

# Title VII: Implications of Bostock

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# Bostock v. Clayton Cty., 140 S. Ct. 1732 (2020)

- Firing someone based on sexual orientation or gender identity is discrimination because of sex.
- If an employer fires a male employee because he is attracted to men but not a female employee who is attracted to men, the action would not have occurred but for the fact that the individual was male.
- Similarly, if an employer fires an individual who was assigned the sex “male” at birth because she now identifies as female, but would not have fired someone who was assigned “female” at birth and now identifies as female, the action would not have occurred but for the individual’s birth-assigned sex.

# The General Rule

- Title VII prohibits discrimination “because of sex.”
- The U.S. Supreme Court in *Bostock* held that employment decisions made because of an individual's sexual orientation or gender identity are decisions made because of sex and therefore, prohibited by Title VII.

# “But-For” Causation

- The court held that Title VII applies the “but-for” cause standard.
- The test requires courts to change one thing at a time and see if the outcome changes.
- There may be more than one but-for cause for an employment decision.
- Sex may be a but-for cause without being the sole or even primary cause.

# Title VII Protections

- Title VII protects job applicants, current employees and former employees if their employer has 15 or more employees.
- Title VII prohibits discrimination in hiring, termination, demotion, pay, job assignments, benefits, and other terms and conditions of employment.
- Title VII prohibits harassment based on sex.
- It also prohibits retaliation for opposing employment discrimination that the employee reasonably believes was unlawful, filing an EEOC charge or complaint, or participating in any investigation, hearing, or other proceeding connected with Title VII enforcement.

# Discriminatory Assignments

- Title VII prohibits limiting, segregating, or classifying a job applicant or employee in a way that adversely affects opportunities or status on the basis of a protected characteristic
  - Segregated or unequal facilities
  - “Channeling” individuals in the protected class into particular jobs or career paths

# Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

- Employment decisions on the basis of sex stereotyping, a person's nonconformity to social or other expectations of that person's gender, constitutes impermissible sex discrimination in violation of Title VII.

# ADA Reasonable Accommodation

- Gender dysphoria may be a disability if it substantially limits a major life activity.
- If a disability exists, the employer and employee must engage in the interactive process.
- The employer may be required to provide a reasonable accommodation, which may include leave for treatment.



# EEOC Resources

- The EEOC has created a new landing page and added resources providing information related to discrimination based on sexual orientation and gender identity discrimination.
- The resources can be located at [www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination](http://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination).

# Practical Steps for Employers

- What steps should an employer take in light of Bostock?