

Texas District Court Holds EEOC Guidance on Sexual Orientation and Gender Identity Discrimination Unlawful

Law and the Workplace on **October 7, 2022**

On October 1, 2022, the United States District Court for the Northern District of Texas held that Equal Employment Opportunity Commission (“EEOC”) guidance addressing sexual orientation and gender identity discrimination in the workplace is unlawful. The case is [State of Texas v. EEOC](#), Case No. 2:21-cv-00194-Z.

Background

[As we previously reported](#), on June 15, 2020, the Supreme Court of the United States in *Bostock v. Clayton County* held that the prohibition on sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) also prohibits workplace discrimination on the basis of sexual orientation and gender identity. 140 S. Ct. 1731 (2020). Following this landmark decision, the EEOC issued [guidance](#) in June 2021 on sexual orientation and gender identity discrimination in the workplace. Among other topics, the guidance states that certain types of workplace conduct may constitute discrimination on the basis of sexual orientation or gender identity and give rise to an unlawful hostile work environment, including: (i) requiring a transgender employee to dress in accordance with the employee’s sex assigned at birth; (ii) denying an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity; and (iii) intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee.

In response to the issuance of this guidance, the State of Texas filed suit, arguing that the guidance does not coincide with law because it diverges from the stated protections of Title VII as interpreted through *Bostock*. The State asked the court to: (i) declare the guidance unlawful; (2) vacate and set aside the guidance; and (3) enjoin enforcement or implementation of the guidance.

Court’s Ruling

The court granted the State's request for declaratory judgment, declaring the EEOC guidance unlawful and vacating and setting aside the guidance on a nationwide basis. In doing so, the Court explained that the EEOC misinterpreted *Bostock* by "melding 'status' and 'conduct' into one catchall protected class covering all conduct correlating to 'sexual orientation' and 'gender identity.'" In other words, under *Bostock*, Title VII prohibits employment discrimination because of sexual orientation and gender identity status, but does not necessarily prohibit all correlated conduct. Therefore, by issuing guidance specifically prohibiting conduct relating to dress codes, bathrooms, and pronouns, the EEOC took *Bostock* a step too far. The court echoed the majority opinion in *Bostock*, explaining that the lawfulness of policies and practices concerning sexual orientation and gender identity under Title VII are questions for future cases.

The court also found that the guidance constitutes substantive, legislative rules and the EEOC violated Title VII when it issued the guidance through improper procedures. Specifically, because of the mandatory language in the guidance and its broad condemnation of the employment practices the State of Texas and its agencies (the plaintiffs in this case) implement, it leaves "no wiggle room for EEOC to issue referrals to the Attorney General." Since the guidance constitutes substantive, legislative rules, the EEOC was required to follow proper rulemaking procedures to promulgate them and failed to do so.

Significance

This decision interprets *Bostock* as not deciding whether specific conduct relating to sexual orientation and gender identity is protected under Title VII, but rather simply holding that sexual orientation and gender identity are protected classes under Title VII.

It remains to be seen whether the district court's decision will be appealed. However, regardless of what happens next with regard to the EEOC's guidance, employers should ensure that their workplace anti-discrimination policies include protections on the basis of employees' sexual orientation and gender identity.

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