CURRENT EVENTS

What Does the LGBT-Discrimination Decision Mean for Religious Employers?

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The Supreme Court recently ruled in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination on the basis of sexual orientation and gender identity. What are the ruling's real-world implications for those who maintain traditional, biblical views about human sexuality? How will it affect churches, schools, camps, mission agencies, humanitarian organizations, and small businesses run by religious believers? After *Bostock*, can these institutions maintain hiring and employment practices consistent with their religious views without running afoul of Title VII?

That remains an open question.

None of the employers in the consolidated *Bostock* cases was a religious organization in the traditional sense, so the Supreme Court avoided deciding how its ruling would affect such organizations. Still, the court flagged the issue. In a vaguely promising gesture, the majority indicated it was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." Ultimately, though, the court said the interplay between Title VII and religious liberty is an issue for "future cases."

Such cases may soon come, as examples of aggrieved LGBTQ employees suing their religious employers are already easy to find. Religious employers facing the prospect of such lawsuits must consider not only Title VII, but also various state and local laws. (Currently, 22 states and the District of Columbia have laws prohibiting LGBTQ discrimination in the workplace.)

As far as Title VII is concerned, though, a number of protections for religious employers remain in place.

Organization Size

Title VII's prohibitions on employment discrimination—including discrimination based on sex—apply only to employers with 15 or more employees on payroll. As a result, many churches and other small religious nonprofits, plus some small businesses owned by people of faith, may not be directly affected by the *Bostock* decision.

However, counting employees for purposes of Title VII is not a simple matter. The Supreme Court had to weigh in on the issue because lower courts could not agree on the exact formula to use. Consequently, organizations and businesses in the vicinity of the 15-employee threshold should consult with an attorney before concluding they lie outside Title VII's scope.

Title VII's Exemption for Religious Employers

Title VII, by its own terms, does not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." This exemption, which dates back to 1972, is generally understood to allow religious organizations to make employment decisions based on religion, even for employees not involved in the organizations' religious activities.

This exemption raises two important questions. First, how religious does an organization need to be in order to qualify? Second, what exactly does the exemption permit?

As for the first question, lower courts have wrestled with whether the exemption covers entities such as religious schools, hospitals, nursing homes, and humanitarian organizations. Lacking guidance from Congress or the Supreme Court, these courts have used a variety of complex tests asking, among other things, whether the organization is controlled by a church, produces a "secular product," or regularly engages in prayer and worship.

The second question has, until now, received scant attention. Some legal scholars interpret the exemption narrowly, arguing it merely permits a religious organization to prefer candidates nominally affiliated with the organization's denomination (i.e., "coreligionists"). Jewish schools, for example, can give hiring preferences to Jewish teachers without violating Title VII.

Another approach to the exemption says religious organizations can require employees to embrace particular religious doctrines, including tenets about human sexuality. On this view, an employee engaged in homosexual activity could be fired not for his LGBTQ status or conduct, but for not sharing the organization's religious tenets. Of course, organizations would need to give the same treatment to all similar employees who do not share such beliefs.

Other commentators read the exemption far more broadly, saying it permits religious employers to discriminate along the lines of protected classifications like sex, so long as the employer offers sincere religious reasons for doing so. To date, though, no courts have adopted this broad view.

Finally, a more nuanced interpretation holds that religious organizations may enforce religiously based conduct requirements—such as a prohibition on extramarital sex—even for employees who do not share the organization's religious affiliation. In the context of LGBTQ discrimination after *Bostock*, the fate of this interpretation largely depends on how courts treat the distinction between LGBTQ status and conduct.

Religious Freedom Restoration Act

The 1993 Religious Freedom Restoration Act (RFRA) requires the federal government to show that laws substantially burdening religious exercise are narrowly tailored to achieve a compelling government interest.

Advocates for one of the defendants in *Bostock*, a Christian-owned funeral home, argued that requiring the home to employ a transgender funeral director would impose a substantial and unjustified burden on the owner's religious exercise by forcing him to choose between endorsing the employee's views about sex or exiting the funeral business. A lower court rejected that argument, concluding there was no substantial burden on the owner's religious exercise and, even if there was, Title VII's requirements were narrowly tailored to serve the government's compelling interest in eliminating workplace discrimination.

The funeral home did not appeal the lower court's ruling concerning RFRA, leaving open the possibility that the Supreme Court could reach a different result in a later case. For now, it remains unclear whether other courts will be receptive to RFRA-based defenses in LGBTQ discrimination cases.

Ministerial Exception

In a landmark 2012 case, the Supreme Court ruled that the First Amendment bars an employment-discrimination lawsuit brought by an elementary teacher at a Lutheran school. In so holding, the court endorsed an implicit, constitutional exception to both federal and state employment nondiscrimination laws known as the "ministerial exception." This exception precludes "ministers" from suing their employers for LGBTQ discrimination.

Unfortunately, the Supreme Court declined to provide a clear test for determining whether a particular employee is a minister. What seems evident at this point is that a minister must be involved in the religious functions of the organization. But how far does that go? Is a volleyball coach at a Christian high school a minister if she leads devotions during

practice? What about a teacher at a church-based preschool who leads Bible songs, or an English professor at a Presbyterian college who lectures on literature from a Christian perspective?

Supreme Court observers hope definitive answers to these questions are on the horizon. Earlier this year, the court heard oral arguments in two ministerial-exception cases involving fifth-grade teachers at Catholic schools in California. But even if the Supreme Court reverses the decision of the lower court (which held the teachers were not ministers), there is no guarantee the court will offer a workable test providing clear guidance to other religious organizations.

As the Supreme Court recognized in *Bostock*, there can be no doubt the court's decision will have serious and far-ranging implications for religious employers holding traditional, biblical views about human sexuality. And while a variety of protections are in place to safeguard the religious liberty of such employers, the precise contours of these protections remain undefined.

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