

# Title VII Post-*Bostock*: Recent Developments in LGBTQ+ Employee Rights

**Emma C. Bellamy**  
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# Title VII of The Civil Rights Act of 1964

- Prohibits discrimination or retaliation in employment on the basis of race, color, religion, sex (note: includes LGBTQ), or national origin
  
- Who Can Be Sued: employer/employment agency/union of over 15 employees
  - ✓ Excludes: non-U.S. citizens employed outside the U.S.;
  - ✓ individual defendants; “a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”
  
- When and Where
  - ✓ Within 180 days of adverse action: file signed and dated charge with the Equal Employment Opportunity Commission (“EEOC”)
  - ✓ Within 90 days of notice of right to sue from EEOC: file lawsuit in United States District Court

# Title VII of The Civil Rights Act of 1964

- Relief:
  - ✓ Injunctive relief: reinstatement; promotion; hire; raise; certain privileges
  - ✓ Damages based on employment: front pay; back pay
  - ✓ Attorneys' fees and costs
  - ✓ Compensatory (including emotional harm) and punitive damages capped:
    - Employer of 15-100 employees: \$50,000
    - Employer of 101-200 employees: \$100,000
    - Employer of 201-500 employees: \$200,000
    - Employer of 500+ employees: \$300,000

## Title VII: Discrimination

*42 U.S.C.A. § 2000e-2*

“It shall be an unlawful employment practice for an employer--

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”



## **Title VII: Discrimination**

Unlawful Employment Practice Examples: Can be intentional discrimination or have “disparate impact”

- compensation (includes salary, wage, bonus, commission, raise)
- Promotion/demotion
- Hire/Fire/Layoff
- Discipline
- Hostile work environment (comments, conduct) “severe or pervasive”
- Can be intentional employer act or have “disparate impact”



## Title VII: Retaliation

*42 U.S.C.A. § 2000e-3*

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

## **Title VII: Retaliation**

- Protected speech examples:
  - ✓ speaking up at work,
  - ✓ internal complaint,
  - ✓ internal investigation,
  - ✓ administrative action,
  - ✓ lawsuit

## Gerald Bostock



- Allegations in complaint:
  - Bostock is a gay man who was employed by Clayton County as a Child Welfare Coordinator with the primary responsibility of the Court Appointed Special Advocate (CASA) program.
  - During the 10 years he worked there (beginning in 2003) he received good performance evaluations and the program received accolades.
  - In January 2013, Bostock joined a gay softball league (the Hotlanta Softball League) and promoted CASA as a volunteer opportunity for the league's members.

## *Gerald Bostock v. Clayton County* (N.D. Ga. 2016)

- He was terminated in June 2013 for “conduct unbecoming of a Clayton County employee.”
- He filed suit under Title VII in the District Court in Atlanta.
- Clayton County moved to dismiss on the grounds that sexual orientation discrimination is not covered under Title VII. The District Court dismissed Bostock’s case.
- Bostock appealed to the 11<sup>th</sup> Circuit Court of Appeals which upheld the District Court’s dismissal.
- Bostock then applied for certiorari to the United States Supreme Court.
- The Supreme Court granted certiorari.
- The Supreme Court consolidated Bostock’s case with the *Zarda* case (appeal of Second Circuit decision on same issue that was decided the opposite way).
- The Supreme Court’s opinion addresses the *Bostock*, *Zarda*, and *Stephens* cases

## *R.G. & G.R. Funeral Homes Inc. v. EEOC* (E.D.Mich.2016):

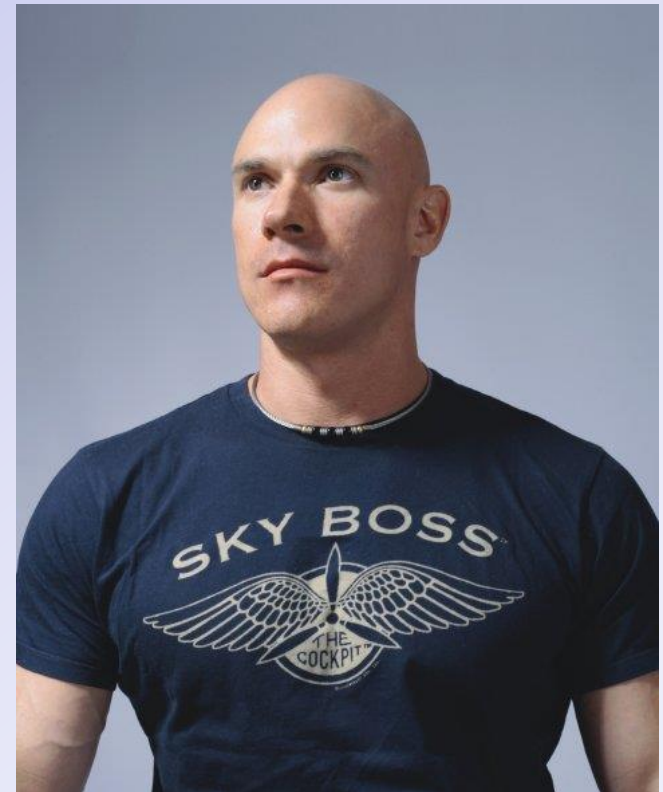
- Aimee Stephens worked at a funeral home and considered herself as a transgender woman, although she presented as male for most of her adult life.
- In 2013, she came out to family and friends, expressed herself as a woman, and arranged to undergo gender reassignment surgery.
- Before taking a vacation from the funeral home where she had been employed for 6 years, she wrote to her supervisor to let him know that, when she returned, she would present as a woman in work attire appropriate for female employees.
- Two weeks later she was fired by the funeral home owner.
- She filed a charge with the EEOC, which filed suit in the case.
- The District Court held that transgender people were not protected under Title VII and, even if they were, because the owner of the home was a devout Christian who did not believe in gender alteration and ran the home under his religion, he was protected under the Religious Freedom Restoration Act (“RFRA”).
- The Sixth Circuit Court of Appeals reversed the decision.
- Stephens died of health complications before the Supreme Court issued its ruling.





## *Donald Zarda v. Altitude Express, Inc.* (E.D.N.Y. 2014)

- Zarda was a skydiving instructor in Long Island, NY.
- To make a woman more comfortable while they were strapped together before a dive, he told her he was gay.
- The woman's boyfriend complained and he was fired.
- He sued his employer in District Court and lost.
- He died in a base jumping accident.
- His estate appealed the case to the Second Circuit Court of Appeals, where it won.



## *Gerald Bostock v. Clayton County (U.S. 2020)*

- [W]e granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.
- We must determine the ordinary public meaning of Title VII's command that it is “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 privileges of employment, because of such individual's race, color, religion, sex, or national origin.” § 2000e–2(a)(1).
- An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.”



## ***Bostock* Implications Beyond Employment**

- Majority: “The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”
  - See e.g. *Adams v. School Bd. St. John’s County* (relied on *Bostock* to hold that requiring transgender male highschooler to use women’s or single-stall bathrooms violated Title IX and 14<sup>th</sup> Amendment)
- Justice Alito’s dissent: “What the Court has done today—interpreting discrimination because of ‘sex’ to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex.”
- Short answer: there is an opening for arguments that this expansion of the definition of sex will apply to federal laws related to housing, education, federal funding, lending, and healthcare, among others, but it is not a given.
  - ✓ Do the laws have ‘because of’ language?
  - ✓ Do the laws apply Title VII standards in other ways?

# Religious Employer Exceptions

- *Our Lady of Guadalupe School v. Morrissey-Berru* (2020)
  - ✓ 2 teachers at religious schools were fired and brought employment discrimination claims (not under Title VII)
  - ✓ Court found that they could not bring claims because of “ministerial exception.”
  - ✓ Ministerial exception: first recognized in *Hosana-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), shields religious employers from certain employee claims.
  - ✓ Court adopted more flexible, broader interpretation of ministerial exception
    - The employee need not have the term “minister” in their job title or special religious training to do job
    - If the job description, duties, handbook, performance metrics includes adherence to certain religious standards it falls within exception
    - Are the employee’s tasks “vital religious duties”: is furthering religion a critical part of the job?

Dissent by Justices Ginsburg and Sotomayor: concern that employers could use this to apply to coaches, in-house lawyers, nurses especially in context of Title IX and schools.

## “Take Aways”

- Sexual orientation and gender identity are protected under Title VII’s prohibition against sex discrimination
- Religious exception to Title VII
- Open question about whether *Bostock* will extend to areas outside employment

Questions?



## **For More Information:**

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

[www.pbpatl.org](http://www.pbpatl.org)  
[info@pbpatl.org](mailto:info@pbpatl.org)  
(404) 618-0900