***Bostock*'s Impact: Recent Policy and Litigation Developments**

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In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court unequivocally held that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII of the Civil Rights Act of 1964, a federal employment statute prohibiting discrimination "because of . . . sex." Based on the "express terms" of Title VII, the Court concluded that "it is impossible to discriminate against a person" for being LGBTQ "without discriminating against that individual based on sex." *Id.* at 1741.

The Court reasoned that an employer necessarily relies on an employee's sex if it penalizes that employee for "traits or actions it would not have questioned in members of a different sex." *Id.* at 1737. For example, if an employer fires a male employee, but not a female employee, for being attracted to men, the male employee's sex plays an "unmistakable and impermissible role in the discharge decision." *Id.* at 1741. In other words, "if changing the employee's sex would have yielded a different choice by the employer . . . a statutory violation has occurred." *Id.* The employee's sex is a "but-for cause" of his termination, even if other factors contributed to or played a more important role in the employer's decision.

Impact on Federal Sex Discrimination Law

Although the claims in *Bostock* involved employment, the Court's interpretation of what it means to discriminate "because of . . . sex" has broad potential implications for other areas of federal antidiscrimination law. According to Justice Alito's dissent in *Bostock*, more than 100 federal statutes prohibit sex discrimination, including the Fair Housing Act (FHA), Title IX of the Education Amendments Act of 1972, and Section 1557 of the Affordable Care Act (ACA). As a general matter, the interpretation of Title VII often informs the interpretation of similar provisions in other federal civil rights laws, not just state analogues to Title VII.

1. Federal Policy and Enforcement

Before *Bostock*, the Obama Administration took steps to interpret the sex discrimination provisions in Title VII and other federal sex discrimination laws such as the FHA, Title IX, and the ACA to prohibit discrimination based on gender identity. The U.S. Equal Employment Opportunity Commission (EEOC) had also issued decisions holding that Title VII protects workers from discrimination based on transgender status and sexual orientation.

Some federal agencies, however, changed course during the Trump Administration. In *Bostock*, the U.S. Department of Justice (DOJ) argued that Title VII does not prohibit

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discrimination based on sexual orientation or gender identity. Even after the Supreme Court rejected its position, the Trump Administration continued to take regulatory actions and litigation positions inconsistent with *Bostock*.

On January 20, 2021, President Biden signed Executive Order 13988, "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," addressing *Bostock* and announcing a policy that federal "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation." EO 13988 also notes that gender identity or sexual orientation discrimination often overlaps with other forms of prohibited discrimination.

EO 13988 directs federal agencies to assess all regulations, policies, and other actions taken under federal statutes that prohibit sex discrimination and to fully enforce those statutes to combat discrimination based on sexual orientation and gender identity. In doing so, agencies must ensure they are "accounting for, and taking appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability." The order requires federal agencies to develop a plan within 100 days.

Federal agencies charged with enforcing federal sex discrimination statutes have begun implementing EO 13988. In February 2021, for example, the Department of Housing and Urban Development (HUD) issued a memorandum outlining the steps it will take to "administer and fully enforce the Fair Housing Act to prohibit discrimination because of sexual orientation and gender identity." In March 2021, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule to clarify that with respect to any aspect of a credit transaction, the prohibition against sex discrimination in the Equal Credit Opportunity Act (ECOA) and its implementing regulation encompasses sexual orientation discrimination and gender identity discrimination.

In addition, the federal government has recently withdrawn prior litigation positions in cases addressing the application of federal sex discrimination protections for transgender people. For example, in February 2021, the DOJ withdrew a statement of interest filed in a district court in Connecticut in *Soule v. Connecticut Association of Schools, Inc.*, in which it had argued that Title IX's prohibition of sex discrimination does not prohibit discrimination based on transgender status. The DOJ also filed a notice in the Ninth Circuit withdrawing an amicus brief filed last year in *Hecox v. Little*, in which it had argued that the Equal Protection Clause did not prohibit an Idaho law excluding transgender girls and women from participating on girls' or women's school athletic teams.

2. Federal Courts' Application of *Bostock*

In the twenty years before *Bostock*, federal courts of appeals consistently applied Title VII to sex discrimination claims brought by transgender plaintiffs. In 2017 and 2018, two en banc courts of appeals also held that Title VII protects lesbian, gay, and bisexual workers as well. Some federal courts similarly interpreted the sex discrimination protections in Title IX, the FHA, and the ACA to bar discrimination based on gender identity or sexual orientation.

Courts have recognized after *Bostock* that earlier Title VII cases inconsistent with *Bostock* are no longer good law. In addition, *Bostock*'s holding that it's impossible to discriminate against someone for being LGBTQ without discriminating based on sex has had a significant impact on courts' application of other federal sex discrimination laws.

For example, since *Bostock*, two federal appellate courts have affirmed judgments in favor of transgender students who brought sex discrimination claims. In August 2020, in *Adams v. School Board of St. John's County*, 968 F.3d 1286 (11th Cir. 2020), the Eleventh Circuit ruled in favor of Drew Adams, a transgender student who challenged his school board's policy of excluding transgender students from the restrooms that matched their gender identity. The court affirmed the district court's ruling after a bench trial that the policy violated Mr. Adams's rights under the U.S. Constitution and Title IX. On the Equal Protection claim, the court applied the heightened scrutiny used for sex discrimination claims, citing *Bostock* in addition to a 2011 case that "established the equal protection rights of transgender people" in the Eleventh Circuit. On the Title IX claim, the court noted that "*Bostock* has great import for Mr. Adams's Title IX claim" and stated that "[w]ith *Bostock*'s guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."

In the same month, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit affirmed summary judgment in favor of a transgender student who brought equal protection and Title IX claims against his school board, which prohibited transgender students from using the bathrooms that matched their gender identity and refused to amend school records to reflect that the plaintiff was male. On the Title IX claim, the court noted that after *Bostock*, it had "little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'" After the Fourth Circuit declined to hear the case en banc, the school board filed a petition for certiorari. In December 2020 (and previously in 2019), the Supreme Court declined to hear appeals of cases rejecting challenges to inclusive school policies that support transgender students.

Bostock has also had an impact on FHA cases. For example, in July 2020, in *Walsh v. Friendship Village of South County*, the Eighth Circuit granted a defendant's motion to vacate a judgment in its favor and remand in light of *Bostock*. Mary Walsh and Beverly Nance alleged that the defendant retirement community excluded them because they are a same-sex couple. In 2019, the district court granted judgment on the pleadings to the retirement community, looking to Title VII and stating that "[t]he Eighth Circuit has squarely held that 'Title VII does not prohibit discrimination against homosexuals.'" The plaintiffs' appeal was stayed pending *Bostock*. After *Bostock*, the retirement community conceded that, in light of *Bostock*, "[b]riefing and arguing this appeal when the outcome is a foregone conclusion would waste the Court's time and the parties' time and money." The Eighth Circuit granted the motion to vacate and remand, and the case settled in the district court.

Several district courts have also considered claims under the Religious Freedom and Restoration Act (RFRA) challenging the potential enforcement of Title VII and Section 1557 of the ACA, as well as Section 1557's regulations. In January 2021, in *Religious Sisters of Mercy v.*

Azar, a district court in North Dakota enjoined the Department of Health and Human Services (HHS) from enforcing Section 1557 with respect to the plaintiffs' refusal to perform and provide insurance coverage for medical treatments for gender transition. The court also enjoined the EEOC from enforcing Title VII in a manner that would require members of a group of Catholic employers to remove exclusions for such treatment from their employee benefit plans. The injunction does not prevent individuals from bringing lawsuits under Section 1557 or Title VII. The court issued an order in February 2021 confirming that the injunction does not preclude the EEOC from accepting charges of discrimination and issuing right-to-sue letters.

In another RFRA case, *U.S. Pastor Council v. Equal Employment Opportunity Commission*, a district court in Texas denied the EEOC's motion to dismiss RFRA and First Amendment claims by churches and businesses that they should be exempt from liability under Title VII for refusing to hire or for firing LGBTQ people, among other claims.

Impact on State Law

Bostock also has an impact on state law in states that do not explicitly prohibit discrimination based on sexual orientation and gender identity, as many state courts and civil rights agencies follow Title VII when interpreting similar provisions in state law. For example, North Dakota's Department of Labor and Human Rights, the Nebraska Equal Opportunity Commission, the Kansas Human Rights Commission, and Florida's Commission on Human Relations announced that following *Bostock*, they will accept and investigate complaints of discrimination based on sexual orientation and gender identity under state laws prohibiting sex discrimination.

The Equality Act

In February 2021, the House of Representatives passed the Equality Act, which would codify *Bostock* by adding explicit nondiscrimination protections for LGBTQ people across a wide area of federal law. The Equality Act would also add protections against sex discrimination in public accommodations and federally funded programs, and it would expand the types of businesses subject to non-discrimination law.