

LABOR RELATIONS

Expert Analysis

## EEOC Guidance on Protections Against Employment Discrimination

**O**n June 15, 2021, the Equal Employment Opportunity Commission (EEOC) issued guidance explaining its views on the U.S. Supreme Court's decision in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), and clarifying employers' legal obligations with respect to LGBTQ+ workers. In the landmark *Bostock* decision, the Supreme Court held that the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status. Specifically, the new guidance from the EEOC (EEOC Guidance) explains that an employer may not discriminate against an employee on the basis of gen-



By  
**David E.  
Schwartz**



And  
**Kimberly  
Franko Lower**

der identity by prohibiting an employee from dressing consistent with the employee's gender identity; by denying an employee equal access to a bathroom consistent with that employee's gender identity; or by refusing to use pronouns or names consistent with the employee's gender identity. With many employers returning to the office over the next several weeks, New York employers should consider how to implement the EEOC Guidance, as well as similar state and city laws.

### The 'Bostock' Decision

*Bostock* consolidated and addressed three separate cases.

In each case, an employer terminated an employee for being gay or transgender: Clayton County in Georgia fired Gerald Bostock, a child welfare advocate, shortly after Mr. Bostock began participating in a gay softball league; Altitude Express in New York fired Donald Zarda, a skydiving instructor, days after Mr. Zarda mentioned that he was gay; and R.G. & G.R. Harris Funeral Homes Michigan fired Aimee Stephens after she told her employer that she planned to live and work as a woman after initially presenting as a male. In Mr. Bostock's case, the Eleventh Circuit held that Mr. Bostock failed to state a claim because Title VII does not prohibit terminating an employee due to the employee's homosexuality. By contrast, the Second Circuit held that Mr. Zarda's case could proceed because Title VII prohibits discrimination based on sexual orientation. The Sixth Circuit reached a similar decision

DAVID E. SCHWARTZ is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom. KIMBERLY FRANKO LOWER is a counsel at the firm. RACHEL J. CORRIGAN, an associate at the firm, assisted in the preparation of this article.

as the Second Circuit in Ms. Stephens's case, holding that Title VII bars employers from firing employees because of transgender status.

In resolving the circuit split, the Supreme Court held that Title VII protects employees from sex discrimination on the basis of sexual orientation or gender identity. The Supreme Court suggested that some employers may be concerned that the *Bostock* decision would set sweeping precedents that may prevent sex-segregated bathrooms, locker rooms, or dress codes; however, the court specified that it would not "prejudge" those questions.

### The EEOC Guidance

The EEOC Guidance explains the EEOC's view on the *Bostock* decision and addresses some of the issues the Supreme Court left open.

Most notably, the EEOC Guidance explains that (1) non-LGBTQ+ applicants and employees are also protected against sexual orientation and gender identity discrimination; (2) an employer may not discriminate against an employee on the basis of sexual orientation or gender identity due to a customer's or client's actual or perceived preference; (3) an employer may not discriminate against an employee

based on stereotypes about the way men or women are expected to behave; (4) an employer may not require a transgender employee to dress in accordance with the employee's sex assigned at birth; (5) an employer may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity; and (6) in certain circumstances, use of pronouns or names that are inconsistent with an employee's gender identity may

---

With many employers returning to the office over the next several weeks, New York employers should consider how to implement the EEOC Guidance, as well as similar state and city laws.

be considered harassment. The misuse of pronouns or names may be considered harassment where intentional and repeated use of the wrong name or pronouns is severe or pervasive, and, when considered with other unwelcome conduct based on the individual's sex including gender identity, creates a hostile work environment.

### Challenges To the EEOC Guidance

Since its release, the EEOC Guidance has been subject to

challenges: (1) a letter to President Biden from 21 state attorneys general; (2) a federal lawsuit brought by twenty states in the Eastern District of Tennessee; and (3) a federal lawsuit brought by the state of Texas against the EEOC in the Northern District of Texas.

On July 7, the Tennessee Attorney General and 20 other state attorneys general sent a letter to President Biden arguing that the EEOC Guidance attempts to impose unlawful guidance on employers and provides a radically inaccurate construction of Title VII. Specifically, the letter argues that the EEOC Guidance improperly extends *Bostock* and may infringe on First Amendment protections by interfering with an individual's use of certain pronouns for others.

The lawsuits in federal court, *State of Tennessee v. U.S. Dep't of Ed.*, No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021) and *State of Texas v. EEOC*, No. 2:21-cv-00194-Z (N.D. Tex. Sept. 20, 2021), are brought under the Administrative Procedure Act and the Declaratory Judgment Act. They allege that the EEOC Guidance attempts to impermissibly expand federal antidiscrimination law including through its guidance concerning bathroom and pronoun usage. In the Tennessee action, there is a

pending motion for preliminary injunction, filed on September 2, to enjoin the EEOC and other entities from enforcing the EEOC Guidance. The EEOC opposed that motion on September 23, and also filed a motion to dismiss the complaint on the same day for lack of subject matter jurisdiction and failure to state a claim. Briefing on the preliminary injunction motion will conclude on October 8 and briefing on the motion to dismiss will conclude on October 22; oral argument on both motions will be held on November 3. There have been no other substantive filings in the Texas action at this time.

### **Implications for New York Employers**

While the EEOC Guidance applies to New York employers as a federal law, New York employers are also subject to relatively new guidance from 2020 concerning the New York State Human Rights Law (NYSHRL). On Jan. 29, 2020, New York State's Division of Human Rights issued guidance similar to the EEOC Guidance: that guidance notes that unlawful discrimination based on gender identity can include utilizing grooming or appearance standards based on sex stereotypes; denying the use of restrooms consistent with a person's gender identity; and refusing to

use an individual's requested names or pronouns.

Similarly, the New York City Commission on Human Rights issued guidance, last updated in February 2019, explaining that the New York City Human Rights Law (NYCHRL) requires employers to use the name or pronouns with which a person self-identifies; to allow individuals to utilize single-gender facilities most closely

---

While the EEOC Guidance impacts an employer's obligations under Title VII, it does not effectively expand New York employers' obligations.

aligned with the person's gender identity; and prohibits discrimination based on a person's failure to conform to gender stereotypes.

### **Concluding Thoughts**

The EEOC Guidance provides additional clarification on what constitutes discrimination on the basis of sex including gender identity and sexual orientation under Title VII. Although it is not yet clear whether the EEOC Guidance will survive current challenges, employers should nevertheless be prepared to comply with the EEOC Guidance.

While the EEOC Guidance impacts an employer's obligations under Title VII, it does not

effectively expand New York employers' obligations, as New York employers are already prohibited from discriminating against employees on the basis of gender identity or sexual orientation under the NYSHRL and New York City employers are already prohibited from discriminating against employees on the basis of actual or perceived gender identity or sexual orientation under the NYCHRL. Nevertheless, employers headquartered in New York may have employees working in other states, especially in today's remote work environment. The EEOC Guidance covers those employees. As such, employers should review their policies and procedures in light of the EEOC Guidance.