HI all: I am sure you have heard this news!! Note the Roberts/Kavanaugh split and the Gorsuch/Kavanaugh split. After oral argument Gorsuch isn't a total surprise. But Roberts is looking a little like Kennedy today (and other days as well...). Long and short summaries below.

In a 6-3 decision in Bostock v. Clayton County the Supreme Court held that gay and transgender employees may sue their employers under Title VII for discriminating against them because of their sexual orientation or gender identity. Title VII of the Civil Rights Act of 1964 outlaws employment discrimination on the basis of race, color, religion, sex, and national origin.

This case will significantly affect states and local governments which may now be sued under Title VII by gay and transgender employees. Previously a patchwork of states allowed discrimination claims under state law.

The Court, in an opinion written by Justice Gorsuch, unsurprisingly, began its analysis by considering the definition of the word "sex." The Court assumed that the term refers only to biological distinctions between male and female. But, the Court noted, Title VII prohibits taking certain actions "because of" sex, meaning "sex" can be one of multiple factors. And Title VII prohibits discrimination against individuals, not groups.

According to Justice Gorsuch: "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee-put differently, if changing the employee's sex would have yielded a different choice by the employer-a statutory violation has occurred."

The Court offered an example involving a gay employee to illustrate its point that sex is a factor in discriminating against gay employees: "Consider for example, an employer with two employees, both whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but for cause of his discharge."

The Court also offered an example involving a transgender employee to illustrate sex is a factor in discriminating against employees based on gender identity: "[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the majority opinion.
Justice Alito wrote a lengthy dissenting opinion which Justice Thomas joined. Justice Alito describes the majority opinion as "legislation." He notes that neither "sexual orientation" nor "gender identity" are listed in Title VII as grounds for prohibited discrimination.

Justice Kavanaugh wrote a briefer, solo dissent opining that it is Congress's and the President's responsibility to amend Title VII, not the Court's.

SCOTUS Rules Employers May Be Sued for Sex Orientation and Gender Identity Discrimination

In a 6-3 decision in Bostock v. Clayton County the Supreme Court held that gay and transgender employees may sue their employers under Title VII for discriminating against them because of their sexual orientation or gender identity. Title VII of the Civil Rights Act of 1964 outlaws employment discrimination on the basis of race, color, religion, sex, and national origin. The Court, in an opinion written by Justice Gorsuch began its analysis by considering the definition of the word "sex." The Court assumed that the term refers only to biological distinctions between male and female. But, the Court noted, Title VII prohibits taking certain actions "because of" sex, meaning "sex" can be one of multiple factors. And Title VII prohibits discrimination against individuals, not groups. According to Justice Gorsuch: "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: . . . If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee-put differently, if changing the employee's sex would have yielded a different choice by the employer-a statutory violation has occurred."

Lisa Soronen
Executive Director
State & Local Legal Center
444 North Capitol Street, N.W., Suite 515
Washington, D.C. 20001
Phone: (202) 434-4845
Email: lsoronen@sso.org
Website: http://www.statelocallc.org/
Twitter: @SLLCSCOTUS

Disclaimer

The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and others authorized to receive it. If you are not the recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.