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English 388

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Bostock v. Clayton County - My Opinion

Upon reviewing the arguments put forth by both the Petitioner and the Respondent, listening to the oral arguments both sides presented to the Supreme Court, and debating the facts of the case amongst our class, I have come to the conclusion that the Court should side with the Petitioner. I agree with almost every argument put forth by the Petitioner, and I was further convinced by arguments brought up during our classroom debate. To summarize my opinions on the matter, I maintain that:

A. The Petitioner is correct in arguing that sexual orientation is a fundamentally sex-based classification
B. The "simple test" used by the Petitioner is sound
C. The Petitioner is correct in arguing that the statutory history of Title VII lends itself to an expansive definition of "Sex-based descrimination"
D. Concerns that finding Title VII in Bostock's favor will harm other members of the LGBT community, such as gender nonconforming individuals, are not compelling

A. <u>The Petitioner is correct in arguing that sexual orientation is a fundamentally sex-based classification</u>

The fundamental question of Bostock v. Clayton County revolves around the meaning of Title VII of the Civil Rights Act of 1964, which forbids workplace discrimination "On the basis of sex." Thus the most important question that can be asked of this case is whether sexual orientation can be reasonably interpreted to be covered by "sex" in this statute. Upon reviewing both sides' arguments, I believe that it can be.

The Petitioner and the Respondent each attempt to tackle the question of what exactly "Because of sex" means in Title VII and how it applies; The Petioner emphasizes the *plain language* of the text, whereas the Respondent focuses on the *original public meaning* of "Sex" at the time of the statute's writing. The Petitioner highlights the fact that sex and sexual orientation are inextricably linked; "One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' [in the dictionary definition of 'homosexuality'] meaningless"(pp. 14) If Bostock were not a man, he could not be homosexual. Thus it seems to be the case that sexual orientation is closely tied, if not completely linked to, a person's sex.

The Respondent attempts to counter this argument by pointing out that:

> "An employer that discriminates on the basis of sexual orientation is prompted to take the challenged action because it objects to the individual's sexual orientation, not his or her sex. Such an employer "is not excluding gay men because they are men and lesbians because they are women. [The employer's] discriminatory motivation is independent of and unrelated to the applicant's sex."(pp. 47)

This is correct, but ultimately irrelevant, due to the fact that *Manhart* (A case in which the employer argued that, because women on average live longer, and longevity is not completely sex-dependent, it cannot be said that they discriminated "because of sex") establishes that even if an action was not exclusively motivated by sex, and even if every member of said sex is not harmed catagorically, the action can still be in violation of Title VII; ultimately, if the result of an employer's action leads to the "Treatment of a person in a manner which but for that person's sex would be different," then they have violated Title VII.

In addition to this, the Respondent attempts to counter the Petitioner's argument that Sexual orientation discrimination is a form of association discrimination by declaring:

"An employer who objects to homosexuality does not have concerns with, for example, a male employee merely associating with other males, having close male friends, socializing with male friends or having lunch or dinner with male friends. Nor does such an employer have any concerns with a male employee who lives with other males, assuming that this is just a platonic arrangement. The employer's only objection is if a male employee has a romantic relationship with another male that reflects that the male employee is homosexual."(pp. 55)

This is a very weak response, because it is responses exactly like this that association discrimination is meant to counter. It has already been established that an employer's action need not discriminate against women or men as such; in the 60's, an employer could use the exact same argument the Respondent uses to justify firing a white employee who married a black person - they are not opposed to her interacting with or befriending black people, they only do not support her marrying one.

B. The "simple test" used by the Petitioner is sound

The use of the "simple test" in *Manhart* by the Petitioner to establish that Bostock was fired "Because of sex" is sound - "When an employer fires a female employee because she is a lesbian – i.e., because she is a woman who is sexually attracted to other women – the employer has treated that female employee differently than it would treat a male employee who was sexually attracted to women."(pp. 31) Following this test, it seems obvious that sexual orientation discriminination can be considered a form of sex discrimination, even if the homosexual person's sex is not a motivating factor of their discrimination.

The Respondent attempts to undermine the Petitioner's use of *Manhart*'s simple test:

> "One relevant trait that must be kept the same is the employee's sexual orientation, since that is the very trait that is the subject of this case. Thus, a hypothetical example illustrating an actual case of sex discrimination based on the employer's treatment of a similarly situated comparator is if an employer fires a female employee because she is lesbian but retains a male employee who is homosexual."(pp. 42)

According to the Respondent, the Petitioner misuses the simple test by covertly shifting *two* variables in the comparison, when only one is supposed to be. When comparing a homosexual man like Bosotock to a heterosexual woman, the Petitioner is swapping the person's sex *in addition to* the person's sexual orientation. Thus the Petitioner's use of the simple test in this case is flawed and should be disregarded.

This response is unsound. I contend that the Respondent is actually using the very reasoning they claim to criticize; the Respondent is correct in saying that the sexual orientation of the employees is the crux of the comparison. Specifically, the whole point of the test is to compare *across* the lines of sexual orientation. Thus, comparing the situation of a gay man and a gay woman in this case misses the fundamental point of the comparison - when holding *attraction to men* equal between two individuals such as in this case, the employer only sees it as wrong in Bostock's case *because Bostock is a man*.

C. <u>The Petitioner is correct in arguing that the statutory history of Title VII lends itself to an expansive definition of "Sex-based descrimination"</u>

The Petitioner persuasively argues that the statutory developments surrounding Title VII lends itself to the idea that "Sex" is to be interpreted broadly in modern application. Besides *Manhart*, the Petitioner highlights *Newport News, Meritor, Oncale,* and *Price Waterhouse* to support this claim. In each of these cases, the court found that situations that most likely were not thought of by Congress in 1964 were found to be covered by Title VII, such as same-sex sexual harassment, sex-stereotype discrimination, sexual discrmination or harassment against men, pregnancy discrimination, and so on. In his opinion in *Gilbert* (which was a different case of pregnancy discrimination), Justice Brennan points out that "Surely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.' "(pp. 52). This implies that Title VII is perfectly applicable to cases so long as they are "strongly sex related," and one would be hard pressed to say that sexual orientation is not

strongly sex related. The Petitioner is spot on in stating that "The Pregnancy Discrimination Act of 1978, along with Manhart, thus confirms that the statutory ban on sex discrimination in Title VII must be read broadly to prohibit discrimination on account of any sex-based classifications, even those not enumerated in the statute."(pp. 52)

The Respondent is adamant that the Court must stay in line with the original public meaning of "Sex" intended by the drafters of Title VII, saying that "None of these cases cited by Bostock has anything to do with discrimination on the basis of sexual orientation, and all of them applied Title VII in a manner that is consistent with its original public meaning prohibiting discrimination on the basis of being male or female."(pp. 34) The Respondent is completely correct in this case, yet woefully misses the point of the Petitioner's argument. The Petitioner, in saying that the Court "departed" from the original public meaning of "Because of sex," it did not depart in the sense that Title VII now covers more than just discrimination arising from a person's sex; the Petitioner is pointing out that what *counts* as discrimination because of sex has expanded beyond the narrow understanding of sex discrimination which the title's drafters might have had in mind, ie. straightforward, male-over-female economic discrimination such as pay inequality or exclusionary job offerings.

The fact remains that the statutory developments of Title VII seem to strongly imply that it is perfectly within the bounds of reason for the Court to count sexual orientation discrimination as a form of sex discrimination, based on the fact that "Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."(pp. 60)

Statutory history shows that Title VII covers any and every case of sex discrmination, even if it is a form of discrimination not explicitly thought of by Congress in 1964.

D. Concerns that finding the case in Bostock's favor will harm other members of the LGBT community, such as genderfluid individuals, are not compelling

A potential concern which came up in our classroom debate that I think is worth addressing is the concern that finding *Bostock v. Clayton County* in Bostock's favor will inadvertently harm the LGBT community. It was brought up several times that, if the Court does rule that Title VII covers sexual orientation discrimination, then it will 1.) perpetuate the dated assumption that sex and gender are interconnected, and 2.) result in further alienating and marginalizing members of the LGBT community who do not fit into the traditional sex or sexual orientation binary, such as genderfluid or intersex individuals. This is a legitimate concern; obviously the ultimate point of *Bostock v. Clayton County* is to expand the rights of the queer community, not harm them. My decision on the case was very effected by this reasoning earlier in the unit, but I have since found this line of thought unconvincing for several reasons.

To begin with, even if it is the case that a victory for Bostock will harm gender nonconforming individuals, that fact is not an overriding concern compared to everything else brought up in the case. It is important to remember that "[Title VII] focuses on fairness to individuals rather than classes"(pp. 44), and in this specific case Bostock is an

individual who is definitely a man and definitely homosexual. If it truly is the case that Title VII covers sexual orientation discrimination, it would be wrong to deny Bostock his justice simply because such a finding may perpetuate a status quo unwelcoming to gender nonconforming individuals down the line. As much as I personally support gender nonconforming individuals and agree that the language of Title VII is woefully dated, such a debate is simply a fight for another day; here and now, justice for Bostock is the principle concern. Combined with the fact that a decision in favor of Bostock certainly won't render the situation of gender nonconforming individuals any worse than if the decision is made against him, I fail to see such concerns as ultimately compelling.

In total, I believe the Petitioner is correct in their assessment of *Bostock v. Clayton County*. Sexual orientation discrimination is perfectly actionable under Title VII, because sexual orientation discrimination can be considered a form of sex disrimination as well as the fact that the statutory history of Title VII lends itself to a broad understanding of sex discrimination beyond what was originally intended by Congress in 1964. Finally, I concede that a decision in Bostock's favor in this case will unfortunately perpetuate a dated understanding of gender as tied to sex, but such a concern does not override the justice due to Bostock, or undermine the fact that Title VII as it is currently written covers sexual orientation discrimination. Such concerns are legitimate, but far beyond the scope of this case. With all of this in mind, it is my final opinion that the Supreme Court should side with the Petitioner in *Bostock v. Clayton County*.

Works Cited

Supreme Court. *Bostock v. Clayton County*, Petitioner's Brief. 2019.

Supreme Court. *Bostock v. Clayton County*, Respondent's Brief. 2019.