



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 19, 2020

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COURT DECISIONS

PRECEDENTIAL:

Case Name: *Bostock v. Clayton County, Georgia*

Tribunal: Supreme Court of the United States

Case Number: [17-1618](#)

Issuance Date: June 15, 2020

DISCRIMINATION

- SEX DISCRIMINATION

In each of three consolidated cases, employers fired long-time employees for being homosexual* or transgender. Each employee sued under Title VII of the Civil Rights Act of 1964, alleging sex discrimination. The courts of appeal reached conflicting decisions as to whether Title VII prohibits discrimination based on sexual orientation or gender identity. The Court granted certiorari to resolve the conflict.

* We use this term because the Court itself used it in its decision.

Holding: By a 6-3 majority, the Court held that an employer who fires an individual for being homosexual or transgender has violated the Title VII prohibition against sex discrimination.

1. Writing for the majority, Justice Gorsuch first addressed the ordinary public meaning of Title VII's command 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).
2. Although the parties offered competing definitions of the term "sex," the Court assumed for purposes of this decision that the term refers only to biological distinctions between male and female. Title VII prohibits employment actions taken because of one's sex, and the Court held that if sex is a but-for cause of an action, the action has necessarily been taken because of sex. The Court acknowledged the 1991 amendments to Title VII that provided for limited relief based on the lower "motivating factor" standard, but it determined that it need not address that standard for purposes of this decision.
3. The Court then looked to the term "discriminate." The Court defined that term to mean intentionally treating an individual worse than others who are similarly situated. Thus, the Court held, "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against the person in violation of Title VII." The Court rejected an argument that discrimination should be defined in terms of the treatment of groups rather than individuals, noting that Title VII specifically makes it illegal to discriminate against "any individual."
4. The Court derived the following rule from the plain meaning of the statute: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." Thus, if changing the employee's sex would have yielded a different choice by the employer, a statutory violation has occurred.
5. The Court held that it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. A man who is fired for his attraction to men has been discriminated against because of his sex if he would not have been fired had he been a woman attracted to men. Similarly, an employee who was identified as male at birth and who is fired for identifying as female has been discriminated against because of her sex if she would not have been fired had she been identified as female at birth. The fact

that another factor besides the employee's sex (i.e., sexual orientation or gender identity) played a role in the firing does not preclude liability for sex discrimination if sex remains a but-for cause of the action.

6. Given the law's focus on the treatment of individuals, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups (e.g, by demonstrating that it fires all homosexual or transgender employees, whether male or female).
7. The Court acknowledged concerns that complying with Title VII's requirements as applied here might require some employers to violate their religious convictions. The Court noted that Title VII itself exempts religious organizations and that both the First Amendment and the Religious Freedom Restoration Act may provide additional protection for employers. However, because no claim of religious liberty was before the Court, it did not attempt to determine how any of those protections apply in cases like these.
8. Justice Alito, joined by Justice Thomas, dissented. He argued that the majority had written protections into the law that were not contemplated at the time Title VII was enacted. Justice Kavanaugh wrote a separate dissenting opinion, arguing that the majority had followed the literal meaning of the statute but not its ordinary meaning.

NONPRECEDENTIAL:

Pollitt v. Department of Veterans Affairs, [No. 2019-1481](#) (Fed. Cir. June 12, 2020) (MSPB Docket Nos. PH-0752-15-0452-I-3, PH-1221-14-0780-W-5): The court affirmed, per Rule 36, the administrative judge's decision affirming the petitioner's removal and denying her request for corrective action in her individual right of action appeal.

Oliva v. Department of Veterans Affairs, [No. 2019-1990](#) (Fed. Cir. June 15, 2020) (MSPB Docket No. DA-1221-17-0225-P-1): The court affirmed the Board's decision awarding the petitioner \$3,500 in emotional harm damages for whistleblower reprisal. The court rejected the petitioner's claim for lost relocation incentive pay, finding that it was not a foreseeable consequence of the agency issuing the petitioner a letter of reprimand. The court also found no error in the amount of the Board's award for emotional harm. However, on the same day it issued its decision in this matter, the Federal Circuit also issued a decision in *Oliva v. United States*, [No. 2019-2059](#), a breach of contract action filed in the U.S. Court of Federal Claims. In that case, the Federal Circuit held that the petitioner had stated claims for lost salary and relocation incentive pay based on the agency's alleged breach of a settlement

agreement, and it remanded the case to the Court of Federal Claims for further proceedings.

Green-Doyle v. Department of Homeland Security, [No. 2019-1955](#) (Fed. Cir. June 16, 2020) (MSPB Docket No. DC-0432-18-0711-I-1): The court dismissed the petitioner's appeal for lack of jurisdiction, finding that the appeal was a mixed case. The court found that the petitioner's removal was an action appealable to the Board and that she had alleged reprisal for prior equal employment opportunity activity, which is a form of discrimination provided in 5 U.S.C. § 7702(a)(1)(B). Because the petitioner did not abandon her discrimination claim before the Federal Circuit, the court determined that it lacked jurisdiction to review her case.

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