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***Bostock v. Clayton County Georgia:* Practical Implications for State Institutions of Higher Education**

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Title VII - states in part:

- *“It shall be an unlawful employment practice 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 privileges of employment, because of such individual’s race, color, religion, **sex**, or national origin...”*



EEOC LGBTQ Litigation Charges & Trends

FY 2013 - FY 2019:

- EEOC received a steady increase in LGBT Charges. From FY 2013 through FY 2019, 10,600 LGBT charges were filed and the EEOC recovered \$29 million.
- In FY 2019, EEOC resolved over 2,000 LGBT charges (including through voluntary agreements), providing approximately \$7 million in monetary relief for workers and achieving changes in employer policies so that discrimination would not recur.
- As of 12/12, the EEOC first stated its position that it will investigate claims of sexual orientation and gender identity in its 2012-2016 Strategic Plan. The “coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions is a top Commission enforcement priority.”



Pre-*Bostock*

- *Price Waterhouse v. Hopkins* (S. Ct. 1989)
- *Macy v. Holder* (EEOC, 2012)
- EEOC Fact Sheets (DOL, 2014, 2016)
- OSHA Guide to Restroom Access for Transgender Workers (2015)



Pre-*Bostock*

- *Price Waterhouse v. Hopkins* (S. Ct. 1989)

Title VII bars not only “discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.”



Pre-*Bostock*

- *Macy v. Holder* (EEOC, 2012)

EEOC ruling that extended Title VII claims to complaints of sex discrimination based on gender identity, change of sex, and/or transgender status



Pre-*Bostock*

- EEOC Fact Sheets (2014, 2016)
 - Result of a December 2014 DOJ memo
 - Reasoned that the “because of” wording in the statute encompassed discrimination that stems from sex-based considerations.
 - DOJ would no longer assert that Title VII sex discrimination prohibition did not encompass gender identity *per se*.



Pre-Bostock

- OSHA Guide to Restroom Access for Transgender Workers (2015)
 - Recommends that all employees, including transgender employees, have access to restrooms that correspond to their gender identity



Trilogy of Cases

- *Bostock v. Clayton County Georgia* – 11 Circuit 2018
- *Altitude Express v. Zarda* – 2nd Circuit 2018
- *R.G. & G.R. Harris v. EEOC* – 6th Circuit 2018

The affected employees sued their respective employers alleging sex discrimination under Title VII of the Civil Rights Act of 1964.



Altitude Express v. Zarda

- *Altitude Express v. Zarda* – Altitude Express fired Donald Zarda days after he mentioned being gay.



R.G. & G.R. Harris v. EEOC

- *R.G. & G.R. Harris v. EEOC* – Funeral home 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.



Bostock v. Clayton County Georgia

- *Bostock v. Clayton County Georgia* – Clayton County fired Bostock for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league.



Bostock: U.S. Supreme Court opinion

- Holding:

“An employer who fires an individual merely for being gay or transgender violates Title VII.”



Bostock: Analysis

“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.”



Bostock: Is everything settled now?

- Even the Majority Opinion says no.
 - Identifies issues not addressed in *Bostock*
 - *Bostock* answers only regarding employment decisions
 - Does not address issues like sex-segregated bathrooms/locker rooms
 - How will this opinion operate in light of religious liberties and laws such as the Religious Freedom Restoration Act of 1993 and Title VII's express exemption for religious organizations?



Practical Tips

- Update employee handbooks
 - Dress codes and grooming standards
 - ACLU sent letter to 500 Texas school districts in September



Dress and Grooming Provisions



September 2, 2020

Via E-mail

Re: Discriminatory Dress and Grooming Provisions

Dear Superintendent:

We write to inform you that your school district's dress and grooming code appears to contain provisions that were recently declared unconstitutional by a federal court in Texas. We ask that you revise your dress code to ensure that it conforms to federal law and does not contain any restrictions that discriminate against students based on sex, race, or religion.

On August 17, 2020, the U.S. District Court for the Southern District of Texas determined that a public school grooming code requiring male, but not female, students to wear short hair is unconstitutional while granting a preliminary injunction to enjoin the district's policy. In *De'Andre Arnold v. Barbers Hill Independent School District*, the court found that



More Practical Tips

- Conduct training for employees and supervisors
 - Update discrimination and harassment training to include discrimination and harassment based on sexual orientation and sexual identity
 - Pronouns and titles: use of gender-neutral pronouns (they/them/theirs and title of Mx).
 - Review employee programs
 - Consider gender transition plan
 - » Employers may want to consider what records can and cannot be amended and the timeline for such amendments when a person is transitioning



Post-Bostock

Adverse Employment Decision based on sex? (Even a little bit)

Sex need not have been the sole factor that led to the employer's decision – instead, sex need only have been a factor that either worked alone or in combination with others in the decision-making process.



Post-*Bostock*

- Office for Civil Rights, August 31, 2020 Letter Regarding Student Complaint
 - OCR enforces Title IX, not Title VII
 - Bostock guides, but does not control
 - OCR finds that it does have jurisdiction over the student's complaint and opens an investigation



Post-*Bostock*

- Footnote in August 31 OCR Letter
 - “...*Bostock* does not impact OCR’s regulation or enforcement of Title IX regarding schools that separate students by biological sex in the context of intimate facilities...locker rooms and bathrooms...or sports teams, athletic opportunities...substantive areas for which Title IX includes specific statutory and regulatory exemptions...”



Post-Bostock

- *Grimm* Opinion – 4th Circuit, August 28, 2020
 - Holding: Grimm’s equal protection rights violated when school
 - Did not allow him to use the restroom of the gender he identifies with
 - Did not alter his transcript to reflect his gender as male



Post-*Bostock*

- Religious Freedom Restoration Act
 - S. Ct. did not consider religious freedom because Harris Funeral Home failed to raise the issue
 - “We are also deeply concerned with preserving the promise of free exercise of religion enshrined in the Constitution...”
 - “Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.”



Pop Quiz:

1. Does the ruling in *Bostock* only address hiring and firing based on sexual orientation or gender identity or does it encompass all aspects of employment?

No, the Bostock holding applies to all employment-related decisions.



Pop Quiz (cont'd)

2. Is the failure of uninformed personnel to identify a nonbinary employee by their preferred pronoun a cause for a claim of discrimination against the institution? What if the co-employee refuses to use the preferred pronoun and claims doing so violates their religion?
 - Ensure EEs are informed, not uninformed
 - If still a problem, come up with a common solution.
 - Goal: maintain professional working environment
 - Say, “Excuse me...”



Pop Quiz (cont'd)

3. Must the institution train its employees in the proper use of pronouns?
 - Probably best practices to do so

4. Should the institution ask transgender employees to use restroom facilities based on their biological sex? May the institution designate separate restroom facilities for non-binary employees or would that be considered discriminatory?
 - Gender-neutral bathrooms (list of such facilities per building)



Pop Quiz (cont'd)

5. Does the ruling in *Bostock* affect Residence Life's housing assignments?
 - Maybe

6. How will the changes in the law be communicated to employees at your institution?
 - Training
 - Policy revision



Thank you!