



Transgender Issues in the Workplace

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Thompson Coburn's Annual Labor,
Employment and Employee Benefits Law Seminar

Agenda



- *Bostock v. Clayton County, Georgia* and the New Legal Framework for Transgender Employee Protections (15 minutes)
- Accounting for Gender Identity and Expression in Facilities Management (15 minutes)
- Best Practices and Policies for Addressing Sexual Orientation and Gender Identity Matters (20 minutes)
- Closing Thoughts and Q & A (10 minutes)

Terminology



Sex at Birth:

- Male or Female designation assigned to individuals at birth based on their external anatomy

Gender Identity:

- A person's internal, deeply-held knowledge of their own gender

Transgender:

- Adjective to describe people whose gender identities differ from the sex they were assigned at birth

Cisgender:

- Adjective to describe people who are not transgender; a person whose gender identity aligns with sex assigned at birth

Terminology, Continued



Transition:

- The process undertaken to bring gender expression or body into alignment with gender identity. Transitions occur over a long period of time, and exact steps vary person to person.

Non-binary:

- Adjective used by people who experience their gender identity/expression as falling outside the binary categories of “man” and “woman.” Many, but not all, nonbinary people also call themselves transgender and consider themselves part of the transgender community.

Sexual Orientation:

- A person’s enduring physical, romantic, and/or emotional attraction to another person.
- Gender identity and sexual orientation are not the same. Transgender people have varying orientations (straight, lesbian, gay, bisexual, pansexual, queer, asexual, etc.).

Legal Protections for Transgender Employees



Legal Framework



- Landmark U.S. Supreme Court case *Bostock v. Clayton County, Georgia* decided in 2020
- By a 6-3 margin, the Court held Title VII of the Civil Rights Act protects employees from discrimination based on sexual orientation and gender identity
- The text of Title VII prohibits employers from discriminating on the basis of an employee's race, color, religion, national origin, or sex
- Sex discrimination was at the heart of the *Bostock* decision

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to “live and work full-time as a woman.” Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock’s suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

“Title VII makes it ‘unlawful . . . for an employer to find or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.’” 42 U. S. C. §2000e–2(a)(1). The straightforward application of Title VII’s terms interpreted in accord

*Together with No. 17–1623, *Altitude Express, Inc., et al. v. Zarda et al.*, as *Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18–107, *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

Legal Framework, continued



- *Bostock* consolidated three cases; two Plaintiffs were fired for being gay; one fired for being transgender
 - Bostock: terminated for “conduct unbecoming a county employee” after he joined a gay recreational softball league
 - Zarda: terminated after mentioning she was gay
 - Harris: terminated after telling her employer she planned to “live and work full-time as a woman”
- Each employee sued, alleging sex discrimination under Title VII
- Employers did not dispute that being gay or transgender was the reason for termination. They argued even intentional discrimination based on sexual orientation or gender identity was not illegal under Title VII
- Lower courts were split; two in favor of employees (*Zarda* – 2d Cir., *Harris* – 6th Cir.) and one in favor of the employer (*Bostock* – 11th Cir.)



Legal Framework, continued



- The Court's ruling was largely based on the connection between sex and sexual orientation, as well as sex and gender identity
- "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex"
- *Example:* If an employer terminates a woman for dating or marrying another woman (her sexual orientation), but would not terminate a man for dating or marrying a woman, the employer is treating the employees differently based on sex

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BOSTOCK v. CLAYTON COUNTY

Opinion of the Court

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. 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 transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

Legal Framework, continued



- After *Bostock*, covered employers cannot discriminate based on sexual orientation or gender identity with respect to:
 - Hiring
 - Firing
 - Furloughs
 - Reductions in force
 - Promotions
 - Demotions
 - Discipline
 - Training
 - Work assignments
 - Compensation
 - Fringe benefits
 - Other “terms, conditions, and privileges of employment”
- Non-LGBTQ+ job applicants and employees are also protected against sexual orientation and gender identity discrimination
- EEOC enforces Title VII and issued guidance in the wake of *Bostock*, much of which we will discuss today. Guidance was last updated June 15, 2021

Legacy of *Bostock*



- Does it apply retroactively?
- How does it impact state laws?
- Is it at risk of being overturned?

Accounting for Gender Identity and Expression in Facilities Management



Common Concerns About Restrooms, Locker Rooms, Changing Rooms – Review of Frequently Asked Questions



Question:

Does Title VII's application to gender identity mean we can no longer have separate restrooms for men and women?

Answer:

No. EEOC's most recent guidance clearly states that employers may have separate bathrooms, locker rooms, and showers for men and woman. They may also choose to have unisex or single-sex facilities.

Common Concerns, Continued



Question:

Our new hire is a transgender woman. Does the law require us to allow her to use the women's restroom?



Answer:

Yes. You must allow your new hire to use the restroom that corresponds to her gender identity.

EEOC States:

“In other words, if an employer has separate bathrooms ... for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women), should be allowed to use the women's facilities.

Common Questions, Continued



Question:

What about state laws saying we need to post notices stating that we allow employees to use the restroom that corresponds to their gender identity?

Answer:

For now, all such laws we are aware of are enjoined (e.g., TN H.B. 1182/S.B. 1224). In other words, the states that passed these laws cannot enforce them at this time.

Common Questions, Continued



Question:

What if an employee is uncomfortable sharing the restroom with a transgender co-worker?



Answer:

- You may anticipate these feelings and implement training on accepting and welcoming trans co-workers when one encounters them in a restroom
- Remind the employee that protections for their transgender peers do not make it lawful for anyone to enter a public restroom for the purpose of harassing or harming someone or invading their privacy
- You may wish to share that studies addressing these concerns show harassment/assault in public restrooms is rare. Most often, it is perpetrated by straight, cisgender men against straight, cisgender women

Questions About Customer Preferences



Question:

I operate a large retail store. If I think my customers are uncomfortable working with LGBTQ+ employees, can I assign those employees out of customer-facing jobs such as inventory management?

Answer:

No. EEOC guidance clearly states that an employer cannot fire, refuse to hire, or take assignments away from someone because of actual or perceived client preferences to work with someone that has a different gender identity or sexual orientation.

Best Practices and Policies for Addressing Sexual Orientation and Gender Identity Matters



Adopt Gender Neutral Dress Codes



- EEOC Guidance states it is discrimination to require an employee to dress inconsistently with their gender identity
- This does not prevent employers from requiring certain levels of professional dress
- Also permissible to require certain dress for safety reasons (e.g., when working with machinery)



As Harvard Business Review said,
“Pay serious attention to ... correct names and pronouns.”



- Common pronouns for transgender individuals:
 - They / Them
 - Ze / Zir / Zem
 - She / Her / Hers
 - He / Him / His
- Social and legal name changes may be part of transitions
- Avoid hostile work environment allegations due to severe or pervasive misgendering, incorrect pronoun use, and incorrect name use



Encouraging Correct Name and Pronoun Use



- Keep records of employees' chosen names and pronouns
- Base e-mail addresses on chosen names and incorporate pronouns in e-mail signatures
- Ensure business cards and marketing materials reflect chosen names; incorporate pronouns
- Encourage use of name badges with chosen pronouns

Support Transitioning Employees



- Social Transition: telling friends, family, and co-workers; using a different name; using different pronouns; dressing differently
- Legal Transition: Changing name and/or sex marker on documents like driver's licenses, passports, social security records, and bank accounts
- Medical Transition: Hormone replacement therapy and/or surgical procedures

Training



- Implement diversity training specific to gender identity and transgender issues.
- Topics may include:
 - Legal Protections
 - Guide to LGBTQ+ Terms
 - Pronoun Use
 - Welcoming Transgender Co-Workers
 - Resources for Transgender Employees
 - Gender affirming care
 - Name change and gender marker legal clinics

Questions?

