

# For Employers: Understanding the Supreme Court's Title VII Ruling

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On June 15, 2020, the Supreme Court of the United States (“SCOTUS” or the “Court”) ruled in *Bostock v. Clayton County, Georgia* that the protections of Title VII of the Civil Rights Act of 1964 (“Title VII”) extend to individuals who are discriminated against in the workplace based on their sexual orientation or gender identity. The landmark decision originated from three separate cases in the federal appellate courts where an individual was terminated after revealing that he or she was gay or transgender. Justice Neil M. Gorsuch, who authored the Court’s majority opinion, made clear that employment discrimination on the basis of sexual orientation or gender identity violates Title VII. While most agree that SCOTUS’s decision in *Bostock* represents a significant win for the LGBTQ+ community, further examination of the opinion reveals that it is not as broad-sweeping as initially thought.

To the contrary, SCOTUS, as it often does, rendered a narrow ruling in *Bostock* based on the legal issues presented before the Court, without reaching the myriad of potential challenges that are sure to come in the future. For example, the Court did not address whether an employer’s sincerely held religious beliefs or another religious exemption could shield an employer from having to comply with the mandates of *Bostock*. Though, this very issue was addressed in one of the underlying cases in *Bostock* (*R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*) by the United States Court of Appeals for the 6th Judicial Circuit (“6th Circuit”).

## Is Religious Freedom a Defense?

Aimee Stephens worked for R.G. & G.R. Harris Funeral Homes in Garden City, Michigan as a funeral director. Initially, Ms. Stephens presented as a man when she was hired, however, she later communicated to her employer that she wanted to live and work as a woman prior to having sex-reassignment surgery. Ms. Stephens, thereafter, was fired because she was no longer going to present as a man. On appeal to the 6th Circuit, Ms. Stephens’ employer (who identified as Christian for over 65 years) argued that if the government, by way of the Equal Employment Opportunity Commission (“EEOC”), forced him to continue to employ Ms. Stephens, then it would result in a substantial burden on his exercise of religion in violation of the Religious Freedom Restoration Act of 1993 (“RFRA”). To be successful in this defense, an employer must first demonstrate that

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compliance with a generally applicable law would result in a substantial burden on the employer's religious exercise. Upon such a showing, the burden then shifts to the government to establish that applying the neutral law to the employer is the least restrictive means of furthering a compelling government interest.

In Ms. Stephens' case, the 6th Circuit held that requiring the employer to comply with Title VII's prohibition against discrimination on the basis of sexual orientation and gender identity would not result in a substantial burden on the funeral home owner's religious exercise. Furthermore, the 6th Circuit ruled that even if the employer's exercise of religion would be substantially burdened by the enforcement of Title VII, the EEOC established that applying Title VII to the employer's case represented "the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex." The employer in Ms. Stephens' case abandoned his RFRA defense on appeal to SCOTUS, and thus, SCOTUS refrained from entering the fray on the interplay of Title VII and the RFRA in this context. Nevertheless, the 6th Circuit's handling of the employer's RFRA defense in Ms. Stephens' case represents the law of the land on that narrow issue for Kentucky, Michigan, Ohio, and Tennessee (states where the 6th Circuit has jurisdiction).

### **What Else Is Not Covered in *Bostock*?**

As discussed above, the Court's opinion in *Bostock* does not address the viability of an employer's RFRA defense in response to an employment discrimination claim based on an individual's sexuality or gender identity. Likewise, the majority's decision in *Bostock* does not discuss the "religious organization exemption" provision that is included in Title VII, 42 U.S.C. § 2000e-1(a), which allows religious organizations to give employment preference to individuals of the same religion.

Additionally, the Court's opinion in *Bostock* does not address other related legal challenges under Title VII, such as sex-segregated bathrooms, locker rooms, and dress codes. Instead, the Court restrained from opining on or providing guidance on what practices or policies would qualify as unlawful discrimination under Title VII. Specifically, Justice Gorsuch, on behalf of the majority, states that "[u]nder Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind," leaving those questions for future cases. In the meantime (and to avoid being the next test case), employers are strongly encouraged to permit employees to use the bathroom/locker room with which they identify and make gender neutral or single- occupancy options available for both transgender employees and other employees who may express privacy concerns with sharing a bathroom/locker room with a transgender individual. Employers should also ensure that their policies and practices clearly include sexual orientation, gender identity, and transgender status in the protections from discrimination on the basis of sex.

### **Conclusion**

SCOTUS's ruling in *Bostock* makes clear that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation or gender identity. That ruling, however, has a narrow application, and lower courts across the country will soon be faced with even tougher, more nuanced questions on how to navigate the multitude of legal challenges that will arise as proponents and objectors of *Bostock* look to test the bounds of the Court's reach.

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