Equality in Credit Decisions - Does "Sex" include Sexual Orientation and Gender Identity?

July 30, 2020 | K. Dailey Wilson and Erica A.N. Kramer

In June of this year, the United States Supreme Court held that an employer who fires an employee for being gay or transgender violates the Civil Rights Act of 1964 ("Title VII"). Title VII prohibits employers from refusing to hire, firing, or otherwise discriminating against any individual because of the individual's race, color, religion, sex, or national origin. Though the list of protected classes covered by Title VII does not expressly include sexual orientation or gender identity, in *Bostock v. Clayton County, Georgia*, the Court found that firing an employee for being gay or transgender constituted discrimination based upon the person's sex. Though the Court acknowledged that gay and transgender status are distinct concepts from sex, the Court went on to state that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

While the Court's holding in *Bostock* certainly has implications for creditors in the employment context, the Court's rationale could also affect creditors' underwriting processes and credit decisions under the Equal Credit Opportunity Act ("ECOA").

In *Bostock*, Bostock's employer admitted to firing him for "conduct 'unbecoming' a county employee" because Bostock began participating in a gay recreational softball league. The Court found that Bostock was terminated because of his sex. That is, Bostock was fired because he was male and was attracted to men, and the employer would not have fired him if he had been female and attracted to men. As a result, Bostock was fired because he was male, which constituted unlawful discrimination under Title VII.

Similarly, Aimee Stephens was fired after she informed her employer she was transitioning and would "live and work full-time as a woman." The Court found that Stephens was fired because of her sex because the employer would not have fired a person identified as female at birth for living and working as a woman. As the Court explained, "[i]f the employer retains an otherwise identical employee who was 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."

So, it seems clear that, under Title VII, a creditor cannot fire an employee because of the employee's sexual orientation. But can a creditor refuse to lend money to a consumer because of sexual orientation or gender identity? Several states have specifically prohibited discriminating on the basis of sexual orientation or gender identity in credit decisions. For example, in Colorado, the Consumer Credit Code expressly prohibits discriminating on the basis of sexual orientation, although that term is not defined. Illinois likewise prohibits discrimination in access to financial credit based on sexual orientation, defined to mean actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. However, federally, this specific scenario has not yet made its way up to the high court. But a review of the statutory language in light of the Supreme Court's decision in *Bostock* is instructive.

The ECOA provides that it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of the credit transaction… on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." Like Title VII, the ECOA uses the term "sex." The Supreme Court in *Bostock* found that the term "sex" referred to an individual's biological sex. While it appears the meaning of the term "sex" hasn't been addressed under the ECOA, it seems logical to conclude that sex means biological sex.

The Court in *Bostock* also grounded their decision in the meaning of Title VII's use of the phrase "because of." Specifically, the Court found that it was irrelevant whether there were multiple reasons for the termination - if even one of the motivating reasons was the individual's sexual orientation or gender identity, then the individual was terminated because of sex. Unlike Title VII, the ECOA uses the term "on the basis of," rather than "because of." But, the Supreme Court has previously used the term "on the basis of" interchangeably with "because of."

Thus, it appears the Supreme Court thinks the two terms have the same meaning. As a result, it is possible - or maybe even likely - that a court, based on the rationale in *Bostock*, could hold that a creditor has violated the ECOA, even if the creditor denied the applicant's credit application for reasons in addition to the applicant's sexual orientation or gender identity. This outcome would seem particularly likely in circuits that look to case law under Title VII when deciding ECOA discrimination cases, such as the First and Sixth Circuits (which cover states such as Ohio, Maine, Massachusetts, Michigan, and Tennessee).

The bottom line is that, even if creditors operate in states that do not include sexual orientation and gender identity as protected classes for purposes of credit discrimination, they should be aware that discrimination based on sexual orientation or gender identity can equate to discrimination based on an individual's biological sex on the federal level. In fact, on July 28, 2020, the Consumer Financial Protection Bureau issued a Request for Information on the Equal Credit Opportunity Act and Regulation B that, among other topics, solicits comments regarding whether the Supreme Court's holding in *Bostock* should affect the Bureau's interpretation of the ECOA.

Therefore, discrimination based on sexual orientation or gender identity could be actionable under the ECOA in either a private individual action or a class action. And any creditor who violates the ECOA could be liable for punitive damages up to $10,000, in addition to actual damages. Thus, creditors should ensure that their underwriting policies and procedures neither facially discriminate against such individuals, nor create a disparate impact. Creditors should also review customer complaints for allegations of discrimination and revise existing policies, procedures, and training materials to specifically state that the financial services provider does not discriminate on the basis of sexual orientation or gender identity. Not only does this help mitigate the risk of claims of discrimination by regulators or private plaintiffs, but it's good practice too - consumers in today's marketplace make decisions based in part on a company's social behavior and reputation. Treating all groups equally and compassionately can pay dividends later.

Hudson Cook, LLP, provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information purposes only. Hudson Cook, LLP, does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP, website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.

SUBSCRIBE TO INSIGHTS

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com

© Hudson Cook, LLP. All rights reserved. Privacy Policy | Legal Notice
Attorney Advertising: Prior Results Do Not Guarantee a Similar Outcome