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Sexual Orientation and Transgendered Status Now Protected From Discrimination in the Workplace: The Bostick Decision

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Can an employer fire someone because they don't like the color of an employee's socks?

This is often how I begin the discussion of Title VII and discrimination law in my human resource course. Students inevitably respond with, "No, that isn't permissible".

When asked why it is not permissible, they say the action is discriminatory. So I ask, "Is the color of employees' socks protected by federal law?"

No, it is not. So, in most states

in the country, it is legal to fire employees for the color of their socks. This may be absurd, but presently, it is legal. The law does not protect against all discrimination in the workplace. And thus, students begin to understand the importance of a protected class.

Protected Classes

The concept of federally protected classes in the workforce originated with Title VII of the Civil Rights Act of 1963. Title VII, in essence, prohibits discrimination against applicants and employees on the basis of membership in a protected class. The five original protected classes were: color, creed, national origin, race, and sex and Subsequent anti-discrimination laws have added: pregnancy, age (40+), and disability. People with disabilities were the last protected class to receive federal discrimination protection in 1990 – a full 30 years ago. States are free to add protected classes to Title VII for enforcement within the state, but a state cannot eliminate a federally protected class. Michigan has added workplace discrimination protection for marital status, all ages, and height/weight.

Briefly, federal discrimination law forbids employers from directly discriminating against anyone in hiring, termination, discipline, compensation, and terms of employment because of their color, creed, national origin, race, sex, age (40+), or disability. Employers also cannot apply a procedure or have a requirement that appears facially neutral (e.g., an educational requirement) that would disproportionately affect a protected class unless the employer can show it is a valid job requirement.

Talk has long swirled that sexual orientation, and more recently, transgender/gender identity should be added to the list of federally protected classes. However, when the House, the Senate, or Presidency was held by Republicans, it didn't seem likely that a law would extend discrimination protection to these groups. That left decisions about what to do up to the states, which resulted in a patchwork of laws. Some states

extended no discrimination protection, some states extended protection to both groups, and some states protected one group but not the other. Michigan offered protection from discrimination in employment on the basis of sexual orientation and gender identify, but only to state employees. Therefore, most employees in Michigan prior to 2020 had no protection on the basis of sexual orientation or transgender status.

Definitions

The gender a person is romantically attracted to defines their sexual orientation. Gender identity is a deeply held sense of one's own gender. Transgender is an umbrella term for anyone whose gender identity does not match the gender they were assigned at birth. When a person's gender identity does not match their biological characteristics, they may take steps to live and present in accordance with their gender identity. This is known as gender expression. Such actions might include a name change, use of alternative pronouns, clothing and haircut changes, behavior and voice changes, or biological changes through taking hormones and/or surgery. Not all people can afford or choose to take medication or undergo surgery, and being transgender is not dependent on medical procedures.

The Bostick Vs. Clayton County Decision

In June of 2020, change came from an unlikely source. A conservatively-dominated U.S. Supreme Court ruled (6-3) in *Bostick Vs. Clayton County* that Title VII of the 1963 Civil Rights Act protects gay, lesbian, straight, bisexual, queer, and transgender employees from discrimination based on sex. In other words, employers may not make employment decisions based on sexual orientation and transgender/gender identity status. As a result, for the first time in three decades, new groups were added to the list of Title VII protected classes.

This ruling applies to all public and private workplaces in the United States with 15 or more employees. The *Bostwick* case dealt with people who had been fired when they revealed they were gay or when they started presenting as transgendered in the workplace. However, because the discrimination protection was based upon Title VII, the ruling also prohibits treating sexual orientation and transgender/gender identity status differently in all aspects of employment, including hiring, termination, discipline, training, promotion, compensation, and terms of employment.

In addition, the ruling makes workplace harassment of people based on sexual orientation and gender identity/transgender status illegal. Same-sex harassment is already actionable under Title VII. The *Bostwick* ruling makes it illegal to engage in a pattern of offensive behavior towards an employee because of their sexual orientation or gender identity.

Ramifications for Employers

What does all this mean for employers? As with any major new ruling, it will take a long time before courts begin to form a consensus around the interpretation and implementation of the Bostwick ruling. However, employers can be reasonably or completely certain about the following:

- It is illegal to refuse to hire or to fire someone because of their sexual orientation or transgender/gender identity status.
- It is illegal to base compensation, opportunities, discipline, or other employment decisions on these variables.
- An employer cannot offer different benefits to similarly situated workers on the basis of sexual orientation, transgender status, or gender identity. Companies should review their health care, leave, adoption, and insurance policies to make sure there is equal coverage.
- Title VII gives employers several avenues to defend charges of discrimination, and those defenses will also apply to charges of discrimination against sexual orientation and gender identity/transgender status.
- Sexual orientation and gender identity/transgender status should be added to any company non-discrimination policy, and employees should be educated about the new policy.
- Employers should be mindful of their state civil rights laws. Some states have had this protection in place for years, and there are specific state court cases to guide interpretation. State policies often apply to employers with less than 15 employees.

Questions left unanswered right now include:

- Faith-based organizations will probably argue that adhering to a non-discrimination requirement conflicts with their moral and religious stances. Exactly which employers will be eligible for an exemption and the conditions of those exemptions are unknown.
- Sex-specific dress codes have been considered acceptable under Title VII as long as they do not burden one gender more than the other. In light of Bostick, it is not known whether dress codes that impose gender-based norms on employees will be acceptable or whether employers will be allowed to prohibit employees from dressing in accordance with their gender identity.
- Questions about sex-segregated bathrooms and locker rooms will arise, but the Bostick decision made it clear that the U.S. Supreme Court is not going to prejudge those questions. Both the EEOC and OSHA recommend that employers allow employees to use restrooms, locker rooms, and other sex-segregated facilities consistent with an employee's gender identity. But, these guidelines do not carry the weight of law, and answers to these questions will not be provided in the near future.

The U.S. Supreme Court has become decidedly conservative during the most recent presidential term, and it will be interesting to watch as the Bostick case engenders further case law. Reactions to the ruling have been mixed and have tended to be based on religious beliefs. However, sexual orientation, transgender and gender identity status rarely have anything to do with a person's ability to do a job, and Title VII holds that, in the interest of fairness, factors that are irrelevant to job performance should not be considered. ■

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