

# BOSTOCK IN BLUE STATES:

## Understanding the Employee Rights Decision in Connecticut and Beyond

BY JOSHUA GOODBAUM



**L**ESBIAN, GAY, AND TRANSGENDER AMERICANS AND their allies rejoiced on June 15 when the US Supreme Court announced—by a vote of 6-3—that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 extends to discrimination on the basis of sexual orientation and gender identity, because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>1</sup> The decision—*Bostock v. Clayton County*—immediately extended civil rights protections to millions of LGBTQ employees who work in the nearly 30 states without such express safeguards for sexual minorities.<sup>2</sup> But for lesbian, gay, and transgender people who work in jurisdictions (like Connecticut) that already prohibited discrimination based on sexual orientation and gender identity as a matter of state or local law (and for lawyers who practice in those jurisdictions),<sup>3</sup> does *Bostock* have anything to offer?

My answer is an emphatic yes.

Most obviously, the Supreme Court’s ruling about what it means to discriminate “because of [an] individual’s ... sex” will have ramifications far beyond employment law. That’s because the textualist explication in Justice Neil M. Gorsuch’s opinion for the Court is not limited to workplace protections. Accordingly, wherever federal law prohibits discrimination “because of [an] individual’s ... sex,” we can expect that those protections now will extend to lesbian, gay, and transgender people, too.

That is an extraordinary development. According to Justice Alito’s dissent in *Bostock*, “[o]ver 100 federal statutes prohibit discrimination because of sex.” And these laws regulate a wide swath of American life, from housing, to small business loans, to military operations. Indeed, LGBTQ rights advocates exploring future impact litigation need look no further than Appendix C to Justice Alito’s opinion, which helpfully lists all 100+ statutes.

Chief among these—at least in the near term—are statutes regulating discrimination in healthcare and education. Indeed, just

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three days before the Supreme Court issued *Bostock*, the Trump administration finalized a regulation permitting healthcare providers to discriminate against LGBTQ patients, based on a reinterpretation of the meaning of “sex” in the Affordable Care Act.<sup>4</sup> *Bostock* puts the legality of this narrowing of the ACA’s civil rights protections in serious doubt. Likewise, Title IX’s prohibition on sex discrimination by educational institutions that receive federal funding is likely to be extended to protect LGBTQ students, which would represent a sea change for many LGBTQ people—particularly transgender youth—and their families. And as with healthcare, that ruling—if it comes—would reverse the Trump administration’s current interpretation that Title IX does not protect sexual minorities.<sup>5</sup>

Circling back to employment law, the *Bostock* opinion seems to confirm the viability of so-called “sex stereotyping” claims, based on the Supreme Court 1989 opinion in *Price Waterhouse v. Hopkins*.<sup>6</sup> In that case, Ann Hopkins alleged that she was denied partnership at the storied accounting firm because her aggressive interpersonal communication style and gender-neutral attire did not conform to stereotypes about how a woman should act and dress. The Supreme Court agreed that her case could proceed, but it couldn’t agree on the precise reasoning, with Justice Brennan’s plurality opinion gathering only four signatures for its articulation of the “sex stereotyping” rationale. In *Bostock*, Justice Gorsuch seems to pick up where *Price Waterhouse* left off, writing that Title VII prohibits employers from terminating employees for “failing to fulfill traditional sex stereotypes.”<sup>7</sup> This anti-essentialist theory will be useful to employment and civil rights plaintiffs of all stripes, especially those members of the LGBTQ community (such as intersex or gender non-conforming people) who might be excluded from *Bostock*’s focus on “homosexuality and transgender status.”<sup>8</sup>

Along similar strategic lines, the reasoning in *Bostock* likely will have the practical effect of lessening the burden on employment and civil rights plaintiffs across the board—whether or not they are LGBTQ. For the last ten or so years, following a duo of US Supreme Court opinions, employment lawyers in Connecticut and around the country have disagreed about the meaning and significance of “but-for causation,” which is the standard of proof in many employment cases.<sup>9</sup> The defense bar has characterized the “but for” standard as a high threshold (in an effort to win more summary judgment motions), while the plaintiff’s bar in turn has tried to downplay its demands.

*Bostock* ends that debate. “[A] but-for test,” Justice Gorsuch’s opinion tells us, “directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”<sup>10</sup> *Bostock* continues, importantly, that events “often” have “multiple but-for causes.”<sup>11</sup> Accordingly, “a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision,” because a protected status

or action need only be “one but-for cause” of a decision “to trigger the law.”<sup>12</sup> Far from being an onerous burden, then, but-for causation actually offers what Chief Justice Roberts had already acknowledged is a “boundless theory of liability.”<sup>13</sup>

Finally, beyond the consequences for future litigation, the symbolic significance of *Bostock* should not be

underestimated. The US Supreme Court has now stated unequivocally what many LGBTQ workers—in Connecticut as much as anywhere else—have been waiting decades for their federal government to say: that lesbian, gay, and transgender people are entitled to the same protections as their straight and cisgender colleagues. And for LGBTQ Americans, regardless of where in the country they work, that undeniably matters. ■

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## NOTES

1. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).
2. See, e.g., Human Rights Campaign, “State Maps of Laws & Policies,” <https://www.hrc.org/state-maps/employment>.
3. For LGBTQ anti-discrimination protections in Connecticut, see Chapter 814c of the General Statutes.
4. 85 Fed. Reg. 37160 (Jun. 19, 2020).
5. See “Dear Colleague” Letter, U.S. Dep’t of Justice & Education (Feb. 22, 2017).
6. 490 U.S. 228 (1989).
7. *Bostock*, 140 S. Ct. at 1742-43.
8. E.g., *id.* at 1742.
9. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (Age Discrimination in Employment Act); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (retaliation under Title VII).
10. *Bostock*, 140 S. Ct. at 1739.
11. *Id.*
12. *Id.*
13. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 706 (2011) (Roberts, C.J., dissenting).