

Bostock v. Clayton County: The Supreme Court’s Textualist Recognition of LGBTQ+ Employment Rights

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I. OVERVIEW

At the center of this case are three unrelated employees in three separate states who were terminated from their employment because they were gay or transgender.¹ Gerald Bostock was a child welfare advocate for Clayton County, Georgia.² Donald Zarda was a skydiving instructor who was fired by Altitude Express for being gay.³ Aimee Stephens worked for R.G. & G.R. Harris Funeral Homes.⁴ Bostock’s participation in a gay softball league resulted in discriminatory remarks directed at him, and he was subsequently terminated for being gay.⁵ Zarda was fired a few days after he came out as a gay at work.⁶ Stephens, diagnosed with gender dysphoria, began the transition to living as a woman and informed her employer who quickly fired her for this reason.⁷

In each instance, the employees brought suit against their former employers, arguing that they had been terminated in violation of Title VII of the Civil Rights Act of 1964 (Title VII). Although Title VII does not explicitly reference either sexual orientation or gender identity, each plaintiff argued that the prohibition of discrimination on the basis of sex encompassed a prohibition of discrimination on the basis of sexual orientation and/or gender identity. Ultimately, each of the three suits were appealed to their respective circuit courts, with the circuit courts disagreeing as to the scope of the Title VII protection against sex

1. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

2. *Id.*

3. *Id.* at 1738.

4. *Id.*

5. *Id.* at 1737.

6. *Id.* at 1738.

7. *Id.*

discrimination.⁸ The U.S. Court of Appeals for the Eleventh Circuit (the Eleventh Circuit) held that Title VII does not prohibit an employer from terminating an employee on the basis for sexual orientation, while the U.S. Court of Appeals for the Second Circuit (the Second Circuit) and the U.S. Court of Appeals for the Sixth Circuit (the Sixth Circuit) found that Title VII does prevent an employer from terminating an employee on the basis of sexual orientation and transgender status, respectively.⁹ The judgment in each case was appealed to the Supreme Court, which granted certiorari and consolidated the cases for review.¹⁰ The United States Supreme Court *held* that the Title VII protections against discrimination on the basis of “sex” do prohibit an employer from terminating an employee on the basis of sexual orientation or gender identity. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

II. BACKGROUND

Title VII states that 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 . . . because of such individual’s race, color, religion, sex, or national origin.”¹¹

In 1971, only seven years after the passage of the Civil Rights Act of 1964, the Supreme Court, in *Phillips v. Martin Marietta Corp.*, ruled that employment opportunities must be available to qualified individuals of any sex.¹² However, the Court also indicated that discrimination could be permitted if the employer presents evidence showing “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹³ In his concurrence, Justice Thurgood Marshall in his concurrence stated that such evidence should not allow permissive discrimination and that “Congress, however, sought just the opposite result.”¹⁴

At its most rudimentary level, Title VII provides that it is unlawful to treat an employee “in a manner which but for that person’s sex would be different.”¹⁵ This was first articulated by the Court in 1978 in *City of L.A.*

8. *Id.* at 1738.

9. *Id.*

10. *Id.*

11. 42 U.S.C. § 2000e-2(a)(1) (1991).

12. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

13. *Id.*

14. *Id.* at 544-545 (Marshall, J., concurring).

15. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

Dep't of Water & Power v. Manhart.¹⁶ There, the Los Angeles Department of Water and Power had an unequal system of pension fund contributions, in which women were mandated to pay more than men based on the fact that “women live longer than men.”¹⁷ The Court was not persuaded by the Department’s claim that their pension contribution scheme was based on a permissible factor, namely life expectancy, due to the fact that the system was inherently based on sex.¹⁸ The Court was also not persuaded by the Department’s reliance on *General Electric Co. v. Gilbert*.¹⁹ In this case, the Court held that General Electric’s exclusion of disabilities caused by pregnancy from an employee disability plan was not a violation of Title VII because pregnancy was not protected under Title VII and the plan did not discriminate against non-pregnant women.²⁰

The Court further added to the jurisprudence of Title VII sex discrimination in regard to sex and gender stereotypes with a plurality opinion in *Price Waterhouse v. Hopkins*.²¹ The Court held that an employer must demonstrate by a preponderance of the evidence that it would have made the same decision for an employee if the employee were a member of the opposite of the sex.²² The standard adopted by the plurality to determine if a Title VII violation occurred is whether the employee’s gender was a “motivating part” of the employer’s decision, not whether it was the sole reason.²³ In this case, Ann Hopkins, became a candidate for a Price Waterhouse partnership and was subsequently rejected, later being told her chances for a partnership would be better if she “walk[ed] more femininely, talk[ed] more femininely, [wore] make-up, [had] her hair styled, and [wore] jewelry.” The plurality rejected Price Waterhouse’s assertion that the “but-for causation test” is the correct standard, stating, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation,’ as does Price Waterhouse, is to misunderstand them.”²⁴ While

16. *Id.* at 702.

17. *Id.* at 704-05 (basing the pension funding scheme on the “determination” that the City of Los Angeles’s female employees “on the average, will live a few years longer” than their male employees and require more pension payments).

18. *Id.* at 712-13.

19. *Id.* at 714.

20. *Id.* at 714-15; see *General Electric Co. v. Gilbert*, 429 U.S. 125, 135 (1976).

21. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion).

22. *Id.*

23. See *id.* at 241, 252-53.

24. *Id.* at 240. “Moreover, since we know that the words “because of” do not mean “solely because of,” to the text of the note we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.”) *Id.* at 241.

sex-stereotyped comments towards an employee alone do not constitute a violation of Title VII, they could be evidentiary of an employer's sex discrimination action.²⁵

The Court in interpreting Title VII also determined that it does not matter if discrimination towards an individual on the basis of sex is delivered by members of the same sex.²⁶ In *Oncale v. Sundowner Offshore Services, Inc.*, the plaintiff resigned from his job after being subjected to various "sex-related, humiliating actions," both verbal and physical and inaction by the employer to stop further incident.²⁷ The Court explained that the Title VII provision that it is unlawful for an employer to discriminate on the basis of sex "with respect to his compensation, terms, conditions, or privileges of employment" means "that this not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'"²⁸ The Court found that same-sex discrimination is sex discrimination under Title VII as "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of other sex are not exposed."²⁹

III. COURT'S DECISION

In the noted case, the Supreme Court held that each of the defendant violated Title VII of the Civil Rights Act of 1964 when they terminated Bostock, Zarda, and Stevens because of their sexual orientation or gender identity.³⁰ In doing so, the Court overturned the decision by the Eleventh Circuit and affirmed the decisions by the Second Circuit and Sixth Circuit.³¹

The Court first discussed the statutory interpretation of Title VII and the provision regarding Title VII's prohibition on employers discriminating against employees on the basis of "sex."³² Based on the text of Title VII, the Court determined not only are employers prohibited from discriminating against solely on the basis of being a biological female or

25. *Id.* at 251.

26. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

27. *Id.* at 77.

28. *Id.* at 78 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

29. *Id.* at 82, 80 (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

30. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

31. *Id.* at 1754.

32. *Id.* at 1738.

male, but they're prohibited from discriminating "'because of' sex."³³ The Court explained that "because of" is determined by a "but-for" causation test, further expounding that the presence of an additional reason of terminating the employment would not suffice to prevent liability under Title VII, particularly with Title VII's amendment in the Civil Rights Act of 1991 that "allow[s] a plaintiff to prevail merely by showing that a protected trait like sex was a 'motivating factor' in a defendant's challenged employment practice."³⁴

The Court reasoned that if an employee's sex in the scenario were changed, and that change resulted in a scenario where the employer would not have terminated the employee, then the employer based their decision to fire the employee on the basis of sex in violation of Title VII.³⁵ The Court determined that "[a]n individual employee's sex is not relevant to the selection, evaluation, or compensation of employees"³⁶ and that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."³⁷ Relying on *Phillips*, *Manhart*, and *Oncale*,³⁸ the Court held (1) "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it;" (2) "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action;" and (3) "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups."³⁹ Significantly, the Court noted that the question of religious liberty interests and the question of sex-segregated facilities and dress codes are questions for future cases.⁴⁰

Justice Samuel Alito dissented against the majority, reasoning that the Court's decision was "legislation."⁴¹ Justice Alito distinguished sexual orientation and gender identity from the five categories expressly identified in Title VII, "race, color, religion, sex, [and] national origin,"

33. *Id.* at 1739.

34. *Id.*

35. *Id.* at 1741.

36. *Id.*

37. *Id.*

38. *Id.* at 1743-44.

39. *Id.* at 1744.

40. *Id.* at 1753.

41. *Id.* at 1754 (Alito, J., dissenting). Justice Brett Kavanaugh also dissented, stating that protections for LGBTQ+ employees should come from the political branches, the legislative and executive, and not the judiciary. *Id.* at 1836 (Kavanaugh, J., dissenting).

and added that “neither ‘sexual orientation’ nor ‘gender identity’ [appear] on that list.”⁴² He attacked the Court’s reasoning that a textualist examination of Title VII resulted in their decision.⁴³ He argued that Title VII’s prohibition on discriminating on the basis of “sex” is for the purposes of protecting against discrimination due to “genetic and anatomical characteristics that men and women have at the time of birth,” and not due to an individual’s attraction to those of the same sex or gender identity.⁴⁴

IV. ANALYSIS

The inclusion of the category “sex” was suggested by a Title VII adversary as a poison pill to kill the proposed law.⁴⁵ This scheme did not succeed, and the inclusion of “sex” as a protected category in Title VII was passed into law; however, “sex” is not defined in Title VII, and its meaning has been left to judicial interpretation.⁴⁶ Transgender individuals, in particular, are highly susceptible to discrimination solely on the basis of being transgender,⁴⁷ and courts in the past have not been sympathetic.⁴⁸ Like sexual orientation, the status of being transgender is an immutable characteristic.⁴⁹ Much like a ban on same-sex intercourse is a criminalization of gays as a group, the prohibition against transgender

42. *Id.* at 1754-55 (Alito, J., dissenting).

43. *Id.* at 1755-56 (Alito, J., dissenting) (“The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court’s opinion is like a pirate ship. Its sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”).

44. *Id.* (Alito, J., dissenting).

45. CARLOS A. BALL ET AL., *CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW* 338 (6th ed. 2016).

46. *Id.* (“[B]ecause of the unusual way in which sex was added to the statute as a protected category, there is little legislative history to provide guidance on the meaning of the term.”).

47. Victoria Manuel, *Trump’s Transgender Military Ban: Policy, Law, and Litigation*, 29 *TUL. J.L. & SEXUALITY* 75, 88 (2020) (“Transgender people have long been forced to live in silence, or face the threat of overwhelming discrimination if they come out.”); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015) (“[T]ransgender people have suffered a history of persecution and discrimination . . . transgender status bears no relation to ability to contribute to society . . . , transgender status is a sufficiently discernible characteristic to define a discrete minority class . . . , [and] transgender people are a politically powerless minority.”).

48. The United States Court of Appeals for the Seventh Circuit ruled in *Ulane v. Eastern Airlines* that Title VII does not prohibit discrimination against individuals with a “sexual identity disorder,” despite the plaintiff undergoing “sex reassignment surgery” and the State of Illinois and the Federal Aviation Administration amending her as female on her birth certificate and flight status certification; reversing the district court’s decision in favor of the plaintiff that “sex is not a cut-and-dried matter of chromosomes.” 742 F.2d 1081, 1083-84 (7th Cir. 1984).

49. *Obergefell v. Hodges*, 576 U.S. 644, 658 (2015); Manuel, *supra* note 47, at 87.

individuals expressing their gender identity in all facets of their life, both publicly and privately, is tantamount to a ban on being transgender.⁵⁰ A trans woman that is unable to dress in clothing that society associates with females without repercussion from public or private actors is a denial of that person's identity. Discriminatory practices against transgender individuals are harsh, pervasive, and found in many areas of society.⁵¹ While states such as California and New Jersey explicitly prohibited discrimination on the basis of sexual orientation and gender identity protected in employment,⁵² other states such as Louisiana and Georgia did not.⁵³ Similar to the results of the *Lawrence v. Texas* and *Obergefell v. Hodges* decisions that struck down bans on same-sex intercourse and marriage in states that prohibited them,⁵⁴ the protections of Title VII now apply to LGBTQ+ individuals in states such as Louisiana and Georgia that did not previously have them.⁵⁵

The result reached by the Court in the noted case was the correct outcome for the question of whether LGBTQ+ individuals are protected from termination of employment on the basis of sex.⁵⁶ Despite how an employer tries to label or articulate their discriminatory practices that result in the firing of an LGBTQ+ individual, at the heart of the decision, sex was the motivating factor.⁵⁷ To a homophobic employer, an employee who is a biological male being married to a biological woman does not break that employer's social conventions; however, if a biological male

50. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (“Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.”) (O’Connor, J., concurring); Manuel, *supra* note 47, at 88.

51. See, e.g., Alison Bader, *Whose Bathroom Is It, Anyway?: The Legal Status of Transgender Bathroom Access Under Federal Employment Law*, 91 S. CAL. L. REV. 711 (2018); Michele Goodwin & Erwin Chemerinsky, *The Transgender Military Ban: Preservation of Discrimination Through Transformation*, 114 NW. U. L. REV. 751 (2019); Alexa Scarpaci, *Transgender Youth in Federal Prisons: Finding a Civil Cause of Action Based on Housing Discrimination*, 41 WOMEN’S RTS. L. REP. 29 (2019).

52. CAL. GOV. CODE § 12940(a) (Deering 2019) (amended 2020); N.J. STAT. § 10:5-12 (2020).

53. LA. R.S. § 23:332 (2014); GA. CODE ANN. § 45-19-29 (1995). Efforts in Louisiana by Governor John Bel Edwards to mandate via executive order that state agencies and contractors prohibit discrimination against employees on the basis of sexual orientation and gender identity were challenged and defeated by Louisiana Attorney General Jeff Landry in the courts, with the Supreme Court of Louisiana refusing to hear an appeal. See *State DOJ v. Edwards*, 233 So. 3d 76 (La. Ct. App. 2017), *cert. denied*, La. Dep’t of Justice v. Edwards, 239 So. 3d 824 (La. 2018).

54. See *Obergefell*, 576 U.S. at 681; *Lawrence*, 539 U.S. at 578-79.

55. LA. R.S. § 23:332 (2014); GA. CODE ANN. § 45-19-29 (1995).

56. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

57. *Id.* at 1735.

employee marries another biological male and the employer fires the employee, that decision was based on sex.⁵⁸ If a transphobic employer employs a biological woman who wears a dress and heels to work, but terminates a biological male who identifies as a woman who wears similar garments, that decision was also based on sex.⁵⁹ There is no inherent reason to justify such discrimination, as LGBTQ+ employees who are qualified for the positions they occupy are just as efficient at their positions as their straight and cisgender counterparts.⁶⁰ The dissenting justices in the noted case argue that the majority's decision circumvented the legislative process; however, they misunderstand that the legislative process was not bypassed.⁶¹ Title VII was the result of the legislative process,⁶² and while the protection of LGBTQ+ individuals was not the objective of the proponent who introduced sex as a protected category, as the majority aptly puts it: "Sometimes small gestures can have unexpected consequences."⁶³ In many jurisdictions, no longer will LGBTQ+ individuals need to rely on difficult to obtain constitutional remedies or for slow and resistant state governments for protection. The Court's decision is particularly important due to the climate it was promulgated in, where not long after this decision was passed, the balance of the Court that decided it has been changed dramatically.⁶⁴ If the noted case were to be decided in the summer of 2021 as opposed to 2020, an entirely different decision may have been decided.⁶⁵

58. *See id.*

59. *See id.*

60. *See* Manuel, *supra* note 47, at 91 (stating in the context of the Donald Trump's transgender military ban, "The reality is that transgender Americans, whether openly or in hiding, have shed blood, sweat, and tears for this country just like their [cisgender] counterparts and they deserve to be able to serve openly as themselves.").

61. *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting) ("There is only one word for what the Court has done today: legislation."); *id.* at 1836 (Kavanaugh, J., dissenting) ("Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law.").

62. BALL ET AL., *supra* note 45, at 338.

63. *Bostock*, 140 S. Ct. at 1737.

64. Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 18, 2020), <http://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html>; Adam Liptak, *Justice Amy Coney Barrett Hears Her First Supreme Court Argument*, N.Y. TIMES (Nov. 2, 2020), <http://www.nytimes.com/2020/11/02/us/politics/amy-coney-barrett-supreme-court.html>. Justice Amy Coney Barrett will likely be a jurist of the same cloth as Justice Scalia and it is not a foregone conclusion that Justice Barrett will uphold the precedent established in *Bostock* in the future. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1941, 1943 (2017) ("Nothing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly.").

65. *See id.*

Additionally, there lies the future issue of the Court addressing restrooms and dress codes that impact LGBTQ+ employees, which the Court declined to address in the noted case.⁶⁶ It echoes the judicial restraint shown by Justice Anthony Kennedy in *Lawrence*, when writing for the Court that state prohibition on same-sex intercourse was unconstitutional, he declined to address the constitutionality of same-sex marriage.⁶⁷ The United States Court of Appeals for the Ninth Circuit, in *Jespersen v. Harrah's Operating Company, Inc.*, ruled the defendant's dress code requiring all female bartenders to wear makeup was not discriminatory and that this case was different from *Price Waterhouse*, in that it did not "require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender."⁶⁸ The Ninth Circuit in *Jespersen* reasoned that allowing the plaintiff to succeed on her Title VII may result in every dress code presenting a cause of action under Title VII.⁶⁹ This, however, is an exaggeration. Plaintiffs such as Jespersen are not challenging dress codes in general, but the particular sex stereotyping requirements these codes present that impact one class of employees, but not other, such as makeup.⁷⁰ It is unforeseeable if a case pertaining to dress codes will be heard by the Court in the near future. Transgender access to bathrooms is an issue of active litigation, particularly in the U.S. Court of Appeals for the Fourth Circuit's decision in *Grimm v. Gloucester County School Board*, a case decided on Equal Protection Clause and Title IX grounds.⁷¹ The Fourth Circuit ruled in favor of the plaintiff, stating "[i]t is time to move forward."⁷²

Despite the additional struggles that LGBTQ+ will continue to face in employment and the unresolved questions of dress codes and bathroom

66. *Bostock*, 140 S. Ct. at 1753.

67. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003).

68. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006) (en banc). The Ninth Circuit also stated a ruling in the opposite direction "would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination." *Id.* at 1112.

69. *See id.*

70. *Id.* at 1107.

71. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

72. *Id.* at 620 ("The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past.").

access that will continue to linger at least momentarily,⁷³ the result of the noted case is a substantial victory for the LGBTQ+ community, particularly transgender individuals who may now feel validated with their first significant victory before the highest court. The Court could have easily decided the other way, with the 6-3 majority's composition seeing some unlikely division, particularly the Court's majority opinion author, Justice Neil Gorsuch, as well as Chief Justice John Roberts.⁷⁴ Hopefully, this unlikely majority was not an anomaly and there will be many more victories in the recognition of rights and protections for LGBTQ+ individuals.

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73. See generally Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 YALE J.L. & FEMINISM 353 (2008); Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465 (2018).

74. Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision.*, WASH. POST (June 16, 2020), http://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

* © 2021 Victoria D. Manuel, LL.M. candidate 2021, Tulane University Law School; J.D. 2020, Rutgers Law School; B.A. 2017, Louisiana State University. The author would like to give special thanks to Rachel Brown, Nicole Espin, Micauri Vargas, and the members of Volume 30 for their unwavering support and feedback. This Case Note is dedicated to Gerald Bostock, Aimee Stephens, and Donald Zarda.