

Work**Smarts** Half-Day Seminar

# Gender Politics in the Workplace

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# How *Bostock* Has Changed America

# Recap of *Bostock v. Clayton County*

- In *Bostock*, the Supreme Court ruled that Title VII's prohibition against sex discrimination includes a person's sexual orientation and/or gender identity.
- The Court's rationale is simple: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it *would not* have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, *exactly what Title VII forbids.*"

# How Does *Bostock* Operate in Practical Terms?

## **Scenario A**

A woman is fired by her male boss because she refuses his sexual advances. The company's defense is that the boss gives preferential treatment to female employees overall, compared to the male employees, so the plaintiff's allegations about him are misplaced.

- The Court's response: "The employer is liable for treating this woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex."

## **Scenario B**

A woman who is fired for being insufficiently feminine or a man who is fired for being insufficiently masculine are protected from discrimination because their sex played a part in those decisions.

# The Federal Government's Response to *Bostock*

- On his first day in office, President Biden issued an executive order requiring that all federal agencies expand its prohibition against sex discrimination to include sexual orientation and gender identity, consistent with *Bostock*, in the areas of employment, education, housing, health care and credit
- A few days later, President Biden issued a second executive order that reversed President Trump's ban on transgender individuals from serving in the military.
- In February 2021, the U.S. House passed the Equality Act of 2021. The Equality Act explicitly recognizes sexual orientation and gender identity as Title VII classifications rather than forms of "sex discrimination." It would also cover federally funded programs like housing and public accommodations. One of the more controversial elements is a pre-emption of the Religious Freedom Restoration Act of 1993 (RFRA).

# The Federal Government's Response to *Bostock*

- In April 2021, the Department of Justice announced that it would "to work to identify areas where [it] can do investigations and look for employer policies that deny equal employment opportunities to LGBT individuals." That stance reverses its former position of arguing against Title VII's expansion before the Supreme Court in *Bostock*. The DOJ will also be reviewing employee policies regarding health care and bathrooms, among other things affects the benefits of employment.
- In May 2021, HHS announced that LGBTQ individuals would be protected against sexual orientation and gender identity discrimination when receiving health care, another reversal of policy by the Trump Administration, which removed those protections originally issued by President Obama.
- Just this past June, the Department of Education issued a notice in the Federal Register that in light of *Bostock*, Title IX's prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity

# States which Recognized Sexual Orientation and Gender Identity as Protected Classes before *Bostock*

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Iowa
- Maryland
- Maine
- Massachusetts
- Minnesota
- Nebraska
- New Hampshire
- New Jersey
- New York
- Oregon
- Rhode Island
- Utah
- Virginia
- Vermont
- Washington
- Wisconsin (which only explicitly protects sexual orientation)

# How *Bostock* has Expanded the Landscape at the State Level

- Arizona
- Florida
- Kansas
- Nebraska
- North Dakota
- Pennsylvania



# Texas and the 5<sup>th</sup> Circuit

- Before *Bostock*, the Texas Supreme Court's decision in *Alamo Heights Ind. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Texas 2018) cast serious doubt on the efficacy of same-sex sexual harassment claims
- *Bostock* has triggered a ripple effect, at least in Texas.
- In *Tarrant County College Dist. v. Sims*, 621 S.W.3d 323 (Tex.App.—Dallas 2021, no writ), the 5<sup>th</sup> District Court of Appeals explicitly recognized *Bostock* for the principle that the Texas Human Rights Act (TCHRA) includes protection from discrimination based on sexual orientation and gender identity since the statute's language is analogous to Title VII and is meant to conform with Title VII's interpretation.

# Texas and the 5<sup>th</sup> Circuit

- The 5<sup>th</sup> Circuit (which covers Texas, Louisiana and Mississippi) has similarly acknowledged *Bostock's* influence in two decisions
- In *Newbury v. City of Windcrest, Tex.*, 991 F.3d 672 (5<sup>th</sup> Circuit 2021), the Court rejected a case of same-sex sexual harassment brought under Title VII for lack of evidence that the alleged harasser was motivated by sexual animus in her conduct towards the plaintiff, while accepting *Bostock's* expansion of Title VII's protection for employees based on their sexual orientation and gender identity.
- Two months later in *Olivarez v. T-mobile USA, Inc.*, 997 F.3d 595 (5<sup>th</sup> Cir. 2021), the 5<sup>th</sup> Circuit invalidated a plaintiff's claim for discrimination under Title VII and the ADA to the extent the plaintiff failed to prove his request for extended medical leave resulted from unequal treatment due to his status as a transgender individual. Still, the Court validated *Bostock's* expansion of protection to the benefits of employment, i.e., medical leave, against discrimination due to an employee's sexual orientation or gender identity.

# What's Next on the Horizon?

- Squaring *Bostock* with an employer's religious beliefs
  - *U.S. Pastor Council et al. v. EEOC* is a case set for trial this summer in the Northern District of Texas (based in Dallas). The plaintiffs are a coalition of Christian groups seeking a religious exemption from *Bostock* under the 1<sup>st</sup> Amendment and RFRA.
- There are other areas which the *Bostock* Court specifically left open, like employee bathrooms and locker rooms. Both the EEOC and OSHA have momentarily filled in those particular gaps. For instance, the EEOC issued guidance on transgender bathrooms and the use of pronouns on the 1<sup>st</sup> anniversary of the *Bostock* decision.
- Additional litigation is a certainty.



# Changing Landscape – Pregnancy Discrimination Laws

# Where are we today?



# The Google Memo



# The Google Memo

*- - - A year and a half ago, after four years of strong performance that included two Superb ratings and several Strongly Exceeds, I was promoted into a position of managing a team of five Googlers. This resulted in my now reporting directly to my director, who had previously shared glowing comments about my work via two prior perf cycles.*

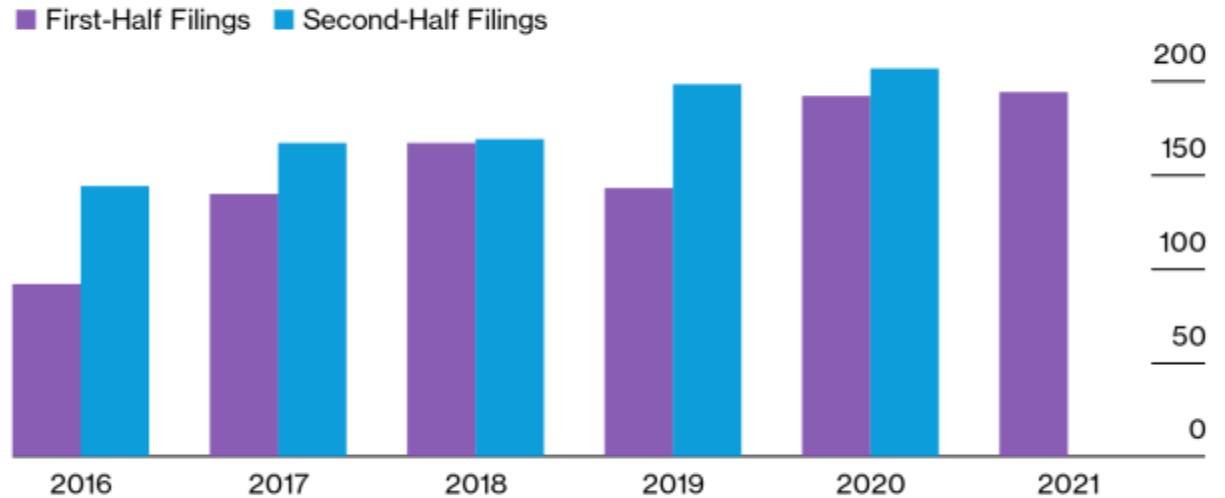
*A few short weeks after joining my new team, I was diagnosed with a pregnancy-related condition that was life-threatening to both me and my daughter. I started socializing among leads to expect my having to take an earlier than expected leave, and that I was restricted from travel because I needed to be within close proximity to a particular hospital that had the facilities to care for my condition and premature babies.*

*Four months after I reported acts of discrimination, I finally heard back from HR with results from their investigation. I was told that my manager did a poor job communicating the scope of my new role, but that there was no evidence of discrimination. It was additionally shared that I was excluded from certain management events because of an administrative error, and that my manager never meant to discourage me from taking early leave. I'm baffled as to how it took four months to come up with such shallow findings.*

# Pregnancy Discrimination Lawsuits – By the Numbers

## Federal Pregnancy Discrimination Lawsuits

Filed January 1, 2016 - June 30, 2021



Source: Bloomberg Law Dockets search by keyword and nature of suit over U.S. District Court complaints for pregnancy discrimination cases.

Bloomberg Law



# Recent Litigation – AMR

- American Medical Response Ambulance Service, Inc. (AMR)
  - Agreed to pay \$162,500 and provide other equitable relief to settle a federal pregnancy discrimination lawsuit filed by the EEOC
  - A paramedic requested light duty for the last trimester and provided a doctor's note in support
  - AMR denied the requested and directed paramedic to take unpaid leave or work without restrictions

14	IN THE UNITED STATES DISTRICT COURT	
15	FOR THE EASTERN DISTRICT OF WASHINGTON	
16	EQUAL EMPLOYMENT	CIVIL ACTION NO. CV-
17	OPPORTUNITY COMMISSION	
18	Plaintiff,	COMPLAINT
19	v.	
20		
21	AMERICAN MEDICAL RESPONSE	JURY TRIAL DEMAND
22	AMBULANCE SERVICE, INC.	
23	Defendant.	

# Recent Litigation – Labor Source/Wise Staffing

- Labor Source, L.L.C., d/b/a Wise Staffing (part of Wise Staffing Group)
  - Agreed to pay \$40,000 and provide other relief to settle a lawsuit alleging failure to hire based on pregnancy (Consent Decree entered, August 25, 2021).
  - Applicant informed a hiring manager about her pregnancy during her interview. After a second interview, applicant was advised that another candidate was hired, but the hiring manager would reach out to the applicant at a later date.
  - EEOC alleged that less-qualified, non-pregnant individuals were hired and hiring manager never reached out.

**“ The Pregnancy Discrimination Act requires employers to treat qualified pregnant women the same as they would treat other qualified applicants and employees. The EEOC will continue to enforce that important law.”**

Edmond Sims, acting district director of the EEOC's Memphis District Office



# Federal Law – Pregnancy Discrimination Act of 1978

- Specifically prohibited “sex discrimination on the basis of pregnancy”
- Bans “discrimination on the basis of pregnancy, childbirth, or related medical conditions”
- Pregnant women are to be treated on an “equal” basis with other temporarily disabled employees
- Law contains a number of carve outs that leave women unprotected
- The equality standard does not confer additional legal protections or accommodations for pregnant women

# Federal Law – Changes Ahead?

- Pregnant Workers Fairness Act

- Passed the House (Led by Reps. Jerrold Nadler (D-NY) & Rep. John Katko (R-NY))
- Senate – introduced on May 2, 2021 (Led by Sen. Bob Casey (D-PA) and Bill Cassidy (R-LA))
- August 3, 2021 – passed the Senate Health, Education, Labor and Pensions Committee
- Bipartisan Support
- Generally ensures that pregnant workers can continue to do their jobs by clarifying legal standard
- Act would require employers to make reasonable workplace adjustments for those workers who need them due to pregnancy, childbirth, and related medical conditions unless the accommodation imposes an undue hardship on the employer
- Accommodations are believed to be short-term and low-cost

# Federal Law – Changes Ahead?

- If passed, it would be unlawful for businesses to:
  - Deny reasonable accommodations to employees subject to limitations resulting from pregnancy, childbirth, or related conditions
  - Deny a covered employee the right to an interactive process with the employer regarding the specific limitations and reasonable accommodations needed, or accept unsolicited accommodations
  - Deny employees or applicants access to employment opportunity based on the need for accommodations resulting from pregnancy, childbirth, or related conditions
  - Force an employee impacted by pregnancy, childbirth, or related conditions to take paid or unpaid leave, if a reasonable accommodation can be provided
  - Take retaliatory action

# State Law – Legislative Changes

- Arizona – effective July 19, 2021
  - Revisions to the Arizona Civil Rights Act allows the state attorney general to investigate charges of pregnancy discrimination
  - “women who are affected by pregnancy or childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work...” (A.R.S. § 41-1463)
- Indiana – effective July 1, 2021
  - Sets out the process for pregnant workers to seek a reasonable accommodation

# State Law – Legislative Changes

- Louisiana – effective August 1, 2021
  - Act 393 provides for reasonable accommodations of employees who become temporarily disabled due to certain pregnancy-related medical conditions
- Minnesota – effective January 1, 2022
  - Expansion of the Women's Economic Security Act (WESA)
  - Nursing & lactating employees are required to receive paid break time to express milk at work
  - More employees have a right to request and receive needed pregnancy accommodations in the workplace



# State Law – Judicial Decisions

- New Jersey – *Delanoy v. Township of Ocean*, March 9, 2021
  - Court articulated three separate causes of action for pregnant employees in the workplace: unequal treatment, failure to accommodate, legal penalization
- Texas – *South Texas College v. Arriola*, February 11, 2021
  - Court of Appeals decision
  - Issue was whether the Texas Commission on Human Rights Act protects an employee who has indicated she intends to become pregnant
  - Yes – employees attempting to become pregnant are covered by the TCHRA

# Covid, Vaccinations and Pregnancy

- Accommodations
- State Law
- Mandatory Policies
- Work at Home



# WorkSmarts

## Top Tips

- Pregnancy discrimination laws are changing. Always check the law of the state where your employees are located.
- Keep an eye out on *Bostock*

# Thank You



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