



Developments in Discrimination Protections for a Person's Sexual Orientation or Gender Identity

Prepared by: Audrey Kratz, Legal Intern, and Margit Kelley, Principal Attorney

In 2020, the U.S. Supreme Court issued a decision prohibiting discrimination in the workplace because of an individual's sexual orientation or gender identity. The Court relied heavily on the ordinary meaning of the phrase "on the basis of sex" from Title VII of the Civil Rights Act in arriving at its conclusion, using a "but-for" causation standard. This statutory interpretation of Title VII could affect other areas of the law that contain the same language, including Title IX, Wisconsin's Public Accommodation Law, and Wisconsin's Fair Employment Law, as discussed briefly below.

BOSTOCK V. CLAYTON COUNTY

In *Bostock v. Clayton County*,¹ the U.S. Supreme Court held that employers may not discriminate on the basis of sexual orientation or gender identity. Employers fired two individuals who were gay after the employers discovered the employees' sexual orientation. Another employer fired a third individual after telling the employer that they were a transgender woman. The individual was assigned male at birth. These three individuals brought suit against their employers under Title VII, alleging that the employers discriminated against them on the basis of sex. The Court combined the cases of the three individuals to decide the issue of whether Title VII bars employers from discriminating against a person because the person is gay or transgender.

Title VII prohibits a covered employer from discriminating against a person on the basis of race, color, religion, sex, or national origin. The Court held that an employer discriminating against any individual because of a person's sexual orientation or gender identity is discriminating on the basis of sex as defined in Title VII. In reaching its decision, the Court interpreted the phrase "because of" to incorporate a "but-for" causation standard. The "but-for" causation standard, as applied in this context, means that the discrimination would not have happened but for the person's sex. In other words, the individual's sex was the determinative factor for the discrimination.

The Court highlighted this principle with an [example](#) of a fictional employer. The employer has two employees, one male and one female. Both employees are attracted to men. If the employer fired the male employee because he is attracted to men, but retained the female employee who is also attracted to men, then the employer has violated Title VII because the male employee's sex was a necessary part of the decision. Likewise, regarding gender identity, the Court focused on traits or actions that an employer would not have questioned in members of a different sex. In sum, because the employees' sex was the only difference, it was accordingly the determinative factor for termination. From this analysis, the Court held that employment discrimination based on sexual orientation or gender identity violates Title VII.

OTHER AREAS OF LAW THAT PROVIDE SIMILAR PROTECTIONS

Similar to Title VII, other areas of law also prohibit discrimination "because of" or "on the basis of" an individual's sex. Some of these areas include federal provisions under Title IX, Wisconsin's Public Accommodations Law, and Wisconsin's Fair Employment Law.

[Title IX of the Education Amendments of 1972](#) prohibits discrimination on the basis of sex in education programs or activities that receive federal assistance. Both before and after *Bostock* was decided, the 7th Circuit Court of Appeals issued decisions regarding transgender students. Each school district denied a student who was transgender the use of the bathroom of the student's choice. The students had each filed a Title IX claim arguing that they were being discriminated against on the basis of sex. In both

instances, the court held that refusing to allow a transgender student to use the school bathroom associated with the student’s expressed gender violated Title IX.² In reaching these conclusions, the court stated that it has in the past looked to Title VII for help in construing Title IX. Accordingly, in determining the Title IX case that was issued following *Bostock*, the 7th Circuit Court of Appeals found the *Bostock* decision to be instructive.

[Wisconsin’s Public Accommodations Law](#) prohibits discrimination because of sex or sexual orientation, and prohibits discrimination on other bases, in a public place of accommodation or amusement. These places commonly include [restaurants and businesses](#). While protections for gender and gender identity are not explicit in the statute, a Wisconsin court may interpret the categories of sex and sexual orientation to include gender and gender identity. Both Wisconsin’s Public Accommodations Law and Title VII use the term “because of” in relation to a protected characteristic, which implicates the “but-for” causation standard used in *Bostock*. Similar to the Title IX analysis, a court may find *Bostock* instructive in reviewing protections on the basis of sex in public accommodations.

[Wisconsin’s Fair Employment law](#) also prohibits employment discrimination against an individual because of that individual’s sex or sexual orientation. Similar to Wisconsin’s Public Accommodations Law, gender and gender identity are not explicitly stated in the statute. Also similarly, Wisconsin’s Fair Employment Law uses the term “because of” in relation to the protections for both sex and sexual orientation. As with the other laws, a Wisconsin court may find *Bostock* instructive in interpreting whether gender and gender identity are already protected in the categories of sex or sexual orientation.

However, Wisconsin courts are not bound to look to federal employment law for guidance in considering discrimination claims under Wisconsin law. Courts may consider whether it is appropriate to interpret provisions of state laws in accordance with analogous federal laws, weighing particularly state statutory language and legislative intent.

RELATED CASE DECIDED DIFFERENTLY

In 2022, the U.S. District Court for the Northern District of Texas held that *Bostock* does not apply to claims under Title IX or Section 1557 of the Affordable Care Act (ACA).³ In *Neese v. Becerra*, two physicians brought suit against the U.S. Department of Health and Human Services (HHS), alleging that HHS’s interpretation of Section 1557 of the ACA to include sexual orientation and gender identity under the umbrella of “on the basis of sex” was incorrect.

Section 1557 of the ACA specifies that an individual shall not be discriminated against in covered health programs or activities on the same basis as grounds that are prohibited under Title VII and Title IX, and other laws. The court held that *Bostock* was narrowly decided to only apply directly to a Title VII claim, and that the reasoning in *Bostock* does not apply to Title IX claims or Section 1557 of the ACA claims.

Neese v. Becerra was appealed to the U.S. Court of Appeals for the 5th Circuit, which heard oral arguments in January 2024. The decision has not been released as of April 2024. While this case is illustrative as to how another court has interpreted *Bostock*, cases from the 5th Circuit are not binding in Wisconsin.

SUMMARY

Although *Bostock* was an employment discrimination case, both state and federal courts have looked and may continue to look to *Bostock* for guidance in interpreting discrimination statutes other than Title VII. Wisconsin law similarly has protections on the basis of sex, and Wisconsin courts may interpret those protections to include sexual orientation and gender identity. Ultimately, if a claim is presented under any of the laws described here, a court would make a decision based on the facts and arguments presented.

¹ [Bostock v. Clayton County](#), 590 U.S. 644 (2020).

² [Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.](#), 858 F.3d 1034 (7th Cir. 2017); and [A.C. v. Metro. Sch. Dist. of Martinsville](#), 75 F.4th 760 (7th Cir. 2023).

³ [Neese v. Becerra](#), 640 F.Supp.3d 668 (U.S. Dist. Ct., N.D. Tex., 2022).