

Hi everyone,

Excellent news for gender equality: Yesterday, the Supreme Court issued its decision in *Bostock v. Clayton County, GA*, regarding whether an employer firing an employee on the basis of sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964. Many thanks to DOJ GEN board member Colleen Phillips, a lawyer in the Civil Rights Division, for writing the following analysis of this groundbreaking decision:

In a 6-3 decision authored by Justice Gorsuch, SCOTUS found that firing an employee because of their sexual orientation or transgender status violates Title VII: “An 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”

The decision is attached, and below is a review of the decision, which highlights its importance in effecting gender equality in employment. The decision touches on a number of the issues upon which DOJ GEN focuses to ensure a diverse and equitable work environment at DOJ, including gender-based barriers, sexual harassment, and wage gaps. DOJ GEN will continue to advocate for these causes on behalf of its membership, and to encourage DOJ leadership to consider them when issuing its own policies, objectives, and directives.

Analysis of *Bostock*:

The decision recognizes that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” The Court provides the following example to illustrate its point:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

In addition to recognizing the important protections that Title VII extends to the LGBTQ community, the opinion re-enforces that “because of sex” must be read and applied broadly. The reasoning of the Court illustrates why Title VII is such an important law in the fight to ensure gender equality. Under the broad reading:

- There can be several “but for” reasons for discriminatory action, and sex does not even need to be the primary reason. (“An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.”)
- Title VII protects individuals, so an employer cannot, as a defense, point to policies and practices that generally benefit women. (“Suppose an employer fires a woman for refusing his sexual advances. It’s no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall.”)

- Title VII protects against all sex-based discrimination, even if an employer discriminates against both men and women. (“So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex.”)

In recognizing Title VII’s broad mandate, the Court re-affirmed that the statute protects against a wide range of discriminatory conduct, some of which was not anticipated at the time the law was adopted, including sexual harassment and motherhood discrimination. In doing to, the Court re-affirmed three prior cases which have been paramount to the fight for gender equality:

- *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), in which the Supreme Court held that a company that refused to hire women with young children, but did hire men with children the same age, violated Title VII.
- *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), in which the Supreme Court held that an employer could not require women to make larger pension fund contributions than men to ensure equity because women, as a class, live longer, because Title VII protects individuals.
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), in which the Supreme Court held that Title VII prohibits sexual harassment by colleagues of the same sex because the harassment would not have taken place but for his sex—he would not have suffered similar treatment if he were the opposite sex.

The Court cautioned that its decision only applies to an employer’s termination action, not actions regarding “bathrooms, locker rooms, or anything else of the kind” under Title VII, and that its decision does not address how Title VII and religious liberty doctrines interact.

A last note: The late Aimee Stephens, a transgender woman, was treated with the dignity she deserved as the majority opinion referred to her using her preferred pronouns—“she” and “her.”

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P.S. One of our youngest and most enthusiastic members, Izzy, rushed over to the Supreme Court yesterday to celebrate:

