

The Supreme Court Affirms the “but-for” Causation Standard in Certain Discrimination Statutory Frameworks

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09.21.2020

The Supreme Court’s recent opinion in *Bostock v. Clayton County* announced that employees are protected from discrimination based on their LGBTQ status. In reaching its historic holding, the *Bostock* Court engaged in an analysis of causation standards, including the “motivating factor” and “but-for” causation standards. The Court recognized, in *dicta*, that Congress supplemented Title VII of the Civil Rights Act of 1964 in 1991 to permit plaintiffs to prevail on discrimination claims brought under the statute by showing a protected trait, like sex, was a “motivating factor” in the challenged employment decision, which is a more lenient standard than “but-for” causation.

But despite *Bostock*’s significant holding, it is important to understand what the opinion did not change. Namely, the *Bostock* Court did not engraft this “motivating factor” causation standard into other statutory frameworks such as the Age Discrimination in Employment Act (ADEA) or Section 1981 (42 U.S.C.S. § 1981). The standard in those frameworks remains the heightened “but-for” causation standard.

This was confirmed in the Supreme Court’s *Comcast Corporation v. National Association of African American-Owned Media et al.* opinion, which was decided in the same term and written by the same Supreme Court Justice as in *Bostock*. In *Comcast*, the Supreme Court reinforced that “but-for” causation means exactly that: but-for X, plaintiff would not have suffered Y. In *Comcast*, Justice Gorsuch specifically rejected the

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“motivating factor” causation standard used in the context of Title VII to evaluate the Section 1981 claim, recognizing that although the motivating factor test “is all well and good for understanding Title VII, it’s hard to see what any of it might tell us about §1981.” In other words, Justice Gorsuch explained the well-known principle that courts cannot borrow the analysis of one statute to interpret a different statute. This standard was recently reaffirmed and reapplied by the Seventh Circuit.

Comcast also clarified for courts in this judicial district that race discrimination claims brought under Title VII and Section 1981 are subject to different causation standards, although historically courts in this judicial district used the same causation standard to evaluate those claims. This will have ramifications for plaintiff’s bringing claims under both statutes: if the Title VII race-based claims fail, the Section 1981 claims will necessarily fail, and if the Title VII race-based claims succeed, the Section 1981 claims may still fail under the more demanding but-for causation standard.

Nevertheless, employers can expect plaintiffs to attempt to make an argument to consider Title VII case law to evaluate the sufficiency of their claims brought under different statutory frameworks. The bottom line is that *Bostock* did not announce a different causation standard for discrimination cases in general, and case law analyzing different discrimination laws are not interchangeable.

We will continue to monitor cases to keep an eye on whether the distinctions between the types of claims brought by plaintiffs, and the appropriate causation standard to evaluate each type of claim, are being adhered to by the courts. Employers who have questions about best policies and practices defending suits brought under Title VII, the ADEA, Section 1981, and other statutes or common laws should be sure to contact their servicing attorney for more details.