

Initiative for Gender Equity in the Public Sector  
Research Translation Brief:

## Beyond *Bostock*: Implications for LGBTQ+ Theory and Practice

*Administrative Theory & Praxis*,  
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### In a Nutshell

- In 2020, the Supreme Court decided *Bostock v. Clayton County* (2020)<sup>1</sup> which clarified previous case law and Title VII of the Civil Rights Act of 1964<sup>2</sup> in terms of sexual orientation and gender identity.
- Prior to *Bostock*, lower courts and federal government commissions and offices had issued competing definitions of “sex” when hearing cases involving alleged sex-based discrimination in the workplace.
- Three key points in the ruling clarify previous case law and Title VII:
  - The ruling clarifies the application of “sex” and sex-based discrimination.
  - The Court recognizes sexual orientation as an identity category; and
  - The ruling affirms Equal Employment Opportunity Commission (EEOC) findings that workplace protections are afforded to employees based on sexual orientation and gender identity.
- *Bostock* established that employers violate Title VII if the employer fires an employee solely for being gay or transgender, affirming “sex,” as written in the Civil Rights Act of 1964, does include sexual orientation and gender identity.
- The ruling strengthens LGBTQ+ protections in the workplace. Thoughtful enforcement of *Bostock* is a first step to building equitable environments for all employees.
- Thinking beyond *Bostock* and related case law is necessary to solidify the ruling’s protections and advance equitable workplaces for all. The authors recommend three steps forward:
  - Full enforcement of the Court’s rulings;
  - Adoption of policies that transcend nondiscrimination to promote greater LGBTQ+ inclusion; and
  - Pass the Equality Act<sup>3</sup>, first introduced in 2019 (reintroduced 2021 and 2023).

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### The Problem

“Sex” as a legal term, and in practice, was used inconsistently, especially for sex-based discrimination cases in the workplace. Historically, courts have relied on biological definitions of “sex” when examining questions of sex-based discrimination and have treated sexual

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<sup>1</sup> *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020).

<sup>2</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>3</sup> United States Congress. (2020). *H.R.5. Equality Act*.

orientation and gender identity as behaviors. This was enforced by rulings such as *Bowers v. Hardwick* (1986)<sup>4</sup>, in which the Supreme Court asserted that homosexuality was a behavior, not an identity, and that there is no constitutional right to engage in homosexual acts (this was later overturned by *Lawrence v. Texas* (2003)<sup>5</sup> which deemed anti-sodomy laws to be unconstitutional). However, the court later ruled in *Price Waterhouse v. Hopkins* (1989)<sup>6</sup> that a worker's failure to behave in line with traditional, gender-based stereotypes is a form of discrimination under Title VII.

The EEOC later used *Price Waterhouse* to find that discrimination due to sexual orientation is also protected under Title VII because the discrimination is rooted in gender stereotypes. It also ruled that discrimination against a transgender worker falls under Title VII's "sex discrimination." The rulings were supported by other executive agencies, including the Office of Special Counsel and the Department of Justice, which, in 2014, issued a directive to treat "sex" as also referring to gender identity. The directive was rescinded in 2017, when a new administration's Attorney General noted that in Title VII, "sex" refers solely to the biological distinctions between male and female. *Bostock* takes a stand against these competing rulings and directives, and establishes clear protections against discrimination based on sexual orientation and gender identity under Title VII.

### **Why Are These Insights Important?**

*Bostock* has implications for public administration theory and practice. In practice, the ruling provides greater legal protections in the workplace to previously unrecognized groups. This may translate to safer, more diverse, and more inclusive workplaces through revision of policy and increased training. However, these benefits are contingent upon the full enforcement of the ruling, and further, policies which do not just *meet*, but *exceed*, minimum legal requirements. Further, while the ruling may improve the representation of LGBTQ+ individuals in public agencies, cultural shifts in the workplace will take longer: overt discrimination, now taboo after *Bostock*, may become more subtle. Finally, to avoid the *Bostock* decision being viewed as a "hollow win," its newly established protections must be applied across other key areas of life.

### **What Should Decision Makers Do?**

*Federal lawmakers should:*

- Pass the Equality Act. The act has been introduced three times, most recently in June 2023, when it was referred to the Senate Committee on the Judiciary<sup>7</sup>. The act is necessary to codify widespread and permanent LGBTQ+ protections. The bill would prohibit "discrimination based on sex, sexual orientation, or gender identity with respect to businesses, employment, housing, federally funded programs, and other settings"<sup>8</sup>

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<sup>4</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1985).

<sup>5</sup> *Lawrence et al. v. Texas*, 539 U.S. 558 (2003).

<sup>6</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

<sup>7</sup> United States Congress. (n.d.). S.5 - *Equality Act*.

<https://www.congress.gov/bill/118th-congress/senate-bill/5/all-actions>.

<sup>8</sup> United States Congress. (n.d.). S.5 - *Equality Act*.

<https://www.congress.gov/bill/118th-congress/senate-bill/5>.

and defines “sex” to include “sex stereotypes, pregnancy, childbirth, sexual orientation, gender identity, and sex characteristics.<sup>9</sup>

*Federal, state, and local public managers should:*

- Fully enforce the *Bostock* decision.
- Adopt workplace policies that go beyond simple “non-discrimination” policies to promote increased LGBTQ+ inclusion

## **What Do We Still Need to Know?**

It is still unknown whether the *Bostock* protections will generate similar protections in other key areas of life for LGBTQ+ individuals, such as housing, transportation, and healthcare. On January 20, 2021, President Biden issued an executive order instructing agencies to apply *Bostock* “not just to employment discrimination, but to other areas of law where sex discrimination is prohibited.<sup>10</sup>” This order may be overturned by future administrations. It is also difficult to know how the ruling will affect workplace dynamics and if it will actually lead to improvements for LGBTQ+ employees. These unknowns further support the urgent need to codify protections through legislative action.

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<sup>9</sup> *Ibid.*

<sup>10</sup> Human Rights Campaign.(2023, June 22). *The equality act.* <https://www.hrc.org/resources/equality>; See also:

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.