, for example: "*Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. The exception applies only to those institutions whose 'purpose and character are primarily religious.' Factors to consider that would indicate whether an entity is religious include: whether its articles of incorporation state a religious purpose; whether its day-to-day operations are religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion?); whether it is not-for-profit; and whether it is affiliated with, or supported by, a church or other religious organization. This exception is not limited to religious activities of the organization. However,* ***it only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex*** [which term now includes sexual preference and/or transgender status]***, age, or disability****. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races*."* It is, therefore, possible but not as yet certain, that certain religious organizations may be able to continue exclusively employing members of their faith to the exclusion of others, even if that indirectly excludes homosexual, bisexual, and/or transgender candidates; however, that issue, like many others, was not directly addressed by SCOTUS.

Justice Gorsuch, expressly indicated in his opinion that the scope of how this decision intersects with past precedents concerning religious freedom would very likely be the subject of future cases before SCOTUS, and so little is certain. Justice Gorsuch seems to be admitting that future litigation may be necessary and stopped just shy of outright inviting it. Justice Alito's dissent in *Bostock* notes that "[o]ver 100 federal statutes prohibit discrimination because of sex." Only Title VII was analyzed in Justice Gorsuch's majority opinion, and so it is clear that employment law litigation is inevitable and will have far-reaching consequences for the overwhelming majority of this nation's employers. What is not yet clear at this time is the precise nature and extent of those consequences. It is not yet clear precisely what employers can and cannot do, and so employment attorneys will be forced to offer counsel based upon "best practices" rather than "bright-line rules" for the foreseeable future in response to many questions.

CASES:

The 3 cases before SCOTUS at issue were as follows: *Bostock v. Clayton County*, 590 U.S. ___ (2020) (involving the termination of a homosexual male employee fired for expressing interest in a homosexual softball league while at work) is the primary SCOTUS opinion on this issue; it was consolidated (ruled on simultaneously) with *Altitude Express, Inc. v. Zarda*, 590 U.S. ___ (2020) (concerning a male skydiving instructor who was terminated for telling a female customer that he was homosexual); and these two cases were argued orally before the Court on the same day as *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, 590 U.S. ___ (2020) (concerning a biological male employee who expressed an intention to have gender reassignment surgery and to return to work thereafter at a funeral home). It is perhaps worth noting that, of the three plaintiffs in these three cases heard by SCOTUS, only Bostock is still alive and capable of returning to the position from which he was terminated, though he has since found alternate work as a mental health counselor at a hospital. Plaintiff Zarda died in a tragic base jumping accident, and his estate prosecuted the appeal on his behalf. Plaintiff Stephens from the *R.G. & G.R.* case died from health complications a month prior to the Supreme Court's decision.**

*https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace#:~:text=While%20Title%20VII's%20jurisdictional%20rules,are%20exempt%20from%20certain%20religious

**https://www.washingtonpost.com/dc-md-va/2020/06/15/fired-after-joining-gay-softball-league-gerald-bostock-wins-landmark-supreme-court-case/

Born in Cincinnati, Ohio, John moved to the State of Georgia in 2005. A partner with the firm, John is licensed and actively practices law in both Georgia and Alabama. He is admitted to all state and federal courts in Georgia, all state courts in Alabama, and also the US District Courts for the Middle and Northern Districts of Alabama. His primary focus is in the areas of insurance defense, workers' compensation defense (including claims arising under the federal Longshore and Harbor Workers' Compensation Act), litigation defense (including Jones Act maritime cases, premises liability cases, and motor vehicle cases), insurance coverage disputes, employment law, EEO defense, corporate, and business law.

John graduated magna cum laude with his Bachelor of Arts in political science Wright State University in Dayton, Ohio where he minored in history. He studied law and obtained his Juris Doctor Degree from Regent University School of Law in Virginia Beach, Virginia.