

Supreme Court Holds LGBTQ+ Workers Protected Nationwide

In a landmark decision issued on Monday, [Bostock v. Clayton County](#), the Supreme Court ruled that workers across the United States cannot be fired or otherwise discriminated against for being gay, lesbian, or transgender. Justice Neil Gorsuch, writing for a 6–3 majority, explained that Title VII’s prohibition of workplace discrimination “because of” an employee’s “sex” extends to discrimination on the basis of sexual orientation and transgender status. While Justice Gorsuch’s opinion lacked the celebratory tone of his predecessor Justice Anthony Kennedy’s recent opinions safeguarding LGBTQ+ rights (for example, same-sex marriage in [Obergefell v. Hodges](#) in 2015), the result was the same: a major victory for millions of LGBTQ+ Americans.

Disregarding legislative intent and applying the strict textualist approach championed by the late Justice Antonin Scalia (laws mean what they say, and legislative intent counts for very little), Justice Gorsuch explained that even though the 88th Congress almost certainly did not intend to prohibit discrimination against transgender or gay workers when it passed Title VII of the Civil Rights Act of 1964, discrimination on the basis of sexual orientation or transgender status necessarily involves, at least in part, discrimination on the basis of sex. Congress also likely did not contemplate that Title VII would be interpreted to cover discrimination on the basis of motherhood or same-sex harassment, as the Supreme Court has long held it does. Justice Gorsuch ruled, however, that as in such situations, lack of Congressional intent cannot overcome the plain meaning of words. As Justice Gorsuch wrote, “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”

Under Title VII, a protected characteristic need only be a “motivating factor” or one of multiple reasons for an adverse employment action to trigger the Act’s protection. While discrimination against a gay or transgender employee may be motivated primarily by anti-gay or anti-trans bias, it necessarily also involves discrimination on the basis of sex. This is so because “[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.”

To explain the point, the Court took the example of an employer with a policy that all homosexual employees will be fired. During the holiday season, the employer hosts an office holiday party and invites employees and spouses.

A model employee arrives and introduces a manager to Susan, the employee’s wife.
Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.

Similarly, an employer who fires, for example, a transgender female “penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” Simply put, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

In dissent, Justice Samuel Alito (joined by Justice Clarence Thomas), denounced the Court’s invocation of the textualist doctrine, accusing the majority’s approach as “being like a pirate ship.” According to Justice Alito, while the majority’s approach “sails under a textualist flag . . . it actually represents . . . a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.” Justice Brett Kavanaugh penned a separate dissent.

While the Court's decision is groundbreaking, states like Connecticut, New Jersey, and New York were ahead of the curve, having already enacted protections for LGBTQ+ employees on the state level. Thus, although employers in such states will not need to update their handbooks, many employers across the country (at least those with 15 or more employees) should consider adopting new policies to make clear that LGBTQ+ discrimination is prohibited. This decision could also fuel new and renewed arguments that other federal statutes that prevent discrimination on the basis of sex without mentioning sexual orientation or transgender status—such as the Equal Pay Act, Title IX, the Fair Housing Act, and the Equal Credit Opportunity Act—also protect LGBTQ+ Americans from discrimination.

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