
BEST PRACTICES FOR INCLUSIVE WORKPLACES AFTER *BOSTOCK*

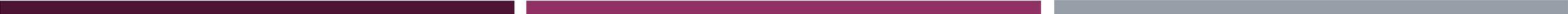
CARA LEAHY WHITE



6000 Western Place, Suite 200
Fort Worth, Texas 76107
(817) 332-2580
www.toase.com

ROAD MAP

1. What is *Bostock*?
2. *Bostock* Applied, Interactions with State Law, and Attempts to Expand
3. Best Practices for Implementing Employment Policies



CASE ANALYSIS:

BOSTOCK v. CLAYTON COUNTY, GEORGIA

DECIDED IN 2020 BY THE SUPREME COURT OF THE UNITED STATES

WHAT HAPPENED?

Supreme Court decided three cases consolidated into one to resolve split rulings among the Circuit Courts of Appeal

Why were these cases filed?

- *Bostock*: county employee fired for “conduct unbecoming” after joining gay recreational softball league
- *Altitude Express, Inc. v. Zarda*: skydiving instructor fired a few days after mentioning his sexual orientation to a customer
- *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC & Aimee Stephens*: funeral home employee fired after notifying her employer that she would be transitioning from male to female

ISSUES ON APPEAL

1. What was the ordinary public meaning of “discrimination because of sex” under Title VII of the Civil Rights Act of 1964?
2. Does “sex” include sexual orientation and transgender status?
3. What did “discrimination” mean when the statute was enacted in 1964?

RULING

- “An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”
- “Discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.”
- “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

TITLE VII AND GENDER NON-CONFORMITY

- Previously, only minimal workplace protections for LGBTQ+ employees
- Now, “sex” incorporates sexual orientation and transgender status
 - Bisexuality is included
 - Targeting transgender individuals on the basis of transgender status is discriminatory

EQUAL PROTECTION AND GENDER NON-CONFORMITY

- Equal protection is a constitutional right that guarantees people the equal protection of the law: a governing body must treat an individual as it would treat other individuals in similar conditions and circumstances
- Equal protection claims are commonly brought against governmental employers, along with Title VII claims
- Transgender status now falls into a quasi-suspect class along with sex
 - Claims alleging a violation will receive heightened scrutiny by the courts
 - Only violations based on race, national origin, and alienage receive stricter scrutiny.



BOSTOCK APPLIED

LOWER COURTS' INTERPRETATIONS OF THE RULING

INTERPRETING THE *BOSTOCK* RULING: *BEAR CREEK BIBLE CHURCH v. EEOC*

- Texas church and multiple Christian businesses filed a class action lawsuit seeking exemption from Title VII as to their rules regarding gender nonconforming individuals.
- Employers did not permit any gender-nonconforming conduct; enforced sex-specific dress-and-grooming code
- Ruling:
 - Bisexuality was included in the *Bostock* decision
 - Sexual ethics policies are not disparate treatment if evenly applied regardless of sexual orientation
 - Policies prohibiting surgical and hormonal treatments for gender dysphoria were discriminatory
 - Gender conforming dress code and bathroom policies are not disparate treatment under Title VII if evenly applied
- Currently on appeal to the Fifth Circuit

INTERPRETING THE *BOSTOCK* RULING: *NEWBURY v. CITY OF WINDCREST, TEXAS*

- Employee was a new female police officer who had a contentious relationship with another female officer
- The new officer filed Title VII claims, among others, alleging sexual harassment, based on the fact that the other female officer harassed her because she was a woman
- Holding: this did not constitute workplace sexual harassment under Title VII, partially because the plaintiff misstated the standard for sex harassment by claiming that *Bostock* created a cause of action if the harassment would not have occurred but for her sex.

***Bostock* did not change the legal standard for sexual harassment; it only incorporated sexual orientation and transgender status into the range of protected classes.**

INTERPRETING THE *BOSTOCK* RULING: *OLIVAREZ v. T-MOBILE USA, INC.*

- Plaintiff alleged that a supervisor made demeaning and inappropriate comments about his transgender status.
- Terminated after requesting a leave extension following five months of medical leave
- Holding: Plaintiff did not plead sufficient facts. Plaintiffs pleading transgender discrimination are entitled to the same benefits but must carry the same burdens as any other sex discrimination plaintiff.

***Bostock* did not change the standard for gender discrimination; it only expanded the range of protected classes.**



INTERACTIONS WITH STATE LAW

APPLICATIONS OF *BOSTOCK* UNDER TEXAS LAW

WHY IS THE APPLICATION OF BOSTOCK IMPORTANT?

- 27 states have no state anti-discrimination law
- When *Bostock* came down, only 23 states + D.C. provided anti-discrimination protections for LGBTQ individuals
- *Bostock* provides anti-discrimination guidance for states without these laws *and* for states interpreting their own laws
- Texas Commission on Human Rights Act (TCHRA)
- Intended to support the policies of Title VII; guided by federal law when TCHRA contains analogous provisions
- Both Title VII and TCHRA prohibit discrimination “because of sex”
- *Bostock* guides Texas federal and state courts interpreting TCHRA

TARRANT COUNTY COLLEGE DISTRICT v. SIMS (TEX. APP.—DALLAS 2021)

- Employee alleged discrimination based on her sexual orientation
- Remember, a political subdivision's immunity is expressly waived under TCHRA
- Holding: the state's human rights laws must reconcile with federal anti-discrimination laws, so *Bostock* is essentially incorporated into TCHRA

Following *Bostock*, “because of sex” necessarily includes discrimination based on homosexuality or transgender status.



POTENTIAL ATTEMPTS TO EXPAND *BOSTOCK*

HOW THE RULING MAY EXTEND TO NEW OR UNIQUE CIRCUMSTANCES

EXPANSION TO RETALIATION CLAIMS: *McLUCAS v. HOME DEPOT USA, INC.*

- Mid-level supervisor was terminated after reporting that her supervisor had harassed another subordinate based on sexual orientation
- Plaintiff argued that her termination violated Title VII's prohibition on retaliation against employees engaging in protected activity
- Holding: following *Bostock*, this type of harassment violated Title VII, and reports of such conduct were therefore protected by Title VII; the termination was retaliatory

Harassment and discrimination based on sexual orientation violates Title VII, and other employees who report such incidents are also protected by Title VII.

EXPANSION TO EQUAL PAY CLAIMS: *SCUTT v. CARBONARO CPAs & MANAGEMENT GROUP*

- Transgender CPA alleged multiple instances of harassment, adverse treatment, retaliation, and Equal Pay Act violations
- Plaintiff filed suit under the ADA, Title VII, and the Equal Pay Act, alleging retaliation, discrimination, and the creation of a hostile work environment
- Holdings: Plaintiff could proceed with her Title VII disparate treatment claim and her Equal Pay Act claim, because discrimination based on transgender status was sufficient to support these claims.

After *Bostock*, an claim for Equal Pay Act violation based on transgender status is a viable cause of action.

EXPANSION TO HOSTILE WORK ENVIRONMENT CLAIMS: *MILO v. CYBERCORE TECHNOLOGIES, LLC*

- Transgender woman sued Maryland corporations for hostile work environment; termination for sex, gender identity, and gender expression; and retaliation for complaints of discrimination
- Plaintiff alleged instances of misgendering, refusal to use preferred pronouns, and other harassment based on transgender status
- Not enough evidence here, but implication that this type of harassment could support a hostile work environment claim with sufficient evidence; her termination and retaliation claims survived summary judgment

With enough evidence, misgendering transgender employees or refusing to use an employee's preferred pronouns may expose an employer to Title VII claims, subject to an analysis of vicarious liability.

EXPANSION TO SEXUAL ACTIVITY CLAIMS: *MANER v. DIGNITY HEALTH*

- Employee claimed he was terminated in retaliation for protesting a supervisor's favoritism of another employee because the supervisor was in a romantic relationship with the favored employee
- Plaintiff argued that the *Bostock* decision had incorporated sexual activity into "because of sex" and therefore created a cause of action based on "paramour preference," or preferential treatment of a romantic partner
- Holding: claims based on sexual activity are not cognizable under Title VII, because the complainant's sex is not the motivating factor for an unfavorable employment decision.

The *Bostock* decision does not incorporate an individual's sexual activity and romantic relationships into the definition of "sex" for the purposes of Title VII claims.

EXPANSION TO HEALTHCARE DISCRIMINATION: *LANGE v. HOUSTON COUNTY, GEORGIA*

- Sheriff's deputy was diagnosed with gender dysphoria and sought sex reassignment surgery on the advice of her doctors; her County health plan explicitly excluded coverage for sex reassignment.
- Plaintiff filed suit based on Title VII and Equal Protection, among other claims
- Holding: after *Bostock*, the exclusion could constitute sex discrimination under Title VII, and it could constitute an equal protection violation due to its disproportionate impact on transgender individuals; there was also evidence that the decision was motivated by discriminatory animus

Declining coverage for care deemed medically necessary may violate Title VII if it has a disproportionate impact on transgender individuals, especially if there is evidence of discriminatory motivation.

There is currently no federal statutory requirement for providing trans-inclusive health plans, but trans employees are entitled to equal terms, conditions, and privileges of employment.



BEST PRACTICES AND IMPLEMENTATION

A GUIDE FOR HUMAN RESOURCES PROFESSIONALS AFTER *BOSTOCK*

BEST PRACTICES

How do employers handle everyday concerns like providing sex-segregated facilities, accommodating preferred pronoun requests, and applying dress codes?

- EEOC guidance: accommodate employees' gender identities
- Intentional misgendering can constitute harassment
- Requiring an employee to dress or present as their biological sex could constitute sex discrimination
- State of Texas has challenged this EEOC guidance in a lawsuit filed in Fall 2021

BEST PRACTICES

How do employers handle allegations of discrimination when there are actual performance deficiencies?

- Documentation of performance is key
- Was the employee similarly situated as other employees, with the same qualifications? An employee with performance issues would *not* be similarly situated.

BEST PRACTICES

How do employers develop inclusive policies in light of *Bostock*?

- Consider whether a policy may have unforeseen adverse effects on gender non-conforming employees
- Consider the needs of LGBTQ+ employees when formulating employment policies
- Inclusive policies would ideally provide space for gender non-conforming employees to share their preferences



CONCLUSIONS

KEEPING *BOSTOCK* IN MIND AS WE MOVE FORWARD