

# **The U.S. Supreme Court Finally Addresses Discrimination Against LGBTQ Employees: What the Court's Opinion Means and Where Employers Go From Here**

July 2, 2020

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# Roadmap

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- Setting the Table
  - Background: By the Numbers and Definitions
  - Existing Legal Protections
  - Background of the cases
- The Court's Opinion
  - Majority
  - Dissents
- Implications and Questions
- Best Practices



# SETTING THE TABLE

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# By the Numbers

- About 9 million U.S. adults identify as LGBTQ
- About 1.4 million U.S. adults identify as transgender
- Adults who identify as LGBTQ and/or transgender are more racially and ethnically diverse than the U.S. general population
- One study says 20% of Millennials identify as LGBTQ
- Estimates show that 150,000 youth ages 13 to 17 identify as transgender in the U.S
- **40% of LGBTQ employees are closeted at work**
  - **26% of these individuals wish they could be out**

Sources: <https://williamsinstitute.law.ucla.edu/category/research/transgender-issues>  
<https://www.bcg.com/publications/2020/inclusive-cultures-must-follow-new-lgbtq-workforce.aspx>



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## By the Numbers

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- LGBTQ individuals generally report higher instances of discrimination:
  - 8-17 % of gay and transgender workers report being passed over for a job or fired because of their sexual orientation or gender identity
  - 10-28 % report receiving a negative performance evaluation or being passed over for a promotion because they were gay or transgender
  - 75% report experiencing negative day-to-day workplace interactions related to their LGBTQ identity!

# Definitions

- LGBTQ: Stands for lesbian, gay, bisexual, transgender, and queer. In use since the 1990s.
- LGBTQQIA+: lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual
- += love, acceptance, and the embracing of all
- Transgender Person: A person whose gender identity and/or gender expression differs from what is typically associated with the sex that they were assigned at birth.
- Queer: Commonly thought of as a term that is fluid and inclusive of diverse sexual orientations and/or gender identities. Can be considered offensive if used in the wrong context; should only be used if someone self-identifies as queer.

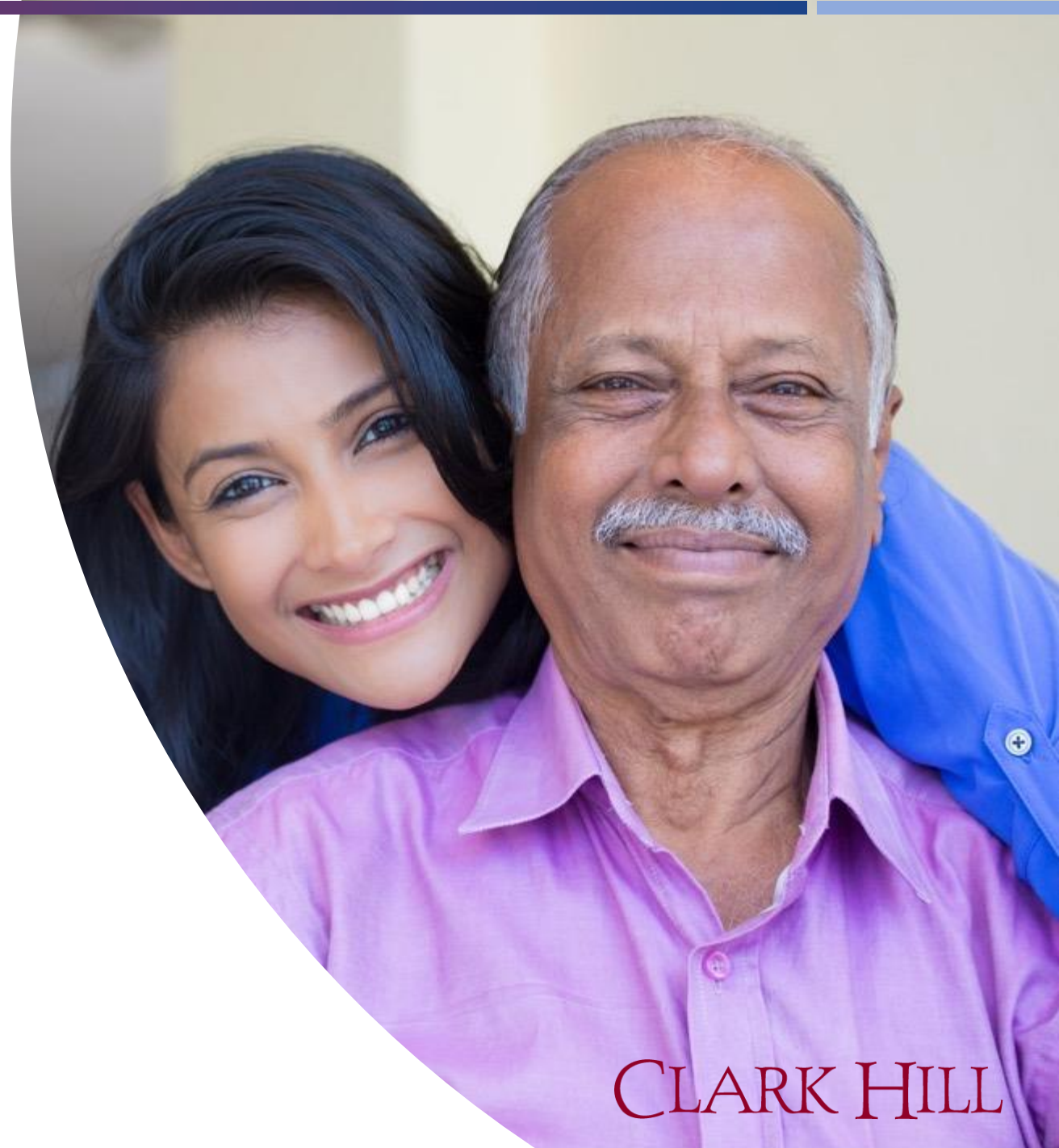


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# Existing Legal Protections

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- Title VII, by its terms, does not explicitly list LGBTQ among those categories of unlawful discrimination in the workplace
- Individuals who have previously alleged discrimination on the basis of LGBTQ status or gender identity or gender expression often pursued claims under a theory of “sex stereotyping”



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## Existing Legal Protections

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- Closest Supreme Court case? In Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), the Court ruled that “sex” within the context of Title VII encompasses both the biological differences between men and women as well as a person’s failure to conform to stereotypical gender norms.
- The plaintiff in Hopkins was told that in order to increase her chances of promotion she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”
- Starting around 7-8 years ago, the EEOC and some federal district courts started interpreting Title VII to grant such protections, but other federal courts did not.





## Existing Legal Protections

- Meanwhile, 22 states and the District of Columbia have enacted laws which prohibit discrimination – in varying respects – against transgender people:
  - California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington

# Existing Legal Protections

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- More than 200 cities and counties have explicitly banned gender identity discrimination for public and private employers:
  - Examples: Atlanta, Austin, Boise, Buffalo, Cincinnati, Dallas, El Paso, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York City, Philadelphia, Phoenix, Pittsburgh, and San Antonio



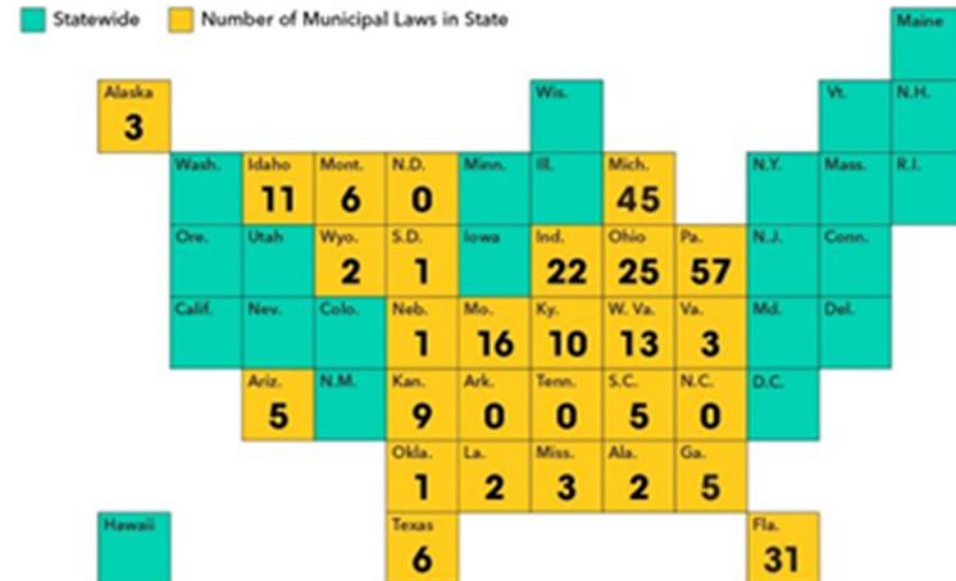
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# Existing Legal Protections

## State and Municipal Laws Prohibiting Discrimination Based on Sexual Orientation

Comprehensive laws barring bias in employment, housing, and public accommodations



Note: Utah's law only covers employment and housing.  
Source: Movement Advancement Project

Bloomberg Law

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## Add It Up And ...

Until the U.S. Supreme Court addressed the issue, the question of coverage of sexual orientation and gender identity discrimination claims under Title VII typically depended on where the employee lived and worked



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# Background of the Cases

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- Zarda v. Altitude Express, 139 S. Ct. 1599 (2019)
- Plaintiff skydiving instructor alleged that he was fired both because his employer discovered he told a female client he was gay and because he did not conform to the “straight male macho stereotype”
- 2nd Circuit ruled *en banc* in favor of the EEOC’s expansive interpretation of Title VII





# Background of the Cases

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- E.E.O.C. v. R.G. & G.R. Harris Funeral Homes Inc., 139 S. Ct. 1599 (2019)
- Plaintiff was fired after she informed her employer that she intended to transition from male to female and would represent herself and dress as a woman while at work
- 6th Circuit Court of Appeals found in favor of the plaintiff



# Background of the Cases

- Bostock v. Clayton County Georgia, 139 S. Ct. 1599 (2019)
- The child welfare services coordinator plaintiff alleged he was terminated after he became involved with a gay recreational softball league and was openly criticized by those who influenced his employer's decision making
- 11th Circuit Court of Appeals, citing past precedent, declined to extend Title VII protection to Bostock's sexual orientation discrimination claim





# THE COURT'S OPINION

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# The Court's Opinion

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In a 6-3 majority opinion – written by one of President Trump's nominees, Neil Gorsuch – the Court held that an employer who fires an individual merely for being gay or transgender violates Title VII



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## The Court's Opinion

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The principal legal basis for the Court's conclusion was simply that the text of Title VII supported it. According to the majority, the ordinary, public meaning of the term "sex" when the law was enacted fairly encompassed "sexual orientation" and "gender identity" because those concepts by definition must include sex.

# The Court's Opinion

- If an employment decision is based just in part on sexual orientation or gender identity, it is intentionally based on “sex” and therefore unlawful under Title VII
- It makes no difference if the employer treats homosexual or transgender women as a group the same as homosexual or transgender men





# The Court's Opinion

- Other points from the Majority:
  - It did not dispute that the term “sex” in 1964 referred to the biological distinctions between male and female
  - It concluded that the legislative history surrounding the law had no bearing, since that is only pertinent if there is ambiguity about the plain meaning of the law’s terms, and the Court felt there was no such ambiguity
  - It rejected the view that Congress should be left to determine whether protections on the basis of sexual orientation and gender identity and amend Title VII to expressly include them







## The Court's Opinion

EXAMPLE: Employer with policy of firing known homosexuals hosts office party where employees bring spouses. Model employee arrives with "Susan," the employee's wife. Will the employee be fired? Applying the employer's policy, the answer is yes if the employee is a woman, but not if a man. This decision intentionally – and unlawfully -- takes the individual's "sex" into account.



# The Court's Opinion

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- Key Points From Lead Dissent (Alito)
  - If the Majority agreed that “sex” referred to biological distinctions between male and female, then discrimination because of “sex” means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender

# The Court's Opinion

- Key Points From Lead Dissent (Alito)
  - If the meaning of “sex” in Title VII was always as straightforward and plain to include sexual orientation and gender identity as the majority concluded, every federal Court of Appeals – and even the Agency charged with enforcing the law, the EEOC – missed the obvious and concluded otherwise for almost 50 years after the law was passed





The background image shows an industrial facility, likely a refinery or chemical plant. In the foreground, a large, white, cylindrical storage tank is visible. Above it, there are multiple levels of yellow-painted metal walkways and railings. Various pipes and structural elements are visible throughout the scene. The lighting is somewhat dim, with some bright spots from industrial lights.

## The Court's Opinion

- Key Points From Lead Dissent (Alito)
  - Majority example: Employer already knew the employee who brought Susan to company party was a woman and even rated her a “model” employee to that point, but learned something new at the party – sexual orientation – which then prompted discharge under the policy





# **IMPLICATIONS AND QUESTIONS**

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# Implications and Questions

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- Remember coverage and state law impacts
  - Title VII covers employers w/15 or more workers
  - State/local protections may already have protected this form of discrimination
  - Will Congress or states be compelled to act?
- Success of the textual argument
  - Many groups, including those who hoped for a favorable result, didn't necessarily expect success on this ground





## Implications and Questions

Even though the Opinion addressed termination, the reasoning applies – like with respect to other forms of discrimination – to all employment decisions (hiring, promotion/demotion, pay, leave, benefit decisions/coverage, etc.)

# Implications and Questions

- Blurring of “motivating factor” and “but-for” causation standards
  - Historically, proving discrimination on the basis of a protected category under Title VII simply had to be “a motivating factor,” and the Court’s opinion reaffirmed this principle by emphasizing that even if discrimination is based only “in part” on sexual orientation or gender identity, it’s unlawful
  - Meanwhile, the “but-for” standard of causation traditionally referred to a higher threshold of proof reserved for retaliation claims under Title VII, and under separate discrimination statutes, like the Age Discrimination in Employment Act
  - In the Majority Opinion, the Court repeatedly referred to the concept of “but for” in equating discrimination on the basis of sexual orientation and gender identity with discrimination on the basis of “sex,” essentially saying that there cannot be discrimination on the basis of LGBTQ grounds “but for” the “sex” of the person



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# Implications and Questions

The Court's Opinion leaves several key issues TBD

- Survival of the equal-opportunity harasser defense?
- How will the religious & ministerial exemptions under Title VII interplay with the Court's holding going forward?
  - Certain employment decisions based on legitimate religious reasons can be deemed exempt, and some beliefs regarding homosexuality are highly tied to religion
- Does the decision impact the legal maintenance of things like separate locker rooms or bathrooms?
  - Employee preference / employer designation



# Implications and Questions

## Other Impacts

- Sectors likely to be impacted going forward include healthcare and education, and possibly even housing and prisons, too
- Schools have been embroiled in bathroom disputes, and Title IX requires equal educational opportunities, so the Opinion may impact participation in sports previously separately designated for one biological sex
- The ACA generally prohibits discrimination in the provision of care, and the current administration – only days before the Supreme Court's Opinion – finalized an Obama-era rule removing nondiscrimination protections for LGBTQ individuals in the Act



# BEST PRACTICES

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# Best Practices

Examine handbooks, as well as EEO/other policies

- Consider explicitly including protection against discrimination or harassment on the basis of sexual orientation or gender identity
  - *Adjust notwithstanding the Court conclusion that the term “sex” already effectively includes sexual orientation and gender identity*
- Consider revising handbook and written policies to reflect gender neutral pronouns
- Consider provisions allowing employees to use the restroom consistent with their gender identity, but be sure to inform and discuss this policy with all employees before implementing it





# Best Practices

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Examine handbooks, as well as EEO/other policies

- Consider gender neutral dress codes and policies which don't specifically define the kinds of attire males and females may wear (no stereotypes) and which permit employees to dress in accordance with their chosen gender
- Consider drafting a policy for dealing with how an employee may transition in the workplace

# Best Practices

## Training

- Whether policies are revised or not, prepare and implement training to set & reinforce expectations for equal treatment of LGBTQ employees, and don't forget inclusion/unconscious bias elements
- Training should include bystander training – we are all in this together!



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## Best Practices

### Don't Forget: It's Diversity AND Inclusion

- Allow LGBTQ employees to self-identify (remember, new EEO-1 form already contains nonbinary designation)
- Allow all employees to select pronouns (can be fluid)
- Offer ally training and programing (not just LGBTQ ERG)
- Conduct 360 reviews on culture, too

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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time.

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# Thank You



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