Office of Congressional Workplace Rights

OCWR BROWN BAG LUNCH SERIES
SUPREME COURT RECAP: EMPLOYMENT CASES
JULY 29, 2020

I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies the rights and protections of 13 labor and employment statutes to the legislative branch of the federal government. Covered employees alleging violations of these laws may file civil actions in federal court, and some might have the option of pursuing their claims through an administrative hearing at the Office of Congressional Workplace Rights (OCWR), in which Hearing Officers and the Board of Directors typically follow federal case law. Whichever route claimants choose to follow, relevant holdings of the Supreme Court of the United States (SCOTUS) are binding.

In its recently-concluded term, the SCOTUS issued two opinions with important implications for laws applied through the CAA: The landmark decision in *Bostock v. Clayton County, Georgia* confirms that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sexual orientation and gender identity, and the holding in *Babb v. Wilkie* clarifies the causation standard for federal-sector claims under the Age Discrimination in Employment Act (ADEA). The Court also issued an opinion in *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* regarding a matter of civil procedure – specifically, defense preclusion – that could affect employing offices involved in litigation under the CAA.

II. *Babb v. Wilkie*

On April 6, 2020 the Supreme Court issued its decision in *Babb v. Wilkie*, 140 S. Ct. 1168 (2020), holding that federal employers violate the Age Discrimination in Employment Act (ADEA) if personnel actions involving employees age 40 or over are "tainted by" considerations of the employee's age.

We analyzed this decision in depth during our Brown Bag presentation on May 20, 2020. The outline from that presentation is available on the OCWR web site at https://www.ocwr.gov/sites/default/files/CAA Causation After Babb v Wilkie.pdf. Here are the highlights:

- **Facts and history** – Noris Babb, a Veterans Administration pharmacist, sued under the ADEA and other statutes, claiming that several adverse actions were taken against her because of age and other unlawful factors. The district court granted summary judgment in favor of the VA, applying the *McDonnell Douglas* burden-shifting framework and holding that although Babb had established a prima facie case of age discrimination, the employer had proffered legitimate non-discriminatory reasons for the adverse actions, and Babb could not establish that those reasons were pretextual. The Eleventh Circuit Court of Appeals affirmed – albeit reluctantly – because although the panel might have agreed with Babb's argument that the district court incorrectly applied a "but-for" causation standard to her ADEA claim, the "prior panel precedent" rule required the application of that standard.
- **Holding** – The SCOTUS reversed and remanded, holding that the standard of causation for federal-sector ADEA claims is not "but for," but rather "untainted by."
- **"Free from any"** – The Court rejected the government's argument that the same "but for" causation standard that applies to private-sector ADEA cases should apply to federal-sector ADEA cases as well. The private-sector provision prohibits discrimination against an individual "because of such individual's age," 29 U.S.C. § 623(a)(1), whereas the federal-sector provision requires that personnel actions "shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The Court held that "free from any" means exactly what it says: free from any, or untainted by.
- **Violation even if outcome would have been the same** – The Court explained that age must be the but-for cause of the discrimination, but the discrimination need not be the but-for cause of the personnel action. In other words, even if the outcome would have been the same if age hadn't been taken into account, if the older employee was treated less favorably because of her age – for example, by having points docked in an employee rating system because she was over 40 – then the ADEA was still violated.
- **Process vs. ultimate decision** – In order to be actionable, discrimination must affect the ultimate personnel decision, not just the process that led to the decision. For example, if a suggestion was made that an employee was too old for a promotion, but the decision-maker rejected that suggestion and made a decision based solely on factors unrelated to age, the action would not violate the ADEA.
- **Remedies** – Whether or not age was the but-for cause of the personnel action is still relevant with respect to remedies. If the same decision would have been made regardless of the unlawful consideration of the employee's age, the employee will not be able to receive reinstatement, back pay, or other such remedies. Injunctive relief or other forward-looking remedies might still be available.

As we discussed in our previous Brown Bag on *Babb v. Wilkie*, the language requiring personnel actions to be made "free from any discrimination based on" protected characteristics appears not only in the ADEA federal-sector provision, but also in the federal-sector provision of Title VII and section 201(a) of the CAA. This suggests that the "tainted by" standard of causation established for the ADEA in *Babb* should apply not only to covered employees' claims of age discrimination, but also to claims of discrimination based on race, color, religion, sex, national origin, or disability.

III. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*

On May 14 of this year, the Supreme Court issued its decision in *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589 (2020), which held on narrow grounds that, in a trademark dispute between two clothing companies, defense preclusion was inappropriate.

- **Facts and History –** Lucky Brand and Marcel, two clothing companies that both use the word "Lucky" as part of their marks on apparel, were engaged in a twenty-year trademark battle. In the first round of litigation, in 2003, the parties signed a settlement agreement in which Lucky Brand agreed to stop using the phrase "Get Lucky" and Marcel agreed to release any claims regarding Lucky Brand's use of its own trademarks. In the second round, in 2005, Lucky Brand sued Marcel for copying its designs and logos. Marcel counterclaimed against Lucky Brand for Lucky Brand's alleged continued use of "Get Lucky," arguing that the use of Lucky Brand's other marks in combination with the phrase "Get Lucky" was confusing. Notably, this litigation did not involve any claims regarding Lucky Brand's use of its own marks independent of the "Get Lucky" slogan. Lucky Brand initially argued that the counterclaims were barred by the settlement agreement, but it did not invoke this defense later in the proceedings. The court found that Lucky Brand violated the settlement agreement with its use of "Get Lucky," the jury found for Marcel on the remaining claims, and Lucky Brand was enjoined from using "Get Lucky." In the third and instant round of litigation, Marcel claimed that Lucky Brand infringed Marcel's "Get Lucky" mark by using Lucky Brand's other marks; however, Marcel did not allege that Lucky Brand was still using the "Get Lucky" phrase. The district court granted summary judgment for Lucky Brand, finding that Marcel's claims were essentially the same as its counterclaims in the previous round of litigation. The Second Circuit Court of Appeals vacated and remanded, finding that Marcel's claims in the second round were distinct from its claims in the third round. On remand to the district court, Lucky Brand moved to dismiss, arguing—for the first time since early in the 2005 action—that Marcel had released its claims in the settlement agreement. Marcel argued, and the Second Circuit Court of Appeals agreed, that Lucky Brand's release defense was precluded because it should have been raised earlier. The Supreme Court granted certiorari to determine whether defense preclusion was appropriate.
- **Holding –** The Supreme Court, in a unanimous opinion authored by Justice Sotomayor, held that defense preclusion was inappropriate because Marcel's new action "challenged different conduct—and raised different claims—from the 2005 Action." 140 S. Ct. at 1598.
- **Reasoning –** The concept of "defense preclusion" derives from the civil procedure concept of *res judicata*, which includes the doctrines of issue preclusion and claim preclusion. 140 S. Ct. at 1594. "Any preclusion of defenses must, at a minimum, satisfy the strictures of issue preclusion or claim preclusion." *Id.* at 1595. Claim preclusion, the kind of preclusion relevant to this case, "prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *Id.* at 1594. In this case, to "satisfy the strictures" of claim preclusion, Marcel must prove that the causes of action share a "common nucleus of operative facts." *Id.* at 1595. The Court determined that, because "the two suits here were grounded on different conduct, involving different marks, occurring at different times," they did not share this "common nucleus of operative facts" and, therefore, defense preclusion was inappropriate. *Id.* First,

the 2005 action involved Lucky Brand's alleged use of "Get Lucky," whereas the instant action involved Lucky Brand's use of its own trademarks, not the "Get Lucky" phrase. *Id.* Second, the alleged infringement in the instant case took place after the conclusion of the 2005 case, and "[c]laim preclusion generally 'does not bar claims that are predicated on events that postdate the filing of the initial complaint.'" *Id.* at 1596. This is because "[e]vents that occur after the plaintiff files suit often give rise to new '[m]aterial operative facts' that . . . create a new claim to relief." *Id.*

- **Significance –** In *Lucky Brand*, the Court sidestepped the broader question of whether defense preclusion is ever appropriate, instead ruling on the narrow ground that, in this particular case, preclusion was inappropriate because the two suits did not share a "common nucleus of operative facts." In a footnote, the Court noted that "[t]here may be good reasons to question any application of claim preclusion to defenses." *Id.* at 1595, n.2. Defense preclusion involves two competing policy justifications: "[R]ecognizing defense preclusion would force defendants to litigate all possible defenses to final judgment, increasing litigation costs and overburdening courts. On the other hand, defense preclusion could promote the same policies as ordinary claim preclusion by requiring parties to resolve all possible defenses at the earliest opportunity." Megan La Belle, *Opinion analysis: Court unanimously reverses 2nd Circuit on "defense preclusion," but on very narrow grounds*, SCOTUSblog (May 14, 2020, 8:29 PM), https://www.scotusblog.com/2020/05/opinion-analysis-court-unanimously-reverses-2nd-circuit-on-defense-preclusion-but-on-very-narrow-grounds/.

IV. *Bostock v. Clayton County, Georgia*

One of the most significant decisions in this past year's SCOTUS term was *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). Issued on June 15, 2020, the opinion encompassed three cases: *Bostock v. Clayton County Board of Commissioners*, 723 F. App'x 964 (11th Cir. 2018), an Eleventh Circuit case involving a child welfare advocate who claimed he had been fired when his employer learned he had joined a gay recreational softball league; *Zarda v. Altitude Express, Inc*., 883 F.3d 100 (2d Cir. 2018), a Second Circuit case involving a skydiving instructor who alleged he was fired for telling a client he was gay; and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), a Sixth Circuit case involving a transgender woman who was fired from her job at a funeral home when she informed her employer that she was planning to begin presenting as female at work. After their firings, each employee sued under Title VII, alleging that their employers had unlawfully discriminated against them on the basis of sex.

In *Bostock*, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and dismissed his case as a matter of law. In *Zarda*, the Second Circuit concluded that Title VII does prohibit sexual orientation discrimination and allowed the case to proceed. In *R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit ultimately concluded that Title VII prohibits employers from firing employees because of their transgender status.

Justice Gorsuch authored the opinion of the Court, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Alito dissented, joined by Justice Thomas. Justice Kavanaugh dissented separately. All three opinions were primarily textualist.

Majority Opinion by Justice Gorsuch

Justice Gorsuch relies heavily on plain meaning analysis and provides several explanatory examples. He concludes that Title VII protects against employment discrimination based on sexual orientation and transgender status, reasoning that "an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision." 140 S. Ct. at 1737. The employers raise several arguments based on extra-textual considerations, to which Justice Gorsuch responds, "Only the written word is the law, and all persons are entitled to its benefit." *Id.*

Key Definitions/Concepts

Justice Gorsuch begins the Court's analysis by determining the ordinary public meaning of its key terms at the time of the statute's enactment. 140 S. Ct. at 1738-39. He focuses on the meaning of "sex", what Title VII says about "sex", and the meaning of "discriminate."

- **Sex**
    - The employees argue that "sex" has a broader meaning that just anatomy and encompasses some norms on gender identity and sexual orientation. 140 S. Ct. at 1739.
    - The employers argue that sex in 1964 meant "status as either male or female [as] determined by reproductive biology." *Id.*
    - The employees ultimately concede this point for argument's sake and the court ultimately uses the employers' definition to conduct its analysis. However, the majority notes that the court's approach does not turn on which definition is right. *Id.*
- **What Title VII says about sex**
    - Title VII prohibits employers from taking certain actions "because of" sex. "The ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" 140 S. Ct. at 1739, citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar***,** 570 U.S. 338, 350 (2013). This phrase invokes but-for causation, which is "established whenever a particular outcome would not have happened 'but for' the purported cause." 140 S. Ct. at 1739.
    - There can be multiple "but for" causes, and Title VII liability can be established if any of these but-for causes are unlawful bases for certain employer actions. 140 S. Ct. at 1739–40. Specifically, the statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. *Id.* at 1740. The employers suggest that the use of the word "otherwise" in the statute means that Title VII only reaches those discharges that involve discrimination, and the Court accepts this point for the sake of argument. If the statute does only reach

discriminatory discharges, then the Court must define what "discriminate" meant when Title VII was passed.

- **Discrimination**
  - In 1964, "discriminate" had the same meaning as it does today: "To make a difference in treatment or favor (of one as compared with others)." 140 S. Ct. at 1740, quoting Webster's New International Dictionary 745 (2d ed. 1954). In disparate treatment cases, the difference in treatment based on sex must be intentional.
  - The Court's focus should be on discrimination against individuals and not groups, based on the reference to "individual" three times in §2000e–2(a)(1). 140 S. Ct. at 1740. To further support this point, Justice Gorsuch notes that Title VII does not say that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment" or that there should be no "sex discrimination" or "'sexist policies' against women as a class." 140 S. Ct. at 1740–41.
  - This individual versus group distinction is important because it clarifies that employers cannot defend acts of discrimination against individuals with evidence that it treats the group to which the individual belongs better as a whole or that it treats other groups equally. An employer that fires a woman for refusing his sexual advances could not justify this by saying that he still gives preferential treatment to female employees overall. Similarly, an employer could not avoid liability where he fires a female employee for being insufficiently feminine and also fires a man for being insufficiently masculine. Even though the employer treats men and women equally, the employer still fired each individual in part because of sex. 140 S. Ct. at 1741.

Operative Rule

- Justice Gorsuch concludes that the following rule emerges based on these definitions: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group." 140 S. Ct. at 1741.
  - Example: An employer has two employees who are materially identical in all respects except that one is a man and the other is a woman. If the employer fires the man solely because he is attracted to men, the employer has discriminated against him for traits or actions it would have tolerated from a female employee. The male employee's sex in this instance is a but-for cause of his discharge. 140 S. Ct. at 1741.
  - Example: An employer fires a transgender person who was identified as male at birth but who now identifies as female. If the employer retains an identically situated employee who was identified as female at birth, the employer intentionally discriminates against the first employee for traits or actions that it tolerates in an employee identified as female at birth. 140 S. Ct. at 1741.
  - Example: An employer has a policy of firing any woman who he discovers to be a Yankees fan, but allows this allegiance in his male employees. This is discrimination based on sex, even though there are two causal factors in play. "If an employer would not have discharged an employee but for that individual's sex,

the statute's causation standard is met, and liability may attach." 140 S. Ct. at 1742.

- It does not matter if employers believed they were only intending to discriminate against homosexual or transgender employees. They necessarily had to rely on sex to carry out this intent, so Title VII liability still attaches.
    - Example: An employer has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Whether the employee will be fired depends entirely on whether the model employee is a man or a woman. Even if the employer's ultimate goal was to discriminate on the basis of sexual orientation, to achieve that goal, the employer must intentionally treat the employee worse based in part on that individual's sex. 140 S. Ct. at 1742.
- In addition to the text itself, Justice Gorsuch writes that the Court's conclusion is also fully supported by its precedents:
    - *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) – A company refused to hire women with young children despite hiring men with young children. The court did not accept the employer's defense that its policy could not violate Title VII since the discrimination was not based on the employee's sex alone, but also on her being a parent of young children or that the company, as a whole, tended to favor hiring women over men. 140 S. Ct. at 1743.
    - *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) – An employer required women to make larger pension fund contributions than men because women tend to live longer than men and are likely to receive more from the pension fund over time. Even though the employer was ultimately trying to achieve equality between the sexes, the employer violated Title VII because an individual female employee would not have been treated the same regardless of her sex. 140 S. Ct. at 1743.
    - *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1998) – A male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed. 140 S. Ct. at 1743–44.

Employer's arguments

In the final sections of the opinion, Justice Gorsuch summarizes and responds to each of the employer's arguments.

- *Discrimination on the basis of homosexuality or transgender status is not referred to as sex discrimination in ordinary conversation.* Justice Gorsuch disposes with this argument by pointing out that, in conversation, a speaker is likely to focus on what seems "most relevant or informative to the listener," so they are not likely to say every "but-for" cause of discrimination. Regardless, "conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause." 140 S. Ct. at 1745.

- *An employer who discriminates based on homosexuality or transgender status does not intentionally discriminate based on sex.* Justice Gorsuch responds that "an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules." 140 S. Ct. at 1745.
- *An employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex, if, for example, they asked all applicants to check a box for "homosexual or transgender" on their application but did not ask the applicant's sex.* Justice Gorsuch reasons that this example does not show that the employer's discrimination can be homosexual or transgender discrimination without being sex discrimination. If an applicant did not know what the words homosexual or transgender meant, the employer could not write out instructions for who should check the box without using the words, man, woman, or sex. 140 S. Ct. at 1746.
- *Since Title VII's passage, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but none have become law. At the same time, it has passed other legislation that does refer to sexual orientation; this suggests that Title VII should not be interpreted to cover sexual orientation.* Justice Gorsuch responds that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." 140 S. Ct. at 1747.
- *The traditional and simple but-for causation standard does not work for cases involving homosexual and transgender employees, because it is too blunt to capture nuances.* Justice Gorsuch explains that this might be true if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action, but this is not the case. 140 S. Ct. at 1747–48.
- *Few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons.* Justice Gorsuch rejects this argument for several reasons. First, when the meaning of the statute's terms is plain, that is the end of the matter. "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." 140 S. Ct. at 1749. Second, the employers do not rely on historical context to argue that the relevant terms of Title VII had a different meaning in 1964; instead, they only argue that historical context shows the drafters would have expected a different result. The Court has previously rejected this reasoning. Whether the argument is framed as one based on legislative intent or honoring the statute's "expected application," "the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it.**"** 140 S. Ct. at 1750. Third, the result cannot really be described as completely unexpected, since gay and transgender employees began filing Title VII complaints as early as 1969, only five years after the statute's passage. He notes how the Court previously handled arguments that "Congress could not *possibly* have meant to protect a disfavored group" in the context of applying the Americans with Disabilities Act to state prisoners: "'in the context of an unambiguous statutory text,' whether a specific application was anticipated by Congress 'is irrelevant.'" 140 S. Ct. at 1751, quoting *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 208 (1998).

Another problem with limiting application of Title VII's anti-sex discrimination provision to "some (yet-to-be-determined) group in 1964" is that the Court has already recognized the law's application in many unexpected scenarios. Justice Gorsuch explains:

> How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." [citations omitted] Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it.

140 S. Ct. at 1751–52. Much of what is covered under Title VII's anti-sex discrimination provisions was not anticipated when the law was passed, especially given the possibility that the obviously broad anti-sex discrimination provision was intentionally added to the Civil Rights Act by a lawmaker at the last minute as an attempt to derail the entire statute's passage. Whatever the original intent of Title VII's drafters may have been, it is not a valid reason to ignore the text of the statute to exclude coverage for sexual orientation and transgender status. 140 S. Ct. at 1752.

- *The Court's decision will have far-reaching consequences beyond Title VII to other federal or state laws that prohibit sex discrimination. Sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after this decision.* Justice Gorsuch notes that those other laws are not before the Court and that the Court is not addressing bathrooms and locker rooms under Title VII in this case. As to the policy argument that this opinion may require some employers to violate their religious convictions, employers already have recourse through the express statutory exception for religious organizations at § 2000e–1(a); the First Amendment, and the Religious Freedom Restoration Act of 1993. 140 S. Ct. 1753–54.

Dissent by Justice Alito

Justice Alito, joined by Justice Thomas, authored a lengthy dissent. The dissent argued that the majority's textualist finding that Title VII clearly encompassed sexual orientation and gender identity was incorrect; further, the Court should have considered supplemental methods of statutory interpretation other than textualism. According to the dissent, these supplementary methods of statutory interpretation, coupled with the lack of textual support for the majority's position, counsel strongly against finding that Title VII protects against discrimination because of sexual orientation and gender identity. The opinion contains a lengthy appendix that includes statutes, employment forms, and dictionary definitions of "sex."

- Separation of powers
    - The dissent admonishes the majority for essentially legislating "under the guise of statutory interpretation," remarking that "[a] more brazen abuse of our authority to interpret statutes is hard to recall." 140 S. Ct. at 1755.

    - "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society. . . . If the Court finds it appropriate to adopt this theory, it should own up to what it is doing." 140 S. Ct. at 1755–56.
    - According to the dissent, the proper inquiry is not "whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964.* It indisputably did not." 140 S. Ct. at 1756.
- Textualism
    - The first part of the dissent argues that the majority is incorrect in asserting that, not only can Title VII be plausibly read to include sexual orientation and gender identity, it "*cannot reasonably be interpreted any other way*." 140 S. Ct. at 1757. Much of the dissent's opinion focuses on countering the majority's textualist interpretation.
    - First, the dissent points out that Title VII prohibits employment discrimination because of race, color, religion, sex, and national origin; neither "sexual orientation" nor "gender identity" appear on that list. 140 S. Ct. at 1754–55.
    - The dissent consults many dictionaries from the 1950s and 1960s and determines that none of them define "sex" to mean sexual orientation or gender identity; instead, they focus on biological distinctions between males and females. 140 S. Ct. at 1756.
    - "Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: 'We do not hire gays, lesbians, or transgender individuals.' And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. . . . An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge." 140 S. Ct. at 1758–59.
    - Therefore, according to the dissent, it is possible to discriminate against a person because of sexual orientation or gender identity *without* discriminating because of sex. 140 S. Ct. at 1758.
    - The dissent criticizes the majority for treating the text of Title VII as unambiguously supporting the inclusion of sexual orientation and gender identity and, as a result, refraining from considering other approaches: "[E]ven if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations." 140 S. Ct. at 1763.
- Other arguments from lower courts
    - The dissent criticizes three arguments made in lower courts in support of finding that Title VII protects against sexual orientation and gender identity

discrimination. Although the majority's opinion does not rely on these arguments, the dissent briefly considers them and finds all three to be unpersuasive.
    - First, some advocates, relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) argue that "discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes" that men should be attracted to women and women should be attracted to men. However, the dissent argues that this argument fails because these stereotypes apply equally to men and women. 140 S. Ct. at 1763.
    - Second, advocates have analogized discrimination against members of same-sex couples to discrimination against members of interracial couples, which lower courts have found to violate Title VII. The dissent argues, however, that discrimination against interracial couples is based on the subjugation of Black people, whereas there is no comparable group in the sexual orientation context: "discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called 'homophobic' or 'transphobic,' but not sexist." 140 S. Ct. at 1765.
    - Third, although "[t]he opinion of the Court intimates that the term 'sex' was not universally understood in 1964 to refer just to the categories of male and female," the dissent consults dictionaries from the 1950s and 1960s and finds that dictionary definitions focused on the biological differences between males and females. 140 S. Ct. at 1766.
- Original public meaning
    - The dissent asserts that, because the text of Title VII does not clearly prohibit discrimination based on sexual orientation and gender identity, it is important to look to what the text was understood to mean at the time it was adopted. 140 S. Ct. at 1766.
    - The dissent argues that people in 1964 would have read "sex" to mean biological sex, not sexual orientation or gender identity. 140 S. Ct. at 1767.
    - The dissent argues that, because other statutes and state constitutions promulgated before 1964 used similar language to Title VII, "the concept of discrimination 'because of' . . . sex was well understood. It was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women." 140 S. Ct. at 1769.
    - Further, the dissent argues that social norms in 1964 were such that ordinary people would not have thought to include concepts of sexual orientation and gender identity within the term "sex": prevailing social attitudes were homophobic. 140 S. Ct. at 1769.
- Legislative history
    - The dissent notes that the prohibition against sex discrimination came from Representative Howard Smith, who is thought to have proposed the language as a "poison pill" to derail the legislation. In debates about the new language, no one mentioned sexual orientation, even though the concept of LGBTQ rights would have been even more controversial than women's rights. 140 S. Ct. at 1776.
    - Further, the dissent argues that even if the "poison pill" theory is not correct, the language stems from the women's rights movement, not from the gay rights movement, which at that time was still nascent. 140 S. Ct. at 1776–77.

- Post-enactment events
    - The dissent analyzes legislative and judicial treatment of Title VII over the years to argue that no one, until very recently, read "sex" to encompass sexual orientation and gender identity. 140 S. Ct. at 1777.
    - First, after Title VII was adopted, bills to add "sexual orientation" to Title VII's list of prohibited grounds for discrimination were introduced every Congress beginning in 1975, suggesting that lawmakers did not think that Title VII already included sexual orientation discrimination. 140 S. Ct. at 1777.
    - Further, until 2017, every Court of Appeals decision understood Title VII's prohibition on discrimination to include only discrimination based on biological sex. 140 S. Ct. at 1777.
    - Finally, the EEOC did not begin to include concepts of sexual orientation and gender identity within its interpretation of "sex" until at least 2011. 140 S. Ct. at 1757, n.7.
- Consequences of the decision
    - The final section of the dissent identifies potential "far-reaching consequences" of the Court's ruling. The dissent criticizes the majority for declining to comment on these issues and for taking the issue away from Congress. 140 S. Ct. at 1778.
    - "[T]he position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty." 140 S. Ct. at 1778.
    - See the "What Comes Next?" section below.

Dissent by Justice Kavanaugh

Justice Kavanaugh dissented separately, quoting heavily from texts on statutory interpretation by the late Justice Antonin Scalia and others. He emphasized repeatedly that he believes LGBTQ individuals should have equal rights in employment and otherwise, but that Title VII as written does not prohibit discrimination based on sexual orientation and gender identity.

- Separation of powers
    - The dissent begins with warnings about the importance of separation of powers and the dangers of blurring the lines between the legislature and the judiciary. It is for Congress to amend the statute, not for the courts to read meaning into the statute that isn't there.
    - "In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway." 140 S. Ct. at 1824.
- Literal vs. ordinary meaning

- Justice Kavanaugh decries the majority's "novel" interpretation of the phrase "because of sex," and explains that this interpretation relies on the literal meaning of the word "sex" rather than the ordinary meaning.
- He writes that, "For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex." 140 S. Ct. at 1824.
- However, "[C]ourts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase. . . . The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of 'discriminate because of sex' was the same in 1964 as it is now." 140 S. Ct. at 1825.
- An example of ordinary vs. literal meaning would be a statutory ban on "vehicles in the park," which "would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word 'vehicle,' in its ordinary meaning, does not encompass baby strollers." 140 S. Ct. at 1825.
- An example of focusing on the ordinary meaning of a phrase rather than the literal meaning of the words in a phrase would be the phrase "American flag": "An 'American flag' could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes." 140 S. Ct. at 1826.
- The dissent includes numerous examples of how the Court has interpreted statutes according to ordinary meaning rather than literal meaning. Further, the dissent provides examples of how the Court has emphasized the importance of sticking to the ordinary meaning of an entire phrase rather than the meaning of the individual words within the phrase. 140 S. Ct. at 1825–27.
- "[I]n light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase 'discriminate because of sex.' Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no. . . . Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination —back in 1964 and still today. . . . In common parlance, Bostock and Zarda were fired because they were gay, not because they were men." 140 S. Ct. at 1828.

- The dissent goes on to explain that Congress has always treated sex and sexual orientation as two distinct concepts.
  - Since the passage of Title VII, "Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination." 140 S. Ct. at 1829.
  - According to Justice Kavanaugh, every federal statute that prohibits sexual orientation discrimination "expressly prohibit[s] sexual orientation discrimination in addition to expressly prohibiting sex discrimination. . . . To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition sex discrimination, Congress explicitly refers to sexual orientation discrimination." 140 S. Ct. at 1829.
  - Justice Kavanaugh applies canons of statutory interpretation to support his view: "Congress knows how to prohibit sexual orientation discrimination," and the

Court usually presumes that differences in language convey differences in meaning; moreover, "[R]eading sex discrimination to encompass sexual orientation discrimination would case aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U.S. Code in laws enacted over the last 25 years." 140 S. Ct. at 1829–30.

- The executive and judicial branches of government have also treated sex and sexual orientation as distinct:
    - The dissent lists examples of post-Title VII Executive Orders and federal regulations attempting to ban sexual orientation discrimination, which indicates that people have commonly understood sexual orientation to be distinct from sex, the latter of which was already protected from discrimination. 140 S. Ct. at 1831.
    - The major SCOTUS cases dealing with sexual orientation also have not treated sexual orientation as a form of sex discrimination, even though all of those cases "would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause." 140 S. Ct. at 1833 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015). "That is presumably because everyone on this Court, too, has long understood that sexual orientation discrimination is distinct from, and not a form of, sex discrimination." *Id*.
    - "Until the last few years, every U.S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. . . . [I]n the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30 judges. The unanimity of those 30 federal judges shows that the question as a matter of law, as compared to as a matter of policy, was not deemed close." 140 S. Ct. at 1833–34.

V. What Comes Next?

As Justices Gorsuch and Alito pointed out in their respective opinions in *Bostock*, the Court's decision that Title VII prohibits discrimination against LGBTQ employees raises several significant questions. Among the considerations likely to be addressed in litigation and/or legislation in the next few years:

- Bathrooms/locker rooms (allowing individuals to use the facilities corresponding to the gender with which they identify)
- Dress codes (allowing transgender individuals to dress according to the requirements for the gender with which they identify)
- Religious issues (religious discrimination claims or cross-claims; RFRA defenses; employment by religious institutions)
- Women's sports (allowing transgender women to play on women's teams)

- Housing (Title IX cases against colleges that resist assigning members of the opposite biological sex as roommates; possibly also Fair Housing Act cases)
- Healthcare (forcing religious employers and healthcare providers to cover sex reassignment surgery)
- Freedom of speech (claims for failing to use preferred pronouns or criticizing LGBTQ individuals)
- Constitutional claims (potentially heightening the standard of review for sexual orientation and gender identity claims under the Equal Protection Clause)

Some of these issues will come up in litigation of Title VII claims. That litigation could very well coincide with the courts' efforts to determine which standard of causation to apply in federal Title VII discrimination cases in the wake of *Babb v. Wilkie.*