

**Bostock: “Because of ... Sex”**

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On June 15, 2020, the Supreme Court issued *Bostock v. Clayton County, Georgia*,<sup>1</sup> a landmark decision wherein the Court held that Title VII of the Civil Rights Act of 1964 (Title VII) protects lesbian, gay, bisexual, and transgender workers from discrimination at work. Because of the broad sweep of the opinion, *Bostock* has significantly reshaped the landscape of employment discrimination law. Though some states prospectively took action to prohibit discrimination on the basis of sexual orientation and gender identity prior to *Bostock*, many others did not. As a result, in-house counsel and their human resources partners should become familiar with *Bostock*'s reach and implement revisions to their policies and procedures as appropriate. To assist in-house counsel in this process, this article addresses Title VII and state law pre-*Bostock*; reviews the Supreme Court's decision, including its potential impact on religious employers; and recommends implementing employment policies that comply with *Bostock*'s holdings.

*The Law Pre-Bostock*

Title VII makes it “unlawful ... for an employer to fail 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.”<sup>2</sup> Pre-*Bostock*, many federal courts of appeals considered whether Title VII's protections reached sexual orientation and gender identity discrimination due to its prohibition against discrimination based on sex.<sup>3</sup> Though some courts held that it did, others did not. The courts' inconsistent interpretation of the law thus created a patchwork of geographic areas subject to different protections and exclusions and ultimately laid the groundwork for the Supreme Court's review.

LGBTQ organizations<sup>4</sup> and their allies did not wait for the Supreme Court to resolve this split. Instead, they lobbied Congress to amend Title VII to include sexual orientation and gender identity as protected classes.<sup>5</sup> In addition, they lobbied state legislatures to enact state anti-

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<sup>1</sup> *Bostock v. Clayton Cnty., Georgia*, \_\_ U.S. \_\_, 2020 WL 3146686, at \*8 (2020).

<sup>2</sup> 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

<sup>3</sup> *Compare Hively v. Ivy Tech Comm. College of Indiana*, 853 F.3d 339, 340 (7th Cir. 2017) (holding that sexual orientation discrimination is a form of sex discrimination under Title VII), *with Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (holding that Title VII does not prohibit employment discrimination based on a person's sexual orientation).

<sup>4</sup> “LGBTQ” is defined as Lesbian, Gay, Bisexual, Transgender, Queer or Questioning.

<sup>5</sup> *See, e.g.*, EQUALITY Act, available at <https://www.congress.gov/congressional-report/116th-congress/house-report/56/1>.

discrimination employment laws for employees who identify as LGBTQ.<sup>6</sup> Many of these efforts were successful. Before the Supreme Court announced *Bostock*, 22 states, two territories, and Washington, D.C., had enacted state laws to explicitly prohibit discrimination based on sexual orientation and gender identity.<sup>7</sup> Pennsylvania, Michigan, and Arizona interpreted their existing prohibition on sex discrimination in employment to include sexual orientation and gender identity.<sup>8</sup> Wisconsin, on the other hand, passed a law prohibiting discrimination in employment based on sexual orientation only.<sup>9</sup> In particular, Colorado state law has prohibited employment discrimination on the basis of sexual orientation and gender identity since 2008.<sup>10</sup> The remaining 25 states and three territories, however, have no explicit state-level employment discrimination protections for sexual orientation or gender identity.<sup>11</sup>

### *Bostock's Background and Rule*

The *Bostock* decision resolved three individual employment cases. In *Altitude Express Inc. v. Zarda*,<sup>12</sup> a skydiving company terminated an instructor shortly after the employee mentioned to his employer that he was gay. The second case, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*,<sup>13</sup> concerned a funeral home that fired an employee who announced she would begin living as a woman. In the third case, Clayton County Georgia terminated *Bostock*, a child welfare advocate, shortly after he participated in a gay recreational softball league. In the federal courts of appeals, the litigants fared differently: the Second Circuit ruled in *Zarda*<sup>14</sup> that Title VII protected employees from sexual orientation discrimination; in *Harris Funeral Homes*,<sup>15</sup> the Sixth Circuit held that Title VII's prohibition against discrimination because of sex included transgender persons; yet in *Bostock*,<sup>16</sup> the Eleventh Circuit affirmed a district court's determination that Title VII's protections do not extend to sexual orientation discrimination. The Supreme Court consolidated these cases for consideration.

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<sup>6</sup> MAP Project: Employment Discrimination, [https://www.lgbtmap.org/equality-maps/employment\\_non\\_discrimination\\_laws](https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> C.R.S. § 24-34-402.

<sup>11</sup> *Id.*

<sup>12</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

<sup>13</sup> *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

<sup>14</sup> *Zarda*, 883 F.3d at 112.

<sup>15</sup> *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 575.

<sup>16</sup> *Bostock v. Clayton Cnty. Bd. of Commissioners*, 723 F. App'x 964, 965 (11th Cir. 2018), *cert. granted sub nom. Bostock v. Clayton Cnty., Ga.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

Justice Gorsuch, writing for a 6-3 majority, held that an employer violates Title VII when it takes an adverse employment action against an individual based on sexual orientation or gender identity, because such discrimination is necessarily based on sex.<sup>17</sup> As Justice Gorsuch explained, **“[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms—and that ‘should be the end of the analysis.’”**<sup>18</sup>

### *Bostock’s Implications for Religious Employers and Freedom of Speech*

Despite *Bostock’s* breadth, the opinion expressly preempted religious employers’ concerns. The Court explained Title VII has long had an express statutory exception for religious organizations.<sup>19</sup> Specifically, 42 U.S.C. § 2000e-(1)(a) does “not apply ... to a religious corporation, association, educational institution or society[.]” Additionally, the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the federal government from substantially burdening a person’s religious exercise except in limited circumstances.<sup>20</sup> In previous precedent, the Supreme Court has held that the First Amendment can bar application of employment discrimination laws to religious institutions in certain situations.<sup>21</sup> At this stage, religious employers should consult with employment counsel to determine whether their employment policies and practices comply with the RFRA and interpretative case law.

### *Implementing Policies to Comply with Bostock*

In *Bostock’s* wake, in-house counsel and human resource departments should consider the following:

- Review your organization’s existing anti-discrimination policies to ensure that sexual orientation and gender identity are specifically included.
- Review your organization’s recruiting, promotion, training and retention policies to ensure that these policies comply with *Bostock*.
  - Importantly, Title VII prohibits discrimination including “*privileges of employment*.”<sup>22</sup> In other words, LGBTQ job applicants and employees are entitled to the same benefits and other privileges that non-LGBTQ employees are provided by the employer.

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<sup>17</sup> *Bostock*, 2020 WL 3146686, at \*8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*17.

<sup>20</sup> See 42 U.S.C. § 2000bb-1.

<sup>21</sup> *Bostock*, 2020 WL 3146686, at \*17.

<sup>22</sup> (emphasis added).

- Conduct supplemental supervisor and employee training to address your organization's policies concerning sexual orientation and gender identity discrimination.