THIRD WAY

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Protecting LGBT Employees and Religious Liberty

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The Supreme Court recently ruled in a landmark decision that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation or gender identity. The decision is a momentous step forward for LGBT equality nationwide. As the ramifications continue to play out across the country, questions are already being asked about the intersection of religious liberty and Title VII, yet most of these concerns have long been settled under existing laws.

1. Title VII and the Supreme Court's Decision

Title VII of US law prohibits discrimination in the workplace based on race, color, religion, sex and national origin. [1] [1] It applies to all employers in the United States with 50 or more employees. Some states have passed laws that supplement the categories protected by federal law, but Title VII sets a baseline nationwide.

The Supreme Court's decision in *Bostock V. Clayton County* confirmed that the law's prohibition against sex discrimination covers sexual orientation and gender identity discrimination as well. [2] [2] The decision has now made it clear nationwide that it is illegal to discriminate against an employee because of his or her gender identity or sexual orientation. Moreover, the decision ruled that discrimination on these grounds does not need to be the primary motivation to violate the law. It simply needs to be a contributing factor in the treatment of the employee (mirroring rules against discrimination on the basis of race, religion, and other protected characteristics). [3] [3] And while religious belief is frequently asserted as a justification for discrimination against LGBT Americans, the decision did not alter existing exceptions religious liberty exceptions that are already embedded in Title VII statutory language and case law.

2. Title VII and Religious Liberty

Title VII generally does not grant exemptions to employers based on religious belief, and the Supreme Court did not alter that situation in *Bostock*. Under current law, an employer typically cannot use their religious views to refuse to hire or promote someone based on a protected category in Title VII. For example, it is illegal in this country to refuse to hire a woman or person of a different race, even if an employer's religious beliefs dictate that women should not work or that people of different races should not associate. Similarly, under the new decision from the Supreme Court, an employer cannot use his or her personal religious beliefs to defend an adverse employment decision against a gay or transgender employee.

Religious Organization Exceptions

While it does not have a blanket exception for an employer's religious beliefs, Title VII does include select exceptions for religious organizations. Religious organizations are not permitted under the law to discriminate in hiring based on race, color, sex, or national origin, but they are permitted to give preferential treatment to those who share their own religious beliefs. This exception generally is only available to religious based non-profits, a status which is usually determined by examining the mission of the organization and its operations. A privately-owned business does not qualify for this exception, even if the owner seeks to operate his or her business in line with his or her religious beliefs. [4] [4]

This exception applies to hiring for all positions within a religious based non-profit organization, meaning that those non-profits may decide to hire only those who share their faith, even if a certain position does not have a religious component to it (i.e. a church janitor). [5] [5] But again, this only applies to employment decisions based on *religious affiliation* —it does not permit discrimination based on any of the other protected categories of Title VII, which now definitively include gender identity and sexual orientation.

Ministerial Exception

In addition to the exception outlined above, there is an absolute exception to Title VII for houses of worship to choose their own ministers. The First Amendment bars individuals from suing a congregation for decisions involving the selection or promotion of ministers. Understandably, positions of faith leadership are treated much differently, given their core role in the free exercise of religion, and advances in LGBT employment protections have never sought to change that. To qualify for this exception, the employment duties of the position must be "religious functions," which typically means leading worship or running the house of worship. [6] [6] For those ministerial positions, none of the protections of Title VII apply (race, sexual orientation, or any other). But staff hired by houses of worship in non-religious positions, such as janitors or cooking staff, are still protected by employment discrimination law.

3. Interaction with the Religious Freedom Restoration Act

The *Religious Freedom Restoration Act* (RFRA) is frequently cited as a point of tension between equality for LGBT Americans and religious liberty. RFRA prohibits federal or state governments from "substantially burdening" a person's religious exercise unless it can show they had a compelling reason for doing so and did so in the most limited way possible.

Opponents of protections against discrimination on the basis of sexual orientation and gender identity have claimed that expanding Title VII protections to LGBT employees would violate RFRA. In writing the majority opinion, Justice Gorsuch stated explicitly the Court's decision would not address the interaction between RFRA and Title VII, though the issue could be examined at a later date. [7] [7]

It is impossible to predict how a case involving RFRA and Title VII would be decided, but there are still some examples to which we can look. The Sixth Circuit Court of Appeals stated in one of the lawsuits that made up the combined cases in *Bostock* that protections for LGBT employees did not conflict with RFRA. [8] [8] The court there ruled that employing an LGBT individual was not considered an endorsement or support for an employee's sexual orientation. As such, the decision held, Title VII has limited interaction with RFRA. In the 1980s, the Supreme Court also rejected religious justifications for racial discrimination in education by Bob Jones University. [9] [9] Though that case predates the enactment of RFRA, the Court held that the government has a strong interest in preventing discrimination which justifies laws like Title VII.

Conclusion

The Supreme Court's ruling in *Bostock* is a monumental step forward for the rights of LGBT Americans. And while concerns regarding conflicts between religious liberty and LGBT equality have long been debated, Title VII has always maintained clear exceptions for the core activities of religious entities. Congregations have an absolute right to choose their own leaders true to their belief. This core tenet of the First Amendment remains untouched by the decision clarifying Title VII's protection against being fired because of your sexual orientation or gender identity.

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ENDNOTES

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