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United States Supreme Court Rules that Federal Law Prohibits, and has Always Prohibited, Employment Discrimination Based on Sexual Orientation or Sexual Identity

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In what can only be described as a monumental opinion, the United States Supreme Court held last week that the Civil Rights Act of 1964 prohibits secular employers from discriminating against gay, lesbian, and transgender employees. The Court's 6-3 decision in *Bostock v. Clayton County, Georgia* – authored by Denver's own Justice Neil Gorsuch – confirmed that Title VII of the Act prohibits discrimination on the basis of sexual orientation or sexual identity.

Bostock arose from undisputed discrimination against gay and transgender employees in three different states. Clayton County Georgia fired Gerald Bostock, a national-award-winning child welfare advocate, for conduct "unbecoming" of a county employee after influential members of the community discovered that he participated in a gay recreational softball league. After lower courts reached conflicting opinions, the Supreme Court elected to hear Bostock's case, as well as two companion cases involving discrimination against gay and transgender employees, respectively. The employers conceded that they had discriminated on the basis of sexual orientation or sexual identity but argued that the Act did not prohibit that form of discrimination.

The Act itself deserves a brief pause to frame *Bostock*. Few pieces of legislation, if any, touch more aspects of American life. The Act protects voting rights. It prohibits

racial segregation in schools. And it outlaws discrimination in employment and public accommodations. Having survived multiple constitutional challenges since its adoption, the Act stands as a pillar of American anti-discrimination law, protecting against both public and private discrimination.

Specifically with respect to employment, Title VII of the Act prohibits employment discrimination "because of [an] individual's race, color, religion, sex, or national origin." Importantly, as the Court in Bostock explains, "because of" has been construed to prohibit discrimination that is based in part on the person's race, color, religion, sex, or national origin; it doesn't matter if other factors contributed to the adverse employment action.

The question in *Bostock* was whether Title VII's prohibition on sex discrimination proscribes discrimination on the basis of a person's sexual orientation or gender identity. The Court concluded that it does. Title VII's prohibition on sex discrimination, the Court reasoned, logically included these other forms of discrimination because they required discrimination "because of" sex, precisely what Title VII forbids. The Court's own example makes the point. Suppose two employees are both attracted to men. At a discriminatory workplace, it's impossible to say whether that constitutes a fireable offense—at least not without one more piece of information: the employee's sex. A female employee attracted to men keeps her job. An otherwise identical male employee attracted to men is fired. Or, stated more succinctly, if both Bob and Hannah love Steve and only Bob is fired for it, it's the employee's sex that makes all the difference. And that, the Court concluded, is discrimination "because of" sex.

The Court likewise determined the same was true for transgender discrimination. If an employee is identified as a male at birth, then later identifies as a female, and her employer fires her despite retaining an otherwise identical employee who was identified as female at birth, then, the Court explained, "sex plays an unmistakable and impermissible role" in the decision.

Under both scenarios, the Court concluded, the employer violates Title VII because it intentionally fires an individual employee based in part on sex—even if the employer did not intend to treat men and women more or less favorably as a group, even if other factors played a role in the adverse employment action, and even if Congress hadn't anticipated that Title VII would prohibit this form of discrimination. The Court made it clear that its holding involved "no more than the straightforward application of legal terms with plain and settled meanings" and that discrimination on the basis of sexual orientation or sexual identity is, and always has been, unlawful under Title VII.

Otten Johnson supports the *Bostock* ruling and equity for all LGBTQ+ people, people of color, and other historically disadvantaged and marginalized communities.

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950 Seventeenth Street, Suite 1600, Denver, CO 80202
Phone 303.825.8400 | Fax 303.825.6525 | ottenjohnson.com