

Legally (Relevant



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Supreme Court Decision Clarifies Prohibited Discrimination Based on Sex; Kansas Agency Follows Suit

Kansas employers are prohibited from using employment practices that discriminate on the basis of sex, both by Federal and State law. Important changes occurred in 2020 that all water and wastewater systems need to be aware of.

Federal and State Law Apply

The Federal law prohibiting discrimination in the workplace based on sex is Title VII of the Civil Rights Act of 1964 (“Title VII”). Title VII makes it unlawful for an employer to discriminate against any individual

“because of such individual’s race, color, religion, sex or national origin”.

The State law prohibiting discrimination in the workplace based on sex is the Kansas Act Against Discrimination (“KAAD”), K.S.A. § 44-1000, et seq., specifically K.S.A. § 44-1009.

The Supreme Court Decision

The prohibition against discrimination based on sex obviously applies to the case of a prospective employer choosing to hire a male applicant over an equally qualified female applicant. But what if the applicant is homosexual? Does Title VII also prohibit the employer from hiring a heterosexual person over an equally qualified homosexual person?

The Federal courts were split on this question. The U.S. Supreme Court settled that question on June 15, 2020, with its decision in the case of *Bostock v. Clayton County*. In this 6-3 decision, Justice Gorsuch, for the majority, wrote:

“Today we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or

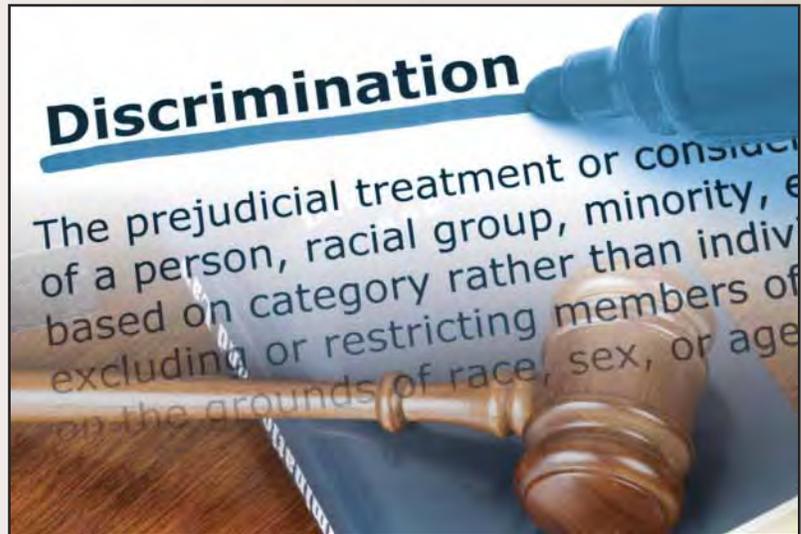
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transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids”.

Thus, under Title VII decisions in the workplace, whether to fire, hire, promote or discipline cannot be made on the basis of sex, including sexual orientation of persons. This decision cuts across political lines and “liberal/conservative” lines, with the decision having been written by Justice Gorsuch, a Trump appointee, joined by Chief Justice Roberts, and the four “liberal” Justices.

The State Follows Bostock

The Kansas Human Rights Commission (“KHRC”), the state agency charged with administering KAAD, quickly followed suit. Per written guidance issued on September 18, 2020, the KHRC made clear that it would likewise interpret the KAAD to prohibit discrimination in the workplace based on sexual



orientation. Although there are some differences between the KAAD and Title VII (including an important one discussed below), the KHRC has generally interpreted the KAAD to comport with Federal court decisions interpreting Title VII.

For water and wastewater systems, the lesson is clear. Title VII applies to all employers, including units of local government that employ 15 or more employees working not less than 20 weeks in the

current or previous year. Local government employers covered by Title VII, including water and wastewater systems, may not discriminate in employment based on sex, including the employees or applicants for employment sexual orientation – period.

But there is an important difference between Title VII (Federal law) and the KAAD (State law). While Title VII applies to units of local government with 15 or more employees, State law applies to all local government employers regardless of the number of employees. So, the bottom line for Kansas water and wastewater systems – do not discriminate in employment based on sex – or face the consequences, administrative action, including penalties enforced by the state and federal agencies and money damages to be paid to the employees harmed by the illegal discrimination.

Diversity

There is a problem at state and national levels in recruiting and retaining qualified water and wastewater employees. Is there an effort to reach across sexual lines to reach potential employees?

Traditionally, office staff have been female and operational employees have been male. By sticking to this model employers exclude half of the potential workforce from either position.

There is no legal requirement for a sexually diversified workforce. The employer cannot control the pool of applicants. But the employer can try to encourage a diverse pool of applicants through a variety of initiatives.

The same can be said of RWD board members. While city governing bodies have succeeded in attracting high quality female candidates, historically RWD boards have been predominately male. But as RWDs mature, and many districts struggle to fill vacant board positions, there is an opportunity to involve more female board members. With 50 percent of customers being female, doesn't it make sense to recruit female members to run for election to the board?