

# What the New Title VII LGBTQ Ruling Means for Employers



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On Monday, the Supreme Court of the United States ruled that employers are prohibited from taking adverse employment action against employees based on sexual orientation or gender identity. Discrimination based on sex prohibited by Title VII of the Civil Rights Act of 1964 now extends to sexual orientation and gender identity.

Justice Neil Gorsuch, writing for the majority in *Bostock v. Clayton County*, stated that “[a]n 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 rules on three consolidated cases. In all three cases, an employer fired an employee shortly after learning the employee was homosexual or transgender.

The Court makes clear that an employer violates Title VII when it intentionally takes adverse employment action against an individual employee based in part on sex, which now includes sexual orientation or gender identity. Adverse employment action includes not only firing, but other lesser actions such as failure to promote, refusal to hire, demotion, salary differentials, and other things. A Title VII violation occurs even if other factors besides the plaintiff’s sexual orientation or gender identity, such as job performance, contributed to the adverse employment action. An employee’s sex need not be the primary reason for the decision.

The decision in *Bostock* rectifies a split among U.S. Circuit Courts of Appeal, some allowing cases to go forward based on sexual orientation or gender discrimination and others not. Eighth Circuit, where Arkansas sits, had yet to opine on the matter, although a decision on this issue was pending. Several laws in other states already prohibit employment discrimination based on sexual orientation and/or gender identity. Arkansas does not have such a law. Arkansas Civil Rights Act prohibits discrimination based on “gender” but does not include specific protections for sexual orientation or gender identity.

The *Bostock* decision represents a clarification in the law, and perhaps a change in practice, for Arkansas employers. Employers in Arkansas should revisit their equal employment opportunity and non-discrimination policies. While discrimination based on sex should already be prohibited, employers may add specific language to inform current and potential employees that discrimination based on sexual orientation or gender identity is also forbidden. se protections extend to anti-retaliation policies as well. Employers may also consider conducting trainings for managers and other employees on LGBTQ issues in the workplace, including how LGBTQ issues can arise in the workplace and the employment actions that are now expressly prohibited when connected with those issues.

Mitchell Williams will continue to monitor developments and will advise on best practices as they emerge. Please contact a member of our employment team for guidance specific to your organization.

