

# U.S. SUPREME COURT ISSUES IMPORTANT TITLE VII DECISION:

## The Significance of Words and Their Definitions

By Lisa F. Tanselle, Esq., General Counsel



**A**s the 2019-2020 term of the United States Supreme Court came to an end, the Court issued a significant opinion impacting employers across the country, including public school corporations, school boards and school administrators. In a case wherein the Court was asked

whether firing an employee for being homosexual or transgender constituted discrimination on the basis of “sex” under Title VII of the Civil Rights Act of 1964, the Court concluded yes.<sup>1</sup>

Earlier in its term, the Court accepted three employment discrimination cases on certiorari and consolidated them into one.<sup>2</sup> In the Bostock case, a 10-year county employee was fired for conduct unbecoming a county employee when he began participating in a gay recreational softball league. In the Zarda case, a skydiving instructor was fired after several seasons with the company when he mentioned that he was gay. In the Harris Funeral Homes case, an employee who presented as a male when



hired, but six years later announced that she planned to live and work as a woman after returning from vacation, was fired. All three employees alleged that their employers violated Title VII by engaging in sex discrimination.

The Court began its analysis by stating that it normally interprets a statute in accord with the “ordinary public meaning of its terms at the time of its enactment.” The Court thus framed the issue as follows: Whether the ordinary public meaning of Title VII’s words that it is unlawful for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin allows an employer to dismiss an employee for being homosexual or transgender.

To determine the ordinary public meaning of Title VII, the Court then proceeded to define critical words used in the statute, beginning with the word “sex,” and how sex was defined in 1964, the year the Civil Rights Act was passed. The employers argued



The next word the Court defined was “discriminate,” and again, defined as used in 1964. Citing a 1954 edition of the Webster’s Dictionary, the Court noted to discriminate meant, “to make a difference in treatment or favor (of one as compared with others).” Citing a 2006 decision, the Court noted “to

**The Court concluded** “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

discriminate against a person would seem to mean treating that individual worse than others who are similarly situated.” The Court further noted that in “disparate treatment” cases, such as this one, the difference in treatment based on sex much be intentional. Taking all this together, the Court stated that “an employer who intentionally treats a person worse because

of sex – such as by firing the person for actions or attributes it would tolerate in an individual of another sex – discriminates against that person in violation of Title VII.”

The last statutory word considered by the Court was “individual.” The Court did not consider any definition for the word, but instead considered whether an employer’s treatment of groups rather than individuals could satisfy the duty to not discriminate on the basis of sex. Because Title VII uses the word “individual” several times, the Court concluded the analysis had to focus on individuals and not groups.

After consideration of these words used in the statute, and their definitions, the Court concluded the ordinary public meaning of the statute, at the time it was adopted, resulted in the following straightforward rule:

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. If the

that “sex” in 1964 referred to a person’s “status as either male or female as determined by reproductive biology.” The employees asserted the term had a broader scope, even in 1964, including gender identity and sexual orientation. For the sake of argument, the Court accepted the employers’ interpretation.

Having defined sex, the Court then noted Title VII prohibits employers from taking certain actions “because of” sex. Considering previous opinions, the Court concluded that the ordinary meaning of “because of” was “by reason of” or “on account of.” The Court further noted that the “because of” test incorporates the “but-for causation” standard, meaning that the but-for test requires a court to “change one thing at a time and see if the outcome changes. If it does, [the court has] found a but-for cause.” Applying this to Title VII cases, the Court stated that “the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.”

employer intentionally relies in part on an 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.

Applying this rule to the facts of this case, the Court concluded “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” The Court gave several examples. In a situation where an employer has two employees who are

attracted to men, but one is a woman and the other is a man, if the employer fires the male employee, the employer discriminates against him for traits or actions it tolerates in female employees. In a situation where an employee was identified as a male at birth, but now identifies as a female, if the employer fires that individual but retains an employee 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. Because homosexuality and transgender status

are inextricably bound up with sex, “to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” More simply stated by the Court: “An individual’s homosexuality or transgender status is not relevant to employment decisions.”

The employers tried to convince the Court to go beyond the statutory language and consider the intentions of Congress when it passed the law and the anticipated outcomes of the law. But the Court rejected that suggestion, concluding that legislative history had no bearing in this case where there was no ambiguity in the language. The Court acknowledged that male-on-male sexual harassment was likely not an expected outcome of the statute when it was passed in 1964, but that did not stop the Court in 1998 from concluding the plain words of Title VII prohibited it. Additionally, the employers attempted to assert there would be undesirable policy consequences if the Court



**ISBA**  
INDIANA SCHOOL BOARDS ASSOCIATION

## COMPREHENSIVE POLICY MANAGEMENT SERVICES

**ISBA MAKES POLICY MANUAL UPDATES EASY WITH COMPREHENSIVE POLICY MANAGEMENT SERVICES (CPMS).** CPMS is a more robust service beyond the policy advisories from ISBA that are provided to all members.

Policy-making is a top priority of any school board's governance responsibility. The policies put in place should comply with current Indiana and federal laws and reflect the educational values of the school corporation and the community.

ISBA is your resource for Indiana public school policy development and management. Through a yearly subscription, ISBA's legal team can provide your school corporation with:

- POLICY EVALUATION, CUSTOMIZATION, & MANUAL CODING**  
Review and evaluation of your current policies, full customization of policies to ensure your school corporation meets required legal mandates, and receive the ISBA policy code, tables of content, and index for organizing your local policy manual.
- FOCUSED CONSULTATION**  
Quarterly Zoom video conferencing meetings to talk with corporation representatives about the CPMS Quarterly Report.
- QUARTERLY POLICY UPDATES REPORT**  
Receive in depth information on policy topics and sample policies on individual topics through the Quarterly Report.
- SAMPLE POLICIES AND POLICY LISTS**  
Receive the Required policy list & sample policies along with Essential and Discretionary policy lists as well.
- POLICY TRAINING**  
Ensure your board and administrators are knowledgeable on current policies with policy training sessions.

**“ School corporations are complex organizations with many moving parts.** Corporations must have clear policies to guide the day to day operations in order to operate effectively. Rossville Schools have been fortunate to team up with ISBA and utilize their Comprehensive Policy Management Services (CPMS). CPMS has been instrumental in guiding Rossville School's policy development to ensure policies are up-to-date, on point, and necessary. I have been extremely pleased with the service and hold it in high regard.”

- Dr. James Hanna, Superintendent  
Rossville Consolidated Schools

**“ We are very thankful to ISBA for their continued support through their policy service. Our board greatly appreciates their ability to adapt legal requirements and policy to fit the individual needs of our school district. Their customer support and availability are remarkable and set their service apart from others.”**

- Scot D. Croner, PhD, Superintendent  
Wa-Nee Community Schools

LEARN MORE ABOUT CPMS ON OUR WEBSITE AT: <https://www.isba-ind.org/cpms.html>  
OR E-MAIL: [CPMS@isba-ind.org](mailto:CPMS@isba-ind.org)

concluded employers cannot consider sexual orientation and gender identity in employment actions. Specifically, they raised concerns about enforcing policies on sex-segregated bathrooms and lockers, as well as dress codes. The Court dismissed those arguments, saying none of those issues were before them in this case. The Court reiterated that the only issue before them was whether an employer who fires an employee for being homosexual or transgender has discriminated against that individual because of the individual's sex.

Lastly, the employers expressed concern about an employer's requirement to abide by Title VII when that may violate the employer's religious convictions. The Court noted the statutory exception in Title VII for religious organizations, the possible application of First Amendment principles, and the possible impact of the federal Religious Freedom Restoration Act on that issue. But, again the Court stated that was a question for another case.

**Title VII Decision simply stated by the Court:** "An individual's homosexuality or transgender status is not relevant to employment decisions."

Thus, while a significant decision from the Court in its interpretation of words in Title VII, apparently its conclusion only is an employer who fires an employee for being gay or transgender violates the law. 🗳️

**REFERENCES**

- 1 Bostock v. Clayton County, Georgia, 590 U.S. \_\_\_\_ (2020)
- 2 The two other cases consolidated with Bostock were Altitude Express, Inc., et al. v. Zarda et al., as Co-Independent Executors of the Estate of Zarda and R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission

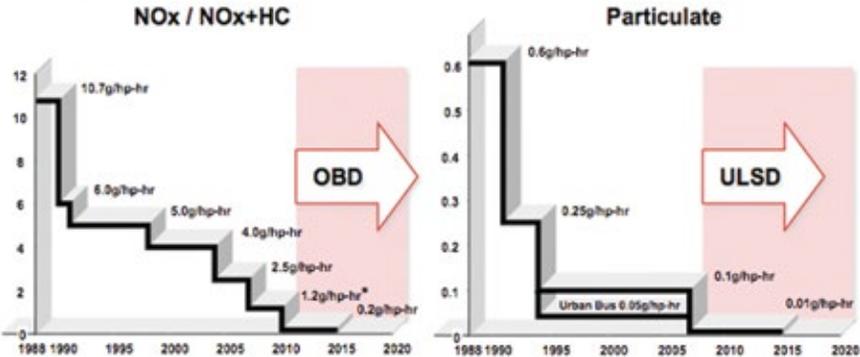
## CLEAN DIESEL: ENVIROMENTALLY RESPONSIBLE AND ECONOMIC

The Thomas Built Bus now available with the new Detroit or Cummins engine has near Zero emissions and with improved fuel economy over older diesel engines is an excellent choice for your fleet.



**Bus Sales & Leasing**  
 9294 South St. Rd. 15 Box 157 • Silver Lake, IN 46982  
 260.352.2722 • 800.331.8942  
 www.kerlinbus.com

**U.S. EPA NOx And PM Standards**



NEAR-ZERO EMISSIONS