
Labor and Employment

Employment Protections for Sexual Orientation and Gender Identity in Ohio



By Rick Bales and Morgan Schweighoefer,
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On June 15, 2020, the U.S. Supreme Court held in *Bostock v. Clayton County, Georgia*¹ that Title VII's prohibition of workplace sex discrimination also prohibits workplace discrimination on the basis of sexual orientation and gender identity. This article describes that case and also discusses Ohio state and local laws providing workplace protections for LGBTQ individuals based on sexual orientation or gender identity.

Federal Law



workers from discrimination based on sexual orientation. In the 2004 case of *Smith v. City of Salem*,⁴ however, the 6th Circuit, relying on *Price Waterhouse v. Hopkins*,⁵ held that employers cannot discriminate against workers who do not conform to gender stereotypes. Before *Bostock*, federal circuit courts were split on whether Title VII prohibits employment discrimination based on sexual orientation or gender identity.

In October 2019, the U.S. Supreme Court granted certiorari in two cases that brought this issue to the forefront of Title VII protections. The first case was a consolidation of two separate cases, *Altitude Express v. Zarda* (No. 17-1623) and *Bostock v. Clayton County* (No. 17-1618). Plaintiffs in both these cases, gay men, claimed they were fired because of their sexual orientation. In a separate case, *Harris Funeral Home v. EEOC* (No. 18-107), a transgender woman alleged she was fired based on her gender identity. In June 2020, the Supreme Court ruled 6-3 in favor of the employees.

Gerald Bostock, a mental health counselor who worked as a case manager for Clayton County, Georgia's Court Appointed Special Advocates, was fired in 2013 after his employer discovered his participation in a local gay softball league. Although Clayton County alleged it had fired Bostock for mismanaging funds, the reason it gave for Bostock's termination was "conduct unbecoming of a County employee." Bostock was criticized "by someone with significant influence in the Clayton County court system" (according to his petition) for involvement in the softball league. He was also a victim of homophobic slurs at a meeting with his program's advisory board.

Bostock sued under Title VII's prohibition of sex discrimination, alleging the County's excuse was a pretext for firing him because of his sexuality.⁶ Both the district court and the 11th Circuit held that Title VII did not cover sexual orientation and dismissed Bostock's claims.⁷ Bostock appealed and the Court consolidated the case with *Harris* and *Zarda*.

Justice Gorsuch wrote the majority opinion and was joined by Chief Justice Roberts as well as Justices Ginsburg, Breyer, Sotomayor and Kagan. The court interpreted "because of sex" in Title VII to include any discriminatory practice due to sexual orientation or gender identity. The majority reasoned that, when an employer fires an individual for being transgender or homosexual, the employer "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."⁸ The majority, relying on the textual language of Title VII's "because of ... sex," determined that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."⁹

The court stated that if a male, but not a female, would be fired because he is attracted to males, that would be treating employees differently – i.e., "discriminating" – on the basis of sex. Sexual orientation and gender identity therefore are indistinguishable from "sex." As a result, both sexual orientation and gender identity discriminatory practices ultimately stem from a discriminatory practice based on sex.

Justice Alito wrote the first of two dissents. He characterized the majority's justification as purporting to adhere to the text of Title VII, but in reality, reflecting the majority's policy preference for modern rules that "better reflect the current values of our society."¹⁰ He argued that neither sexual orientation nor gender identity fall within the meaning of "sex," and it is not the court's prerogative to expand the definition of "sex" to include them. Warning of far-reaching consequences such as the impact on bathroom or locker room usage, Alito stressed that the court's duty is to "interpret statutory terms to mean what they conveyed to reasonable people at the time they were written."¹¹



gay, not because they were men.”¹² Further, he argued that courts, applying statutes, should and generally do follow a law’s ordinary meaning rather than its literal meaning. In earlier decisions, the court refused a reading of “mineral deposits” that included water, even though water is literally a mineral. It declined to hold that “personnel rules” encompass any rules that personnel must follow. Beans are not “seeds.” An aircraft is not a “vehicle.” Buying drugs is not “facilitating” drug distribution. Ordinary meaning, wrote Kavanaugh, should sometimes preclude the literal application of a statute’s terms. Here, he argued that, because no one in 1964 expected that prohibiting sex discrimination would also prohibit discrimination on the basis of sexual orientation or gender identity, the court should have merely pointed out the issue, referred the subject back to Congress, and declined to enforce the text of Title VII in the meantime.¹³ One cannot overstate the irony of Justice Kavanaugh rejecting a textualist approach to statutory interpretation.

Bostock is a monumental win for LGBTQ employees. However, the win may be short-lived. That’s because the court is considering whether to grant employers with religious objections to LGBTQ people an exemption from Title VII. Justice Gorsuch hinted at this in a concurring opinion two years ago in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*¹⁴ when he suggested that religious conservatives should enjoy sweeping exemptions from laws prohibiting discrimination on the basis of sexual orientation or gender identity. He ended the majority opinion in *Bostock* by again raising this issue, noting that because none of the employers in *Bostock* had raised the issue it was not then before the Supreme Court.

However, in November 2020, the court heard oral arguments in *Fulton v. City of Philadelphia*.¹⁵ In that case, the court will consider the interaction between Title VII and the Religious Freedom Restoration Act of 1993¹⁶ (RFRA), which prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. Some employers have argued that RFRA allows them to make employment decisions based on their individual owners’ religious beliefs and that it supersedes Title VII’s prohibitions of discrimination. This argument, if accepted by the court, could open the door to discrimination not just based on sexual orientation or gender identity, but also to discrimination based on race, sex, national origin, color and religion.

Thus, even after *Bostock*, state and local antidiscrimination laws are critically important because the Supreme Court may, in *Fulton*, significantly restrict the reach of Title VII. Even if the court does not, state and local antidiscrimination laws are important because they often cover employers that Title VII does not cover. For example, while Title VII covers only employers with 15 or more employees, the Ohio Civil Rights Act covers employers with four or more employees.¹⁷ Many state and local antidiscrimination laws also give workers longer to file their claims after the discrimination has occurred.

"If the Ohio Fairness Act passes, LGBTQ employees in the state will receive broader protections than under the new federal ruling."

State Law



sexual orientation or gender identity. For example, one Ohio appellate court has stated: “Sexual orientation is noticeably not included in the list of prohibitions enumerated in R.C. 4112.02(A) . . . We decline to interpret R.C. 4112.02 to prohibit discrimination based on sexual orientation. We conclude that the protections of R.C. 4112.02(A) do not extend to discrimination based on sexual orientation.”¹⁹

However, statewide efforts are underway to change this through new legislation. On Oct. 16, 2019, the proposed Ohio Fairness Act (HB369) was introduced in the Ohio House of Representatives on a bipartisan basis. The first hearing on the bill was held on Nov. 19, 2019 in the Civil Justice Committee. Not much progress has been made on this bill and it has stalled as pandemic-related bills have taken priority. State Rep. Mike Skindell (D-Lakewood) acknowledged that the bill has been “put on the back burner.”²⁰

However, the U.S. Supreme Court ruling in *Bostock* may reignite the efforts to get the bill passed. Despite its slowed movement forward, its sponsors remain optimistic that the bill will pass. Rep. Brett Hudson Hillyer (R-Uhrichsville), one of the primary sponsors of HB369, reported in 2019: “This has a good chance of passage. This bill has the ability to get fully vetted in the House this year which is the furthest it’s gone in a Republican-controlled body of the General Assembly. The House Speaker is open to debate and fully vetting this out whereas previous Speakers may have been afraid of this conversation. He is not afraid of big ideas and letting everyone have a voice.” Introduced in the Senate as SB11, the proposed legislation would add sexual orientation and gender identity to the list of protected classes covered by the state’s antidiscrimination laws pertaining to employment, public accommodation and housing.

Skindell also points out that the Ohio Fairness Act is broader than Title VII as interpreted by *Bostock*, because the Ohio Fairness Act, but not Title VII, covers discrimination in health insurance and housing.²¹ If the Ohio Fairness Act passes, LGBTQ employees in the state will receive broader protections than under the new federal ruling. However, as of early fall 2020, the bill appeared to be stalled.²²

County and Local Laws

County-Wide Protections

Before *Bostock*, an increasing number of counties and local communities around Ohio had adopted employment antidiscrimination ordinances protecting sexual orientation, gender identity and gender expression. For example, Cuyahoga County passed legislation in fall 2018 protecting the rights of all persons to be free from discrimination, including based on “sexual orientation, and gender identity or expression.”²³

Some counties have antidiscrimination laws limited to county employees or county vendors. For example, Summit County prohibits discrimination on the basis of sexual orientation and gender identity in county hiring and employment practices.²⁴ Other counties, such as Franklin County, have banned employees from non-essential travel to the states of North Carolina and Mississippi, citing “divisive laws codifying legal discrimination and even precluding local governments from undoing their state-sanctioned discrimination against members of the LGBTQ community.”²⁵ In 2016, the North Carolina legislature revoked the City of Charlotte’s attempt to ban discrimination against LGBTQ individuals and then modified state law to prohibit a city from expanding any discrimination protections beyond what the state offered.²⁶ That same year, Mississippi adopted into law a provision allowing persons with religious objections to deny wedding services to same-sex couples and protecting from discrimination claims private businesses choosing not to serve LGBTQ individuals based on their own religious convictions.

Municipal Protections



discrimination on the basis of sexual orientation or gender identity.²⁷ Other communities, such as Athens and Cleveland Heights, have not only included LGBTQ protections in their antidiscriminatory employment ordinances, but also have passed resolutions in support of the Ohio Fairness Act.²⁸

Many of these municipal ordinances explicitly protect only sexual orientation, while others explicitly protect both sexual orientation and gender identity. For example, the city of Springfield “prohibits discrimination based on sexual orientation.”²⁹ Section 101.02 (General Definitions) of the Codified Ordinances of the city of Springfield, however, was subsequently amended to define sexual orientation as “a person’s actual or perceived heterosexuality, bisexuality, homosexuality or gender identity, by orientation or practiced by and between consenting adults.”³⁰ Similarly, a city of Lakewood ordinance applies to employment, housing, education and public accommodation, and forbids “discrimination based on ... gender, gender identity or expression, sexual orientation or physical characteristic.”³¹

Cuyahoga County, like Lakewood, includes “gender expression” in its ordinance, whereas Springfield does not. It may be that some ordinances use “gender expression” and “gender identity” interchangeably. Springfield’s definition, for example, includes the word “perceived heterosexuality, bisexuality, homosexuality or gender identity...”³² Other communities appear to distinguish between the phrases “expression” and “identity.” Shaker Heights has included a chapter in its codified ordinances expanding discrimination prohibitions to include sexual orientation and “gender identity or expression.”³³

Although the Bostock decision now encompasses gender identity and sexual orientation, as noted above, some Ohio municipalities include broader terms such as “perceived gender identity” and “expression.” The intent behind including the word “perceived” appears to be to reach discrimination based on stereotypical assumptions about a person’s gender identity or expression, whether accurate or not. Similarly, “gender expression” and “gender identity” might be interpreted as overlapping terms. However, it also is possible to distinguish them, with “gender expression” referring to an external manifestation and “identity” referring to one’s self-perception. Municipalities wishing to provide the broadest possible protection are advised to include both terms.

Ohio employers covered by Title VII should now, thanks to Bostock, amend their antidiscrimination policies to include sexual orientation and gender identity. Ohio counties and municipalities should consider amending their antidiscrimination ordinances to protect at least sexual orientation and gender identity. Ohio counties and municipalities that want to extend broader antidiscrimination protection should consider amending their antidiscrimination ordinances to include also “gender expression” and to protect against perceived sexual orientation, gender identity and gender expression.

Conclusion

Bostock significantly expands the scope of Title VII protection to persons who have long been marginalized. However, state, county, and local antidiscrimination laws and ordinances often cover employers and employees not covered by Title VII. These laws and ordinances continue to provide an important source of legal protection for Ohioans discriminated against because of sexual orientation and gender identity.



About the Authors

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Endnotes

¹590 __ U.S. __ (2020).

²Pub. L. 88-352, 42 U.S.C. § 2000e et seq.

³453 F.3d 757 (6th Cir. 2006).

⁴378 F.3d 566 (6th Cir. 2004); see also EEOC v. R.G., 884 F.3d 560 (6th Cir. 2018).

⁵490 U.S. 228 (1989).

⁶Bostock v. Clayton Cty., N.D.Ga. No. 1:16-CV-1460-ODE-WEJ, 2017 U.S. Dist. LEXIS 229334 (Feb. 2, 2017).

⁷Bostock v. Clayton Cty. Bd. of Commrs., 723 F.App'x 964 (11th Cir.2018).

⁸Boston v. Clayton Cty., __ U.S. __, 28 Fla L. Weekly Fed. S. 294 (2020).

⁹Id. at 21.

¹⁰Id. at 61.

¹¹__ U.S. __, 123 S.Ct., 3 (2020).

¹²<https://www.nationalreview.com/bench-memos/justice-kavanaughs-dissent-in-title-vii-ruling/>, also Pp. 11-22.

¹³Andrew Koppelman, Bostock: What Two Conservatives Realized and Three Dissenters Missed, The American Prospect (June 15, 2020), available at <https://prospect.org/justice/bostock-what-two-conservatives-realized-and-three-dissenters-missed/>.

¹⁴584 U.S. __, 138 S. Ct. 1719 (2018).

¹⁵922 F. 3d 140 (3d Cir. 2019), cert. granted, 140 S. Ct. 1104 (2020).

¹⁶42 U.S. Code § 2000bb (2020).



¹⁸O.R.C. § 4112.02.

¹⁹Tenney v. GE, 11th Dist. Trumbull No. 2001-T-0035, 2002-Ohio-2975, ¶ 17-18; (also see Burns v. Ohio State Univ. College of Veterinary Medicine, 10th Dist. Franklin No. 13AP-633, 2014-Ohio-1190, ¶ 13 “Appellant refers to R.C. Chapter 4112 and Title VII as demonstrating a public policy prohibiting discrimination based on sexual orientation; however, . . . courts have held that these statutory provisions do not apply to sexual orientation.”).

²⁰Susan Tebben, After U.S. Supreme Court decision, Ohio Fairness Act still awaiting hearings, Ohio Capital Journal (June 24, 2020), <https://ohiocapitaljournal.com/2020/06/24/after-u-s-supreme-court-decision-ohio-fairness-act-still-awaiting-hearings/>

²¹Id.

²²See Stephen D. Hambley, Statement On House Bill 369 Pending Ohio House Civil Justice Committee (Jan. 29, 2020), available at <http://www.ohiohouse.gov/stephen-d-hambley/press/statement-on-house-bill-369-pending-ohio-house-civil-justice-committee> (last visited Sept. 3, 2020).

²³Ordinance No. O2018-0009, passed September 25, 2018.

²⁴Ordinance No. 2009-475, passed November 30, 2009.

²⁵Resolution No. 0321-16, passed April 26, 2016.

²⁶Public Facilities Privacy and Security Act, H.B. 2, <https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v1.pdf>

²⁷Dayton Ordinance No. 3069-07, passed November 21, 2007; Bexley Ordinance No. 12-15, passed June 23, 2015; Youngstown Ordinance No. 16-441, passed December 22nd, 2016; Sandusky Ord. 18-090, passed May 14, 2018.

²⁸Athens Resolution No. R-06-18, passed June 11, 2018; Cleveland Heights Resolution No. 41-2019, passed June 3, 2019.

²⁹Springfield Ordinance No. 18-24, passed January 20, 2018.

³⁰City of Springfield Codified Ordinances Sec. 101.02; General Definitions.

³¹Ordinance No. 1-16, passed June 22, 2016.

³²City of Springfield Codified Ordinances Sec. 101.02; General Definitions.

³³Ordinance No. 19-43, passed October 28, 2019.

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