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Justices' LGBT Ruling May Mean More Bias Cases Reach Trial

By **Braden Campbell**

Law360 (June 19, 2020, 7:08 PM EDT) -- Older and disabled workers may have an easier time getting workplace bias cases before a jury thanks to the U.S. Supreme Court's landmark ruling that federal law forbids job discrimination based on sexual orientation and gender identity.

Justice Neil Gorsuch's majority opinion in Bostock v Clayton County makes clear that workers don't have to prove their protected trait was the sole cause of their mistreatment under the "but for" standard, which applies to claims brought under the Americans with Disabilities Act, the Age Discrimination in Employment Act and certain other statutes.

This framing of the but-for standard clears up a longstanding debate over what workers have to show to survive summary judgment in suits that turn on this causation rule, said William Goren, an attorney and consultant who focuses on ADA compliance.

"The decision is huge for plaintiffs' lawyers," Goren told Law360.

In Bostock, a 6-3 majority said language in Title VII of the Civil Rights Act banning sex-based discrimination makes it illegal for employers to mistreat workers because of their sexual orientation or gender identity.

The landmark ruling resolved a deep circuit split over gay and transgender workers' rights following a decadelong effort by LGBTQ advocates to pose the question of Title VII's scope to the high court. The ruling also sheds light on another long-standing legal debate: What workers must show to win job bias cases under laws that use but-for causation.

The ADEA and Title VII's anti-retaliation provisions make it illegal for employers to mistreat workers "because of" certain traits or actions, and the ADA uses the similar "on the basis of" disability. The Supreme Court has read "because of" to require that workers show their trait was the but-for cause of their alleged mistreatment to win their case. That is, workers must show they would not have been mistreated "but for" their disability or other protected trait.

The Bostock case turns on Title VII's ban on bias "because of … sex," so the court examined whether a worker's sex is a but-for factor when an employer fires a gay or transgender worker

because of their sexual orientation or gender identity.

At several points in the majority opinion, Justice Gorsuch says sex is a but-for factor even when it's not the only factor. For example, an employer that has a policy of "firing any woman he discovers to be a Yankees fan" violates Title VII when he enforces it, Justice Gorsuch said, because even though the worker's fandom plays a determining role in the decision, her sex is still part and parcel to her firing.

This framing changes the game for workers because employers and judges often treat the but-for standard like the "sole cause" standard, Goren said. Under this standard, a worker in an ADA unfair firing case would have to show his disability alone cost him his job. Bostock makes clear a worker has a case if his disability worked alongside another factor to trigger his firing, Goren said.

"This decision clearly says that but-for is nothing close to sole cause," he said. "'But for' means exactly that: if the action would not have occurred 'but for' — even if that is just part of a larger whole — you still have liability."

Alan Kabat, a Bernabei & Kabat PLLC attorney who represents workers in discrimination cases, said he expects plaintiff attorneys to cite the ruling "in almost every summary judgment opposition where the employer says 'we have some other reasons for firing the person.'"

Motions for summary judgment ask the judge to act in the jury's stead and decide claims when "no reasonable juror" could disagree. If the court applied something closer to a sole-factor analysis, it might be more apt to credit the employer's story and grant them the win. The Bostock decision raises that bar, Kabat said.

"More cases will go to trial," Kabat said. "Even if the employer is able to present evidence that 'Oh, we had another reason' ... the jury is still going to be able to weigh those reasons and figure out what would be an appropriate verdict."

Not all attorneys see Bostock as a broader win for plaintiffs, however. Eric Meyer, a management-side litigator at FisherBroyles LLP, said the decision "didn't move the needle" for him on the but-for standard because, he said, it tracks the court's 2014 analysis in Burrage v. U.S.

In Burrage, the court said the but-for test controls a Controlled Substances Act provision heightening penalties for drug dealers when deaths "result from" their sales.

Justice Antonin Scalia explained his take on the test using a baseball analogy. If the leadoff batter hits a home run and his team wins 1-0, his score would fairly be considered the but-for cause of the victory, even if "skillful pitching" and other factors played a role. But if his team won 5-2, the slugger wouldn't get the credit.

Like Justice Scalia's framing in Burrage, Justice Gorsuch's read of the but-for standard boils down to whether "the termination decision still would've happened" absent other factors, Meyer said.

"I don't think a plaintiff citing the but-for language from the Bostock case is going to make or break a summary judgment decision because I'm going to continue to cite Burrage," Meyer said. "Either the facts are there and it kind of smells like this [case] should go to a jury ... or it doesn't."

Goren, however, disputed that Justice Gorsuch's analysis in Bostock mirrors Burrage. In Burrage, Justice Scalia said the worker's protected trait must be the determining factor when more than one cause is in play, Goren said. By contrast, Justice Gorsuch said "over and over" that the trait can be one part of a larger whole, as long as it played a deciding role, Goren said.

Ultimately, whether Bostock helps plaintiffs is up to the courts. They'll likely have many chances to weigh in, Goren said.

"Every plaintiff's attorney worth a darn is going to use this case to try to defeat a motion for summary judgment, there's no doubt about that," Goren said.

--Editing by Brian Baresch.

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