BELLNUNNALLY

HAS THE U.S. SUPREME COURT TURNED THE PROOF STANDARD IN TITLE VII AND OTHER FEDERAL EMPLOYMENT LAWS ON ITS HEAD?

August 24, 2020

On June 15, the U.S. Supreme Court created a new class of employees protected by Title VII – those who are "homosexual and transgender" – in *Bostock v. Clayton County Georgia*, which is the subject of a previous client alert. In addition to extending the protection of Title VII to this class of employees, the court may have significantly altered the causation standard required for an employee to show gender discrimination. Historically, employees needed to prove the employer was "motivated by" an employee's gender when making employment decisions on behalf of that employee. The Supreme Court's decision in *Bostock,* however, changed that standard to "but for," and offered detailed commentary about what that new standard means. The laws potentially implicated by this new standard include: portions of Title VII; the Americans With Disabilities Act; the Age Discrimination in Employment Act; 42 U.S.C, Section 1981 (race discrimination); and other acts.

Bostock Changes the Standard of Proof for Gender Discrimination Claims

Until the *Bostock* decision, the "but for" causation standard required a plaintiff to show that his/her/their injury would not have occurred but for the unlawful conduct of the defendant. In fact in March, the Supreme Court said just that, in *Comcast Corp. v. National Association of African American Media* (holding that the causation standard for race discrimination cases under 42 U.S.C. Section 1981 is "but for" and observing that few legal principles are better established than the "but for" causation standard in tort cases) in an opinion written by Justice Gorsuch who also wrote the majority opinion

in *Bostock*. Yet due to language in *Bostock*, it will be argued that even if other factors played a role in an employer's decision, even factors having a more important role than the employee's sex, the other factors are of no significance. So long as an employee's sex was one "but for" cause of that decision, then Title VII protection is triggered.

Interestingly, the causation standard under Title VII was not an issue to be decided in *Bostock* and therefore may not be binding on lower courts. Nonetheless, the plaintiffs' bar can argue that the court lowered the plaintiff's burden of proof on "but for" causation not only under certain causes of action under Title VII cases, but also under the ADA, ADEA, 42 U.S.C. Section 1981 and others that utilize the standard. It could take years for courts to figure out if this language is binding, and if it is, how to apply it.

How do Employer's Respond to the *Bostock* Decision's More Lenient Proof of Standard?

In the meantime, employers need to be thorough in their investigations of employee conduct, make carefully reasoned decisions on the action to be taken as a result of those investigations and consult with their attorneys if there is any question about how to proceed.

If you have questions or would like to discuss further, please contact Jay Wallace or Tom Case.

Related Practices

Labor and Employment

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