# California

Guillaume D'Amico

## Simple and Momentous: How Small Gestures Can Have Unexpected Consequences through Statutory Interpretation of Title VII of the Civil Rights Act of 1964

In Bostock v. Clayton County, No. 17-1618 2020 U.S. LEXIS 3252 (June 15, 2020), the United States Supreme Court resolved at last the disagreement among the court of appeals over the scope of protections for homosexual and transgender persons under Title VII of the Civil Rights Act of 1964. Justice Gorsuch delivered the majority decision, holding that Title VII protects employees against discrimination because of their sexual orientation or gender identity. This groundbreaking ruling combines three cases[i] based on similar facts but with different outcomes. Mainly, an employer fired a long-time employee allegedly for no reason other than the employee's homosexuality or transgender status.

Working for Clayton County as a child welfare advocate, Gerald Bostock was fired for conduct "unbecoming" a county employee. Influential members of the community made disparaging comments about Mr. Bostock's sexual orientation when they found out he participated in a gay recreational softball league. In another case from New York, Altitude Express fired its skydiving instructor Donald Zarda days after he mentioned being gay. Last, in Garden City, Michigan, R.G. & G.R. Harris Funeral Home fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman."

Each employee sued their respective employer, alleging sex discrimination under Title VII, and none of the employers disputed these allegations. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay; therefore, Plaintiff Bostock's suit could be dismissed as a matter of law. However, the Second and Sixth Circuits allowed the claims of Plaintiff Zarda and Plaintiff Stephens to proceed.

Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." [ii]

Justice Gorsuch engages in an analysis of statutory interpretation of Title VII by looking at the language of the text itself and the ordinary public meaning of its terms at the time of its enactment. If the meaning of the terms is plain, then the analysis ends. "After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our

own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."[iii] Only if ambiguous statutory language occurs, members of the Court may look at the legislative history.[iv]

In 1964, the noun "sex" was defined as the "status as either male or female [as] determined by reproductive biology" while the ordinary meaning of the phrase "because of" was previously explained 'by reason of ' or 'on account of.'"[v] In the language of law, Title VII's "because of " test incorporates the "simple" and "traditional" standard of but-for causation, which is established whenever a particular outcome would not have happened "but for" the purported cause. [vi]

While acknowledging the "but-for" causation's sweeping impact in this analysis, the Court found that events often have multiple "but-for" causes (e.g. car accidents), and when it involves Title VII, "the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law." [vii]

More importantly, the Court determines that the statute applies to individuals and not groups. Indeed, the noun "individual" is used three times in Title VII and its meaning in 1964 is the same as it is today, i.e. "[a] particular being as distinguished from a class, species, or collection."[viii] This statute then works to protect individuals of both sexes from discrimination, and does so equally. The Court states an employer who fires a woman because she is insufficiently feminine and fires a man, for being insufficiently masculine may treat men and women as groups equally. However, "in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." [ix]

Therefore, by applying these ordinary public meanings of the statute's language at the time of the law's adoption, the Court finds an employer violates Title VII when it intentionally fires an individual employee based in part on sex regardless whether other factors besides the plaintiff's sex contributed or not to the decision or the employer treated women as a group the same when compared to men as a group. The simple but momentous message of Title VII is that an individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."[x] Equally simple and momentous, the individual's homosexuality or gender identity is not relevant to the employment decisions because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.[xi]

The Court explains its rationale as follow: if an employer fires a male employee for no reason other than the fact he is attracted to men, this employer then discriminates against him for traits or actions it tolerates with female employees. The same applies to employers who fires a transgender person who was identified as a male at birth but who now identifies as a female if the said employer retains an otherwise identical employee who was identified as female at birth. In those examples, the individual's sex plays "an unmistakable and impermissible role in the discharge decision." [xii]

Therefore, to achieve the employer's goal of discriminating against homosexual and transgender employees, the employer must intentionally discriminate against individual men and women in part because of sex. [xiii] That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." [xiv] This conclusion was already confirmed with this Court's precedents, as Justice Gorsuch cites Phillips v. Martin Marietta Corp., 400 U. S. 542 (1971) (wherein the employer was found liable for refusing to hire women with young children but did hire men with children the same age), Los Angeles Dept. of Water and Power v. Manhart, 435 U.

S. 702 (1978), (an employer required women to make larger pension fund contributions than men); and Oncale v. Sundowner Offshore Services, Inc., 523 U. S. 75 (1998) (a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment.)[xv]

One of the dissenting opinions, however, argued that this statutory interpretation analysis reaches beyond the intent of the 1964 Congress. Yet Justice Gorsuch finds that legislative history is used to clear up ambiguity and not create it[xvi] and that the Title VII's terms are unambiguous when applied to the cases at issue. The fact that the status reaches beyond the legislative intent demonstrates the breadth of a legislative command, [xvii] which governs us, and not the principal concerns of our legislators. [xviii]

In California, the scope of Government Code section 12940 (the California Fair Employment and Housing Act of 1959) already prohibited discrimination or different treatment in any aspect of employment or opportunity for employment based explicitly on sexual orientation and gender identity thanks to amendments adopted in 1999 and 2011 respectively. When interpreting status, California courts have looked to pertinent federal precedent because of the similarity between state and federal employment discrimination laws. [xix] The Courts also adopted the "but-for" causation standard, meaning that liability may attach even if the alleged adverse employment action was caused at least in part by a discriminatory motive.[xx] The groundbreaking aspect of the Bostock decision is the analysis of the discrimination based on sex which inevitably occurs in the context of sexual orientation and gender identity.

While about 20 states and the District of Columbia have already prohibited employment discrimination based on sexual orientation and gender identity, the Bostock decision marks a major advancement for LGBTQ equality in the 30 other states; however, much work remains to ensure every workplace has inclusive policies and practices in place.[xxi] For instance, California employers of five or more employees[xxii] should ensure to comply with Government Code section 12950, subdivision (a) by posting a poster, developed by the Department of Fair Employment & Housing, regarding transgender rights in a prominent and accessible location in the workplace and provide sexual harassment training to all supervisory employees as required by Section 12950.1 of Government Code.