

## Where Anti-Discrimination Law Stands 4 Years After Bostock

By **Evan Parness and Abby Rickeman** (June 13, 2024, 4:56 PM EDT)

Four years ago, on June 15, 2020, the U.S. Supreme Court significantly altered the landscape for LGBTQ+ rights in the workplace.

In *Bostock v. Clayton County*, a 6-3 decision authored by Justice Neil Gorsuch, the court held that Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of sex, necessarily encompasses adverse employment actions against individuals based on their sexual orientation and gender identity.[1]

Prior to *Bostock*, federal courts throughout the nation were divided on whether Title VII's protections against sex discrimination extended to LGBTQ+ individuals who alleged that they suffered employment discrimination because of their sexual preferences and/or gender identity.

On the four-year anniversary of *Bostock*, we take stock of the decision's continuing substantial effects on discrimination law. Since June 2020, there has been a near doubling of Title VII cases alleging discrimination against LGBTQ+ employees as compared to the four years prior to *Bostock*.

The decision also has had ripple effects on state anti-discrimination laws, with several states applying *Bostock*'s reasoning to state laws that prohibit workplace sex-based discrimination.

Meanwhile, federal courts are now split on whether *Bostock*'s reasoning should apply to disparate treatment claims from LGBTQ+ individuals under other federal statutes that prohibit sex discrimination, such as Title IX and the Affordable Care Act.

Federal courts are also grappling with *Bostock*'s impact on religious-based exemptions to Title VII, namely, under what circumstances an employer may, on religious grounds, lawfully treat employees differently based on sexual orientation or gender identity. We can expect the Supreme Court to take up these critical issues in future years.

### **Title VII and 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 with respect to his compensation, terms, conditions, or



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privileges of employment, because of such individual's race, color, religion, sex, or national origin." [2]

Title VII applies to employment agencies, labor organizations, and public and private employers that have 15 or more employees. [3]

In *Bostock*, the court resolved three consolidated cases, each of which presented similar issues regarding whether Title VII's prohibition against employment discrimination "because of ... sex" encompasses discrimination based on sexual orientation and gender identity. The three cases included:

- *Bostock v. Clayton County*, in which Gerald Bostock was fired for what his employer deemed to be "conduct unbecoming a county employee" after participating in a gay recreational softball league. [4]
- *Altitude Express Inc. v. Zarda*, in which Donald Zarda was fired shortly after revealing to a customer that he was gay. [5]
- *R.G. & G.R. Harris Funeral Homes v. U.S. Equal Employment Opportunity Commission*, in which Aimee Stephens was fired shortly after notifying her employer that she was diagnosed with gender dysphoria and planned to begin presenting as female in anticipation of gender reassignment surgery. [6]

The court held that both sexual orientation and gender identity were included in Title VII's ban on sex discrimination. [7] The court reasoned that "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" and therefore, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." [8]

Recognizing that Congress in 1964 may not have anticipated this result, the court explained that Title VII is written in "starkly broad terms," which "virtually guaranteed that unexpected applications would emerge over time." [9]

Four years after the Supreme Court resolved the split among lower courts regarding the reach of Title VII's protections, LGBTQ+ employees have increasingly sought to enforce their rights under Title VII. [10]

For example, according to data from Lex Machina, approximately 495 Title VII claims related to sexual orientation or gender identity discrimination were filed between Jan. 1, 2016, and June 15, 2020, in federal court, compared to approximately 810 claims filed between June 16, 2020, and March 31, 2024.

### **Bostock's Application to Title VII Claims and Beyond**

Although the claims in *Bostock* involved employment terminations, courts are increasingly applying *Bostock* in the context of Title VII disparate treatment claims.

For example, in *Lange v. Houston County, Georgia* on May 13, the U.S. Court of Appeals for the Eleventh Circuit relied on *Bostock* to hold that an employer violated Title VII for providing a health insurance plan that denied a transgender employee coverage for gender-affirming care. [11]

The Eleventh Circuit noted that employees "who are transgender are the only [individuals] who would seek gender-affirming surgery." [12] Citing *Bostock*, the court found that the plan violates Title VII

because it "denies health care coverage based on transgender status," and therefore, the employee's "sex is inextricably tied to the denial of coverage for gender-affirming surgery." [13]

Bostock has also been extended to cases alleging sex-based harassment. In another Eleventh Circuit decision in *Copeland v. Georgia Department of Corrections* in March, the court relied on Bostock in finding that "a transgender man who was harassed about his gender after coming out at work" experienced "discrimination 'because of sex.'" [14]

In April 2024, the EEOC issued new enforcement guidance on harassment in the workplace to account for Bostock. [15]

The guidance provides several illustrative examples of unlawful harassment under Bostock, such as harmful comments aimed at an individual who does not present in a manner that is stereotypically associated with their sex, outing an employee's sexual orientation or gender identity without their permission, repeatedly and intentionally using an employee's incorrect pronouns, and denying an employee access to a bathroom consistent with their gender identity. [16]

Bostock's impact has not been limited to the Title VII context. As Justice Samuel Alito noted in his dissent, there are "[o]ver 100 federal statutes [that] prohibit discrimination because of sex" that could be affected by Bostock. [17]

The Supreme Court noted in its opinion that it did not intend to "prejudge" the question of whether sexual orientation and gender identity were encompassed in other laws' prohibition on sex discrimination. [18]

Accordingly, a new split has emerged concerning whether Bostock's reasoning extends to other federal laws, including Title IX and the Affordable Care Act. [19]

For example, the U.S. Courts of Appeals for the Fourth and Seventh Circuits have relied on Bostock to hold that denying transgender students access to school bathrooms that correspond with their gender identities violates Title IX's prohibition on sex discrimination. [20]

However, the Eleventh Circuit reached a different conclusion on the same issue. [21] We can expect that the Supreme Court will eventually take up these lower court splits.

The Bostock decision has also affected federal agencies beyond the EEOC. President Joe Biden issued an executive order instructing federal agencies to apply Bostock to other federal laws that prohibit discrimination based on sex, including Title IX, the Fair Housing Act, and Section 412 of the Immigration and Nationality Act, among others. [22]

In response, several federal agencies published statements explaining how they will implement Bostock to enforce protections against discrimination based on sexual orientation and gender identity. [23] The outcome of the upcoming presidential election may affect federal agencies' enforcement of discrimination laws with respect to the LGBTQ+ community.

Bostock's application to state anti-discrimination laws has been more mixed. Forty-seven states and Washington, D.C., have statutes that prohibit private employers from engaging in sex discrimination. [24]

Prior to Bostock, some of these state laws already explicitly prohibited discrimination based on sexual orientation and gender identity, including Maryland, New York and California, among others.

Following the decision, some state courts have adopted Bostock's holding when interpreting state laws that prohibit sex discrimination in employment,[25] while others have declined to extend Bostock to their state anti-discrimination laws.[26]

Bostock's impact will likely continue to evolve as more courts are faced with determining the scope of its application. In the meantime, employers should continue to review and update their policies and practices to ensure that they align with Bostock's application to employment decisions.

### **Religious Freedom Defenses Remain Unresolved**

After Bostock, the extent to which employers with sincerely held religious beliefs can be considered exempt from Title VII's obligations remains uncertain, including but not limited to whether employers can rely on certain religious-based arguments to treat individuals differently based on sexual orientation or gender identity.

Employers generally assert one or more of three exemptions in seeking to defend against Title VII claims. First, Title VII permits "religious organizations" and "religious educational institutions" to employ people who share their own religion, or "limit hiring in this way." [27]

Second, Title VII's ministerial exception — which is rooted in the First Amendment — provides religious employers discretion to employ people of their choosing to perform vital religious duties.[28]

Third, the Religious Freedom Restoration Act prohibits the federal government from placing substantial burdens on religious exercise unless it has a compelling governmental interest and the law is the least restrictive way of achieving that interest.[29]

Some employers have asserted that the RFRA exempts them from Title VII when they make employment decisions based on their religious beliefs, even when those actions discriminate on the basis of sexual orientation or gender identity.[30]

Although Bostock acknowledged these religion-based defenses under Title VII, none of the employers involved in the case were religious entities and therefore the court had no occasion to determine the precise scope of religious freedom defenses. As a result, courts continue to apply these defenses differently.

For example, the U.S. District Court for the District of Maryland granted summary judgment in 2022 for an employee who alleged that his employer, Catholic Relief Services, violated Title VII by terminating spousal health insurance benefits because he is married to another man.[31]

CRS asserted a variety of religious defenses, including that it was exempted from Title VII as a religious organization, and therefore it was permitted "to discriminate not just in favor of co-religionists but also against those who do not share particular beliefs or conduct standards tied to its religious identity," such as individuals who identify as LGQTQ+.[32]

The district court disagreed, finding that:

A plain reading of [Title VII] reveals Congress's intent to protect religious organizations seeking to employ co-religionists, but the reading urged by CRS would cause a relatively narrowly written exception to swallow all of Title VII, effectively exempting religious organizations wholesale.[33]

On the other hand, the U.S. Court of Appeals for the Fourth Circuit reversed the U.S. District Court for the Western District of North Carolina's order on May 8, granting summary judgment in *Billard v. Charlotte Catholic High School* for a former drama teacher at CCHS who alleged he was fired for marrying his same-sex partner.[34]

On appeal, CCHS did not contest the district court's conclusion that the termination of the former teacher amounted to sex discrimination.[35]

Nonetheless, the Fourth Circuit found that because the former teacher "played a vital role as a messenger of CCHS's faith, he falls under the ministerial exemption to Title VII" and therefore, the school's actions did not violate Title VII.[36]

In the absence of more clarity from the Supreme Court, EEOC guidance dictates that courts should continue to consider and apply religious defenses on a case-by-case basis.[37]

In its recent guidance on workplace harassment, the EEOC "acknowledges that in some cases, the application of the EEO statutes enforced by the EEOC may implicate other rights or requirements including those under the United States Constitution, other federal laws such as ... RFRA, or sections 702(a) and 703(e)(2) of Title VII" and that "the agency works with great care to analyze the interaction of Title VII harassment law and the rights to free speech and free exercise of religion." [38]

However, the EEOC also explained that employers are not required to accommodate religious expression that creates or "reasonably threatens to create" a hostile work environment for employees who are protected by Title VII.[39]

In May 2024, a coalition of states filed a lawsuit challenging the EEOC's April 2024 guidance.[40] The challengers contend that the EEOC's interpretation extends beyond *Bostock* by unlawfully expanding the scope of Title VII's protections for transgender employees and requiring employers to act in ways that conflict with their religious beliefs.[41]

Until further notice, the EEOC guidance remains in effect and courts may view it as persuasive authority when assessing the scope of Title VII's protections to sexual orientation and gender identity harassment claims.

## **Conclusion**

The *Bostock* decision was a momentous step forward in protecting LGBTQ+ individuals from unequal treatment in the workplace. Millions of people who live in states that lack express LGBTQ+ protections in their employment laws are now protected under Title VII.

The full impact of *Bostock* will continue to develop as courts increasingly face the question of whether to extend the holding to other federal laws that prohibit sex-based discrimination, as well as to state anti-discrimination laws.

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[1] *Bostock v. Clayton County*, 590 U.S. 644, 651–52 (2020).

[2] 42 U.S.C. § 2000e–2(a)(1).

[3] 42 U.S.C. § 2000e-2.

[4] *Bostock*, 590 U.S. at 653.

[5] *Id.*

[6] *Id.* at 653–54.

[7] *Id.* at 651–52.

[8] *Id.*

[9] *Id.* at 680.

[10] *Doe v. Snyder*, 28 F. 4th 103, 114 (9th Cir. 2022) ("Bostock held that 'it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex' . . . [t]hus firing a person based on his sexual orientation or transgender status is discrimination 'because of sex.'"); *Sch. of the Ozarks, Inc. v. Biden*, 41 F. 4th 992, 995 (8th Cir. 2022) ("Bostock held that the statute's prohibition on employment discrimination 'because of sex' encompasses discrimination on the basis of sexual orientation and gender identity."); *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. 2021) ("Under Bostock . . . discrimination on the basis of sexual orientation or gender identity is a form of sex discrimination under Title VII."); *Doe v. Cath. Relief Servs.*, 618 F. Supp. 3d 244, 252 (D. Md. 2022) (citing Bostock to find that "[w]hen an employer discriminates against an employee based on sexual orientation, 'it necessarily and intentionally discriminates against that individual in part because of sex'", rev'd on other grounds, 300 A. 3d 116 (Md. 2023); *Brooks v. Temple Univ. Health Sys., Inc.*, No. 21-18032022, 2022 WL 1062981, at \*4 (E.D. Pa. Apr. 8, 2022) (citing Bostock to find that "[d]iscrimination because of 'sex' includes sexual orientation discrimination and gender stereotyping discrimination").

[11] *Lange v. Hous. Cnty., Ga.*, 101 F. 4th 793, 793 (11th Cir. 2024).

[12] *Id.* at 799.

[13] *Id.*

[14] *Copeland v. Ga. Dep't of Corr.*, 97 F. 4th 766, 775 (11th Cir. 2024); see also *Doe v. City of Detroit*, 3

F. 4th 294, 300 n.1 (6th Cir. 2021) (citing *Bostock* to state that "harassment on the basis of transgender identity is sex discrimination under Title VII because 'it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex'"); *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 121 (4th Cir. 2021) ("[T]he Supreme Court's holding in *Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes.").

[15] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.

[16] *Id.*

[17] *Bostock*, 590 U.S. at 724.

[18] *Bostock*, 590 U.S. at 681.

[19] *Grabowski v. Ariz. Bd. of Regents*, 69 F. 4th 1110, 1116 (9th Cir. 2023) (relying on *Bostock* to hold that "discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX"); *Doe v. Snyder*, 28 F. 4th 103, 113–14 (9th Cir. 2022) (rejecting the district court's finding that *Bostock* did not apply to Section 1557 of the Affordable Care Act because the decision was limited to Title VII as "too narrow" of an interpretation); *C.P. v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 793 (W.D. Wash. 2021) (holding that a "plaintiff who alleges that he was denied insurance coverage for medical treatment because he is transgender states a claim for sex discrimination under Section 1557 of the Affordable Care Act").

[20] *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F. 3d 586, 593 (4th Cir. 2020 ); *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F. 4th 760, 764, 769 (7th Cir. 2023).

[21] *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F. 4th 791, 796 (11th Cir. 2022).

[22] Exec. Order No. 13988, 86 C.F.R. 7023 (2021).

[23] See, e.g., Memorandum from Jeanine M. Worden to the Office of Fair Housing & Equal Opportunity, Fair Housing Assistance Program Agencies, and Fair Housing Initiatives Program Grantees (Feb. 11, 2021), [https://www.hud.gov/sites/dfiles/PA/documents/HUD\\_Memo\\_EO13988.pdf](https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf).

[24] Christy Mallory, Luis A. Vasquez, & Celia Meredith, *Legal Protections for LGBT People After Bostock v. Clayton County*, UCLA School of Law Williams Institute (Aug. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>.

[25] See *Rouch World, LLC v. Dep't of C.R.*, 987 N.W.2d 501, 504 (Mich. 2022) (holding that the prohibition of discrimination because of sex in the Elliot-Larsen Civil Rights Act encompasses discrimination on the basis of sexual orientation in line with *Bostock*); *Tarrant Cnty. Coll. Dist. v. Sims*, 621 S.W.3d 323, 329 (Tx. Ct. App. 2021) ("In order to reconcile and conform the [Texas Commission on Human Rights Act (TCHRA)] with federal anti-discrimination and retaliation laws under Title VII, we conclude we must follow *Bostock* and read the TCHRA's prohibition on discrimination 'because of ... sex' as prohibiting discrimination based on an individual's status as a homosexual or transgender person.").

[26] See *Gauthreaux v. City of Gretna*, No. 22-CA-424, 2023 WL 2674191, at \*7–8 (La. Ct. App. March 29,

2023) (declining to apply Bostock to Louisiana's anti-discrimination statute because "there is no binding federal or state law or jurisprudence on point, and because the legislature has not seen fit to amend La. R.S. 23:332 to specifically include protection from employment discrimination because of a person's sexual orientation"); *Vroegh v. Iowa Dep't of Corr.*, 972 N.W.2d 686, 702 (Iowa 2022) (declining to apply Bostock to Iowa's anti-discrimination statute because "[d]iscrimination based on an individual's gender identity does not equate to discrimination based on the individual's male or female anatomical characteristics at the time of birth (the definition of 'sex')").

[27] U.S. Equal Emp. Opportunity Comm'n, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#:~:text=Courts%20and%20the%20EEOC%20consider,VII%20and%20other%20applicable%20laws>.

[28] U.S. Equal Emp. Opportunity Comm'n, *Section 12: Religious Discrimination* (Jan. 15, 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

[29] 42 U.S.C. § 2000bb-1.

[30] See, e.g., *Braidwood Mgmt., Inc. v. EEOC*, 70 F. 4th 914, 919, 937 (5th Cir. 2023) (finding a Christian-owned wellness center's practice of disallowing gender nonconforming behavior and restricting bathroom usage by biological sex did not violate Title VII because "RFRA requires that Braidwood . . . be exempted from Title VII because compliance with Title VII post-Bostock would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct").

[31] *Doe v. Cath. Relief Servs.*, 618 F. Supp. 3d 244, 249 (D. Md. 2022), rev'd on other grounds, 300 A. 3d 116 (Md. 2023).

[32] *Id.* at 253.

[33] *Id.*

[34] *Billard v. Charlotte Cath. High Sch.*, 101 F. 4th 316, 320 (4th Cir. 2024).

[35] *Id.* at 324.

[36] *Id.* at 320.

[37] U.S. Equal Emp. Opportunity Comm'n, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#:~:text=Courts%20and%20the%20EEOC%20consider,VII%20and%20other%20applicable%20laws>.

[38] U.S. Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>.



[39] Id.

[40] Complaint for Declaratory and Injunctive Relief, Tennessee v. EEOC, No. 3:24-cv-00224 (E.D. Tenn. 2024), ECF No. 1.

[41] Id.