

Editor and Author's Note: LGBTQ is the preferred acronym. However, some of the cited sources use the older acronym, LGBT. For sake of consistency with the cited sources, LGBT is used throughout this article.

The Benefits of *Bostock*: Extending Workplace Protections to LGTBQ Employees

by Angela Dunne and Jayden Barth



Angela Dunne (far left) stands outside of the court after oral arguments on February 19, 2015. Pictured left to right: Attorney Angela Dunne, Attorney Susan Ann Koenig, Plaintiffs Greg Rubach, Bil Roby, Susan Waters, Carla Morris-Von Kampen, Crystal Von Kampen, Sally Waters, Jason Cadek, Marj Plumb, Nick Kramer, Attorney Amy Miller, Plaintiff Tracy Weitz.

It was a frigid February day—February 19, 2015. I made my first and only appearance in the federal court of Nebraska for the oral argument in *Waters v. Ricketts*. A divorce lawyer by practice, my typical days are spent navigating the legal complexities of untying a marriage. On this day, six years ago, I was on a legal team advocating to secure marriage rights for same-sex couples. It marks one of the proudest moments in my career. I was part of the intersection between the law and societal change. Four months later, our case was resolved when the Supreme Court legalized same-sex marriage in all 50 states.¹

I remember the tears, hugs, and celebrations in June upon learning our client's families would now be afforded the legal protections marriage provides. For one of our couples, a dad would now be legally recognized as such, inheritance rights were now secured and the highest rate of inheritance tax avoided for our client battling cancer, military benefits would now be extended to the family, and employer-sponsored health



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insurance would now be available. It was a huge victory and yet, so much work remained to secure legal protections for the gay, lesbian, bisexual, or transsexual community.

In the six years since the *Obergefell* ruling, the legal focus for the LGBT community turned from the right to love to the right not to be hated—specifically, to be protected from discriminatory acts in the workplace based on sexual orientation.

A broad grant of protection from workplace discrimination came in 1964 with Title VII of the Civil Rights Act (CRA). Title VII prohibits discrimination in the workplace on the basis of “race, color, religion, sex, or national origin.”² Despite this seemingly expansive protection, prior to June 2020, the CRA did not provide any protection for workers who were discriminated against due to their sexual orientation. In 2020, whether discrimination on the basis of sex included sexual orientation remained a hotly debated question.

Over eleven million adults in the United States—including approximately 55,000 Nebraskans—identify as gay, lesbian, bisexual, or transgender (LGBT).³ Out of the eleven million people identifying as LGBT, 35% reported that workplace discrimination negatively impacted their ability to be hired, and 31% reported discrimination impacted promotions, salary increases, and their ability to retain employment generally.⁴ With around 3.9 million Americans reporting that workplace discrimination negatively impacted their employment,⁵ a definitive determination regarding the definition of the word “sex” was imperative to improve the working conditions for a staggering number of workers.⁶

History of the Law

Since the enactment of the CRA in 1964, the phrase “because of sex”⁷ has been the most controversial phrase considering the numerous ways that “sex” may be defined. The primary nuance under the law was divided by sexual orientation discrimination and sexual-stereotype discrimination. One distinction actionable, the other not.

The first class of cases examines sexual orientation discrimination. *Blum v. Gulf Oil Corporation* held that discrimination or termination on the basis of homosexuality is not actionable under Title VII of the CRA.⁸ The second class of cases examines sexual-stereotype discrimination. In 1989, the Supreme Court extended Title VII sex discrimination protection to sexual-stereotypes in *Price Waterhouse v. Hopkins*.⁹ Sexual-stereotype claims were made actionable while claims on sexual orientation discrimination remained non-actionable.

The late 1990s and early 2000s brought more cases, new legislation, and Equal Employment Opportunity Commission (EEOC) rulings that further divided *Blum* and *Price Waterhouse* distinctions.

In 1998, *Oncale v. Sundowner*, the Supreme Court extended protection to claims that include same-sex harassment.¹⁰ Following this determination, until 2020, the Supreme Court had not offered further clarification or opinions regarding gender identity and sexual orientation discrimination in the workplace. Without guidance from the Supreme Court, the U.S. Courts of Appeals made varied decisions following *Oncale*.

In 2012, the EEOC ruled that gender identity claims could be bought pursuant to Title VII.¹¹ Following their 2012 ruling, the EEOC consistently decided gender identity and sexual orientation claims were actionable under Title VII.¹² In 2014, the Attorney General for the Department of Justice released a memo saying gender identity discrimination is a sex-based claim and should continue to be actionable under Title VII for all future cases.¹³

Despite this trend for protecting the LGBT communities in the United States, in 2017, the application of Title VII protection became more complicated when the Attorney General appointed under the Trump Administration released a memo stating Title VII protections would no longer be extended to gender identity or sexual orientation discrimination claims.¹⁴ The courts also continued to trend inconsistent, creating an unreliable framework for the application of Title VII protections. The Fifth and Eleventh Circuits continued to limit Title VII protection.¹⁵ Meanwhile, the Second and Seventh Circuits prohibited discrimination on the basis of sexual orientation.¹⁶ With a circuit split and complicated history, Title VII finally was resolved in June 2020 with the Supreme Court’s ruling in *Bostock v. Clayton County*.

Facts of *Bostock v. Clayton County*

In 2016, Gerald Bostock brought suit against his employer for workplace discrimination on the basis of his sexual orientation under Title VII in *Bostock v. Clayton County*.¹⁷ Gerald Bostock is a gay male who previously worked as a Child Welfare Services Coordinator for the defendant, Clayton County.¹⁸ During the 10 years Bostock worked for Clayton County, he received awards, served in leadership positions, and had good performance evaluations.¹⁹ In 2013, Bostock joined a gay softball league in the city.²⁰ While playing softball, Bostock promoted the work he did for Clayton County and recruited volunteers for his department.²¹

After Bostock joined the team, some of his co-workers made degrading comments regarding his sexuality while in the presence of his superiors.²² Following a string of negative comments, the defendant informed Bostock that they planned to audit the funds Bostock managed for the department.²³ Soon after, Clayton County terminated Bostock for “conduct unbecoming of a County employee.”²⁴

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Bostock believed Clayton County terminated his employment due to his sexual orientation and filed a complaint with the EEOC in 2013.²⁵ Later, in 2016, he filed a complaint with the District Court for the Northern District of Georgia.²⁶

Lower Court Holdings

After Bostock filed his complaint, the defendant filed a motion to dismiss arguing that the District Court should dismiss Bostock's claim because sexual orientation discrimination is not protected by Title VII.²⁷ The District Court agreed.²⁸ The District Court in *Bostock* determined that they would not defer to the recent EEOC adjudications.²⁹

Bostock appealed and the Eleventh Circuit Court of Appeals affirmed.³⁰ In April 2019, the Supreme Court of the United States, seemingly to remedy these broad disparities in Title VII application, granted certiorari to review *Bostock v. Clayton County*.³¹

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

In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. 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.³²



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The Supreme Court decided *Bostock* after three separate cases were consolidated for review. The other two cases included a Second Circuit case involving a skydiving instructor whose company fired him days after he mentioned his sexual orientation³³ and a Sixth Circuit case that involved a transgender employee whose company fired her after she informed superiors of her transition.³⁴ In *Bostock*, the Supreme Court interpreted Title VII in relation to sexual orientation and solidified the test for causation in Title VII cases.

The Supreme Court's interpretation of Title VII shed light on the protection it provides LGBT workers. After examining the public meaning of words at the time of enactment, the Court interpreted Title VII to mean that "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII."³⁵ More specifically, the Court reached this decision by reasoning that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions . . . because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."³⁶

The Court clarified that for Title VII cases, under the traditional "but-for" causation test, "a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."³⁷ This means that even if sex is just one of many factors that led to an individual being discriminated against in the workplace, that is enough to show "but-for" causation in Title VII discrimination cases.³⁸ This distinction is important to extending protection to individuals discriminated against because of their sexual orientation. The causation link is that the employee who is fired because of their sexual orientation has been fired because of two factors: their sex, and their sexual orientation or gender identity.³⁹ Since sex is one of the factors, the "but-for" causation standard is met.

This decision stands as a landmark not only for interpretation of Title VII, but also as a landmark for members of the LGBT community in their fight to secure necessary protections in the workplace.

Implications for the Future

The implications that *Bostock* has on the future of LGBT rights are still developing. The *Bostock* holding is narrow in scope and does not provide carte blanche protection to the LGBT community. In *Bostock*, the majority addressed concerns employers voiced for the future. In doing so, they noted that their decision does not discuss or "prejudge" questions involving "bathrooms, locker rooms, or anything else of the kind."⁴⁰ With this statement, the Court limited the scope of this decision to address only Title VII and Title VII sexual orientation discrimination cases. Despite this limitation, this holding has since "prompted a

number of legal challenges" including challenges to statutes containing similar language as Title VII, such as Title IX.⁴¹

Current legal challenges seek to expand *Bostock's* holding to education and healthcare laws. These challenges rest on similar statutory language prohibiting discrimination based on sex in those fields. With similar—or substantially the same—statutory language, the reasoning in *Bostock* used to extend protections to the LGBT community should hold true when applied to other fields.⁴² This means that *Bostock* may have lasting impacts in a variety of discrimination contexts, including in the application of the Affordable Care Act, Fair Housing Act, and the 14th Amendment.⁴³

However, despite the potential for further protections in the LGBT community, the holding in *Bostock* may be concerning for those who identify as bisexual. Those who identify as bisexual have been left out as a protected group from many opinions and holdings regarding LGBT rights.⁴⁴ For example, in *Bostock*, the majority referred to the issue as "whether an employer can fire someone simply for being homosexual or transgender," leaving out persons identifying as bisexual.⁴⁵ Omitting this group of people out of the court's consideration leaves uncertainty for the bisexual community, while also "hurt[ing] the integrity of the LGBTQ rights discourse by perpetuating false dichotomies, reinforcing inaccurate paradigms that require persons to fall under either a gay or straight category to be entitled to formal recognition."⁴⁶

Additionally, *Bostock* does not protect LGBT employees in all situations. Title VII and its protections only apply to employers that have 15 or more employees.⁴⁷ In Nebraska, over 400,000 workers are employed with small businesses.⁴⁸ This leaves a large number of workers in our state that find themselves without Title VII protection for sexual orientation discrimination.

Further, there are exceptions to Title VII's protections generally. In *Bostock*, the majority addressed the religious organization exception to Title VII protections.⁴⁹ 42 U.S.C. § 2000e-1(a) provides that Title VII does not apply to employers of a "religious corporation, association, educational institution, or society with respect to the employment of individuals."⁵⁰ Thus, religious employers are exempt from Title VII and may not be forced to hire employees, or refrain from firing employees, if it would violate the religious practices of the employer.

In Nebraska, approximately 75% of the population reports being Christian.⁵¹ The large religious population in Nebraska has led to controversies in the LGBT community in recent years. For example, in 2015, an English teacher and speech coach at Skutt Catholic High School in Omaha was fired after telling school officials of his engagement to a male partner.⁵² These firings have been highly publicized for their discriminatory nature. However, these actions by religious organizations

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are exempt from Title VII, and often employees are left without recourse. Despite the lack of progress *Bostock* made toward ensuring protections for LGBT workers who are working for religious organizations, the majority did state that how statutes protecting religious liberty for employers actually interact with Title VII is a question to be resolved in future cases.⁵³ This pronouncement left the door open for further expansion of LGBT protections in the future.

Until further clarity is provided, LGBT workers in Nebraska may still find themselves vulnerable to adverse employment actions based on their sexual orientation. Therefore, Nebraska legislators should consider implementing greater protections for those employees working for exempt employers in order to protect our workforce.

We are at another crossroads between who and what our laws protect and who and what our society values. Once aligned, I remain as hopeful as I did on that February day, that all Nebraskans and Americans will be afforded the right to live peacefully and protected within their homes and in their workplaces. ▢

Endnotes

- ¹ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2608 (2015) (holding “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character”).
- ² 42 U.S.C. § 2000e-2 (a)(1) (1991).

- ³ Kerith J. Conron & Shoshana K. Goldberg, *Adult LGBT Population in the United States*, UCLA WILLIAMS INSTITUTE (July 2020), <https://williamsinstitute.law.ucla.edu/publications/adult-lgbt-pop-us/> (This study used data from 2017 available through the Gallup Daily Tracking Surveys).
- ⁴ Sharita Grunberg, Lindsay Mahowald & John Halpin, *The State of the LGBTQ Community in 2020*, CENTER FOR AMERICAN PROGRESS (Oct. 6, 2020, 9:00 AM), <https://www.american-progress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/> (describing the results of the NORC AmeriSpeak survey that interviewed 1,528 self-identified LGBTG adults).
- ⁵ This number was calculated by taking 35% of eleven million, which comes to 3,850,000.
- ⁶ See, Erin E. Buzuvis, *A Reasonable Belief: In Support of LGBT Plaintiffs’ Title VII Retaliation Claims*, 91 Denv. U. L. Rev. 929, 930 (2014) (“sex discrimination claims are a second-best solution for LGBT plaintiffs- an insufficient work-around to the problem created by Title VII’s omission of sexual orientation and gender identity as protected characteristics”). The LGBT community needs a better way to protect themselves from sexual orientation discrimination. Considering the sizeable LGBT community in the United States, better protection from workplace discrimination is necessary and will impact the community as a whole.
- ⁷ *Id.*
- ⁸ *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).
- ⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (“We hold that when a plaintiff in a Title VII case proves that her gender played a motivating party in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account”).
- ¹⁰ *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81(1998) (concluding “sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).
- ¹¹ EEOC, *Macy v. Holder*, Appeal No. 0120120821 Dept. of Justice (ATF) 14 (2012); Regina L. Hillman, *Title VII Discrimination Protections & LGBT Employees: The Need for Consistency, Certainty & Equality Post-Obergefell*, 6 Belmont L. Rev. 1, 5 (2019) (“the EEOC has extended Title VII prohibition on sex discrimination to prohibit discrimination on the basis of both gender identity and sexual orientation”); Tessa M. Register, *The Case for Deferring to the EEOC’s Interpretations in Macy and Foxx to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 Iowa L. Rev. 1397, 1402 (2017) (stating that Title VII created the EEOC, an independent federal agency, to enforce and adjudicate disputes regarding workplace anti-discrimination statutes).
- ¹² EEOC, *Baldwin v. Foxx*, Appeal No. 0120133080 Dept. of Transp. (FAA) 15 (2015) (concluding that allegations of sexual orientation discrimination are claims of “discrimination on the basis of sex within the meaning of Title VII”).
- ¹³ Dep’t of Justice, Memorandum regarding the Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014). The Attorney General made the determination to permit gender identity claims to be actionable under Title VII in light of the recent federal government actions. First, he stated that the federal government’s Office of Personnel Management released guidelines stating that the workplace should be free from discrimination based on one’s gender identity. Second, he cited to the EEOC’s holding in *Macy v. Holder*, Appeal No. 0120120821. Finally, he noted that the President, in 2014, announced via Executive Order 13672, that gender identity discrimination is prohibited in federal workplaces.
- ¹⁴ Dep’t of Justice, Memorandum regarding the Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017). A memorandum regarding the treatment of transgender employment discrimination claims under Title VII reversed the previous

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Attorney General's memorandum regarding the issue. The reasoning being that "the Department of Justice must interpret Title VII as written by Congress" and that Congress did not include gender identity in the statute. Further, the Attorney General stated that gender identity discrimination did not disadvantage members of one gender in relation to the other, which also supports his reading of Title VII.

- ¹⁵ *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (holding that *Blum* provided binding precedent that must be followed absent a Supreme Court decision on the matter).
- ¹⁶ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) ("we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of ... sex'"); *Hively v. Ivy Tech Comty. Coll. of Indiana*, 853 F.3d 339, 349-50 (7th Cir. 2017) (holding that a person who has been discriminated against on the basis of sexual orientation may claim Title VII protection from sex discrimination).
- ¹⁷ *Bostock v. Clayton Cty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356, at *1 (N.D. Ga. Nov. 3, 2016).
- ¹⁸ *Id.*
- ¹⁹ *Id.*
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² *Id.* at *2.
- ²³ *Id.* Bostock claimed the audit his superiors ordered was merely "a pretext" for discrimination against him for being gay.
- ²⁴ *Id.*
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.* The Defendant argued that only sex-stereotyping claims, and not sexual orientation claims, are covered by Title VII.
- ²⁸ *Id.* at *4. Fifth Circuit cases were adopted as binding precedent in the Eleventh Circuit for all cases that were decided before September 20, 1981. This adoption included *Blum*, 597 F.2d 936.
- ²⁹ *Id.* at *5 (stating "the EEOC interpretations of Title VII are entitled to ... 'deference to the extent [that they have] the power to persuade'"). Although EEOC interpretations hold the power to persuade, the District Court stated that they would not consider their interpretations due to the inconsistencies in EEOC rulings and the existing precedence in the circuit.
- ³⁰ *Bostock v. Clayton Cty. Bd. of Comm'r.*, 723 Fed.Appx. 964, 965 (2018).
- ³¹ *Bostock*, 139 S.Ct. at 1599.
- ³² *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1737 (2020).
- ³³ *Id.* at 1738; *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).
- ³⁴ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

- ³⁵ *Bostock*, 140 S.Ct. at 1740.
- ³⁶ *Id.* at 1741.
- ³⁷ *Id.* at 1739.
- ³⁸ *Id.*
- ³⁹ *Id.* at 1742. ("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).").
- ⁴⁰ *Id.* at 1753.
- ⁴¹ Amy Post, Ashley Stephens, & Valarie Blake, *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After Bostock*, 11 CAL. L. REV. ONLINE 545, 551-554 ("In the aftermath of *Bostock*, several circuits have concluded that *Bostock* applies with equal force to Title IX cases. In a case deciding whether a transgender high schooler should have access to a restroom of their choice, the Eleventh Circuit concluded that "Title IX like Title VII prohibits discrimination against a person because [they are] transgender, because this constitutes discrimination based on sex.").
- ⁴² *Id.* at 555 ("Discrimination may take a different form in employment, education, and health care settings, but no matter the setting, *Bostock's* logic applies equally to the idea that discrimination against an LGBTQ individual is always because of their sex.").
- ⁴³ Sharita Grunberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CENTER FOR AMERICAN PROGRESS (Aug. 25, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/>.
- ⁴⁴ Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U.L. REV. ONLINE 223, 230 (2020).
- ⁴⁵ *Id.*
- ⁴⁶ *Id.* at 233.
- ⁴⁷ 42 U.S.C. § 2000e (b) (1991).
- ⁴⁸ Nebraska Workforce Trends, NEB. DEPT OF LAB. (May 2018), https://www.dol.nebraska.gov/webdocs/Resources/Trends/May%202018/Trends_May2018.pdf (426,636 Nebraska employees work for small businesses with zero to nineteen employees).
- ⁴⁹ *Bostock* at 1754.
- ⁵⁰ 42 U.S.C. § 2000e-1(a).
- ⁵¹ *Adults in Nebraska*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/state/nebraska/> (last visited Feb. 22, 2021).
- ⁵² Nicholas Bergin, Lincoln J. Star (May 5, 2015), https://journalstar.com/news/local/education/supporters-say-teacher-losing-job-because-hes-gay/article_c3188885-7839-5745-b7ff-29844223e850.html ("Students, parents and alumni of an Omaha Catholic high school have rallied behind a teacher who was told his contract would not be renewed if he marries his same-sex partner.").
- ⁵³ *Bostock* at 1754.



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