



Agencies may not use religion as basis for sex discrimination

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IN FOCUS: While religious rights may conflict with protections for [sex discrimination](#) in some situations, the Supreme Court's [Bostock decision](#) sets a "high bar" that will make these religious claims difficult to prove, particularly in the federal sector where "it will be a different story" than the private sector, Alden Law Group partner Michelle Bercovici told **cyberFEDS**® in an exclusive interview. *Bostock v. Clayton County, Georgia*, [120 LRP 18316](#) (U.S. 06/15/20).

In the federal sector, agencies "cannot claim a religious exemption to hiring, period," she said. Also, the Equal Employment Opportunity Commission has "already shown that it will apply a very critical eye to claims asserting a religious basis to discriminate against or harass people based on their [sexual orientation](#)."

For example, in *Humberto P. v. Department of Veterans Affairs*, [117 LRP 4723](#) (EEOC OFO 2017), the EEOC found an employee's allegations that an agency's LGBT pride program announcement was religious discrimination failed to state a claim because he did not allege the event burdened his right to freely exercise his religion.

Federal employment law expert John Mahoney said that while "private employers may be able to raise religious beliefs defenses to Title VII claims, unless the employer was a religious organization, they would not likely be successful."

Religious protection doctrines

In *Bostock*, Justice Neil Gorsuch's majority opinion noted the court was "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution" and acknowledged that "worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage."

But the court concluded that how "doctrines protecting religious liberty interact with Title VII are questions for future cases."

Other potential issues

Mahoney said "inevitably, the federal government will have to grapple with the question of whether the Court's decision threatens the freedom of religion, freedom of speech,

and personal privacy and safety." In addition to issues related to employee bathroom and locker room use, he said, questions may arise regarding whether:

- A strongly religious federal employee health care provider could refuse to conduct sex reassignment procedures based on the argument that doing so will have a severe impact on their ability to honor their deeply held religious beliefs.
- Federal employees could be disciplined for not addressing another federal employee with fluid gender identity by the preferred gender pronoun.

The majority decision may also "pressure federal agency employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures" -- something some employers are already imposing voluntarily, Mahoney said. "Allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims."

Dissent's concerns

In his dissent, Justice Samuel Alito said the decision could have "potential consequences" on "many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex."

For some, "there is more at stake," Alito said, such as women who have been victimized by sexual assault or abuse for whom "the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm."

The majority's ruling, he added, would allow transgender persons -- including someone "who has not undertaken any physical transitioning" -- to claim they have the right to use the facility of the gender with which they identify, but the "Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed."

Health care benefits also "may emerge as an intense battleground under the Court's holding" as "transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery," Alito said.

"Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning," Alito concluded.

But "none" of these other issues were before court, Gorsuch said in the majority opinion, so the decision does not address bathrooms, locker rooms, "or anything else of the kind" under Title VII. The "only question" before the court was "whether an employer

who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."

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