

One Year Later: Have Employers Taken Stock Following *Bostock*?

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This week (specifically June 15, 2021) marked the one-year anniversary of the U.S. Supreme Court's landmark decision in the case of *Bostock v. Clayton County*, which outlawed sexual orientation or transgender status employment discrimination.

Issued at the height of the COVID-19 global pandemic, the *Bostock* decision may not have received the same amount of attention it otherwise would have or had the same immediate impact on employers as expected. With the end of the pandemic in sight, employers must ensure their policies and practices have caught up with this important case decision.

In short, *Bostock* made clear that employment discrimination on the basis of sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964 ("Title VII") (more detailed information on the decision is available [here](#)). On the anniversary of the *Bostock* decision, the Equal Employment Opportunity Commission ("EEOC") launched a new webpage containing resources to educate employees, applicants, and employers about the rights of workers to be free from sexual orientation and gender identity (newly named "SOGI") discrimination in employment. The following is a summary of these publications.

EEOC Fact Sheet on LGBTQ+ Worker Rights

The EEOC issued a fact sheet titled "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity" (the "Fact Sheet"). The Fact Sheet outlines basic information about Title VII, and includes some helpful reminders for employers:

- **Non-LGBTQ+ workers also are protected against sexual orientation and gender identity discrimination.** Similar to other types of "reverse" discrimination under Title VII, the EEOC recognizes that a straight or cisgender person also cannot be discriminated against in employment because of how they identify regarding their sexual orientation and/or gender identity.
- **Customer or client preferences can cause unlawful discrimination or harassment.** The EEOC reminds employers that just because a customer or client prefers to work with a person with a certain sexual orientation or gender identity does not mean that the employer can lawfully grant such a request. The EEOC extends this concept by stating that employers cannot place workers in certain geographic locations or non-public-facing positions due to their sexual orientation or gender identity.
- **Sex and gender discrimination includes stereotyping.** Even prior to *Bostock*, courts have found

that unlawful sex or gender discrimination occurs when an employer discriminates or harasses a worker for not conforming to stereotypical sex or gender roles. This also applies to sexual orientation and gender identity. The EEOC provides the example that "employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways." Such concepts apply regardless of whether the employer knows an employee's sexual orientation or gender identity.

- **Bathrooms correspond with gender identity.** The EEOC continues to take the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. However, employers may choose to have unisex or single-use bathrooms.
- **Using correct names and pronouns.** Similar to other types of harassment under Title VII, simple teasing or offhand comments that are not serious will typically not rise to the level of creating a hostile work environment. However, the consistent and intentional use of the wrong name or pronoun may be considered unlawful gender identity-based harassment.

Compilation of EEOC Resolved Cases Involving Sexual Orientation and/or Gender Identity Employment Discrimination

The EEOC also published a fact sheet with "Notable EEOC Litigation Regarding Title VII & Discrimination Based on Sexual Orientation and Gender Identity." Following are common themes from these case summaries that employers should keep top of mind:

- Inappropriate conduct by a manager to subordinate employees (i.e., unwelcome touching, inappropriate photos, sexually explicit comments) will be imputed to the employer.
- Co-worker comments with anti-gay epithets and slurs can rise to the level of unlawful harassment when not addressed by management.
- Co-worker harassment of an employee for failure to conform to sexual stereotypes and/or due to sexual orientation will be considered unlawful when a manager observes the conduct but takes no action.

Takeaways

Although the EEOC has long taken the position that employees are protected from sexual orientation and gender identity discrimination, *Bostock* made this principle the law of the land. Therefore, all employers subject to Title VII must ensure their policies and practices reflect these requirements. This includes updating employee handbooks and training materials and reengaging employees in training courses, particularly for managers and supervisors, regarding discrimination, harassment, and diversity/equity/inclusion (also known as DEI).

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