Selected Recent Federal Case Law Involving Discrimination Claims Against LGBT Persons
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1. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731(2020)

In each of three consolidated cases, an employer fired an employee, allegedly after the employee revealed that he or she was LGBT. Each employee sued under Title VII, alleging unlawful discrimination because of their sexual orientation or gender identity. The courts of appeal had issued contrary decisions as to whether gay or transgender persons fall within the scope of Title VII.

Title VII prohibits discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Court noted that the phrase "because of" denotes the standard of but-for causation, which means that if sex was a factor in the employer's decision, Title VII is triggered. The Court noted that the standard is "sweeping" and that Congress could have inserted limiting language into the text but chose not to do so. Thus, "an employer violates Title VII when it intentionally fires an individual employee based in part on sex." Because it is impossible to discriminate against a person for being gay or transgender without consideration of their sex, an individual's sexual orientation or transgender status cannot be considered for employment decisions. The plaintiff's sex itself does not necessarily need to be the primary cause of the employer's adverse action to give rise to liability. As Justice Gorsuch, writing for the Court, wrote:

> When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would have not discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Id. at 1742.

2. *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595 (5th Cir. 2021)

In this post-*Bostock* decision, the plaintiff was transgender and alleged that he was discriminated against because of his sex in violation of Title VII. However, the court found that he failed to allege facts sufficient to support a Title VII violation.

First, the plaintiff complained about demeaning and disparaging comments made by a supervisor about the plaintiff's transgender status. However, the court determined that those claims were not brought timely. "Title VII requires a plaintiff to file an administrative charge no later than 300 days 'after the alleged unlawful employment practice occurred.'" *Id.* at 601 (quoting 42 U.S.C. § 2000e-5(e)(1)). Because the plaintiff waited too long to bring that claim, it was barred.

The plaintiff also alleged that he had been fired on an unlawful basis after the employer declined an extension of medical leave longer than six months. The plaintiff had used

the leave, at least in part, for the purpose of undergoing transition-related surgery. The Fifth Circuit found that the plaintiff failed to allege sufficiently that any discrimination occurred because of his sex, because he did not allege that any other employees who engaged in the same conduct received more favorable treatment. In other words, the plaintiff did not allege that the plaintiff's transgender status was a factor in the employer's decision making regarding declining to extend medical leave, or that the employer would have extended medical leave for other employees who were not transgender.

3. *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020)

The plaintiff was a transgender student who alleged that his school district violated Title IX and the Fourteenth Amendment's Equal Protection Clause by discriminating against him on the basis of sex. After the plaintiff began to transition and to present at school as a boy, the school board adopted a new policy that students could only use the restrooms matching their "biological gender." Rather than using the boys' restroom, the plaintiff was instructed to use a specially built single-stall restroom. The school board's policy caused, among other things, the plaintiff to avoid using the restroom at school, which led to health problems. The school further declined to update its records to identify the plaintiff as male even though he presented an amended birth certificate denoting that change.

Analyzing the Title IX claim, the court noted that because Title IX is based on Title VII, Title VII jurisprudence guides evaluation of Title IX claims. After the Supreme Court's decision in *Bostock*, discrimination against a person for being transgender is deemed sex discrimination, there was no genuine issue of fact that the school violated Title IX.

As to the equal protection claim, the court found that the school had engaged in sex discrimination and found that the school violated the plaintiff's constitutional rights. First, the court held that the conduct at issue was sex discrimination subject to intermediate scrutiny, under which the state must provide an "exceeding persuasive justification" for the alleged discrimination. "[W]hen a 'School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate,' the policy necessarily rests on a sex classification." (quoting *Whittaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)). The Court further found that the school's conduct against the plaintiff was "marked by misconception and prejudice," including instances of community members stigmatizing the plaintiff and threatening board members; thus, no exceedingly persuasive justification was offered.

For another case involving a transgender student challenging a school bathroom policy, *see* ***Adams v. School Board of St. Johns County, Florida***, No. 18-13592, 2021 WL 2944396 (11th Cir. July 14, 2021) (similarly holding that a school's bathroom policy violated the Equal Protection Clause and declining to address the student's title IX claim). For a case involving a challenge to a state's attempted regulation of transgender participation in high school athletics, see ***Hecox v. Little***, 479 F. Supp. 3d 930 (D. Idaho 2020) (granting a preliminary injunction against a state law that barred transgender women from participating in women's sports teams).

See also ***Morris v. Pompeo***, --- F. Supp. 3d ----, No. 2:19-cv-00569-GMN-DJA, 2020 WL 6875208 (D. Nev. 2020) (partially granting a transgender passport applicant motion for summary judgment and finding that the U.S. State Department's policy regarding gender markers on passports for transgender applicants violated the Equal Protection Clause).