BOSTOCK v. CLAYTON COUNTY

7/11/22 Commission Briefing Paper

On June 15, 2020, the Supreme Court issued its 6-3 decision in *Bostock v. Clayton County*, 590 U.S. ___ (2020) (hereinafter "*Bostock*"), authored by Justice Gorsuch. The decision combined three similar cases. Clayton County, GA, fired Gerald Bostock shortly after he joined a gay softball league. Altitude Express terminated Donald Zarda shortly after stating in the workplace that he was gay. Lastly, R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when hired, after she informed them she planned to live full time as a woman. There was a split between the Eleventh Circuit, which held that Title VII of the Civil Rights Act of 1964 ("Title VII") does not protect gay employees, and the Second and Sixth Circuits, which allowed the claims to proceed.

The Court held that Title VII prohibits terminating an employee solely because the employee is gay or transgender. The Court examined the word "sex" in Title VII, and the parties conceded that the word in 1964 referred to the biological distinction between male and female. The Court found a "but-for causation standard" incorporated into "sex;" a Title VII violation happens if an employer intentionally relies in part on an individual employee's sex in making a termination decision. Discrimination on the basis of homosexuality or transgender status is inherently treating the employee differently because of their sex, therefore penalizing an employee for being homosexual or transgender violates Title VII.

The Court illustrated it decision with the following examples:

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. 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 is 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. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as a male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 10.

Because the Alaska Supreme Court incorporated the Title VII framework in interpreting AS 18.80, and ASCHR is a Fair Employment Practices Agency with the EEOC that investigates Title VII employment discrimination cases, the Commission almost immediately began accepting LGBTQ+ employment discrimination cases after *Bostock* was decided, pending guidance from the Department of Law. In December of 2020, the Department of Law provided guidance: ASCHR should accept LGBTQ+ discrimination claims in all five of our subject matter areas. This is supported in part by the Alaska Supreme Court opinion that AS 18.80 "is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination." *Smith v. Anchorage School Dist.*, 240 P.3d 834, 842 (Alaska 2010). At that point, ASCHR began accepting all LGBTQ+ complaints that were also otherwise jurisdictional as a matter of law.