

Texas Judge Blocks EEOC's Transgender Guidance in Latest Battle in the Restrooms War

Labor & Employment Law Update

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As we discussed in our previous blog post, in 2021 the EEOC issued a technical assistance guidance addressing employers' obligations under *Bostock v. Clayton County*, the U.S. Supreme Court's 2020 landmark decision holding that Title VII prohibits workplace discrimination on the basis of sexual orientation and gender identity. We blogged about the *Bostock* decision in June 2020.

The EEOC guidance instructed employers to allow employees who are transgender to use the restroom (or other gender-specific amenity) that aligns with their gender identity and further cautioned that refusing to use a person's preferred pronoun or name, or enforcing a dress code inconsistent with an employee's gender identity, could, depending on the circumstances, create a hostile work environment actionable under Title VII.

After the EEOC issued its guidance, the Texas Attorney General filed a lawsuit against the EEOC, *State of Texas v. EEOC*, Case No. 2:21-CV-194-Z, seeking to overturn the EEOC's guidance and stop its enforcement. In ruling on the lawsuit, the Texas District Court honed in on the Supreme Court's use of the word "status," and the phrase "homosexuality and transgender status" in *Bostock* and concluded that while *Bostock* prohibits discrimination on the basis of a person's status as a transgender or homosexual person, it does not require an employer to accept or sanction "conduct" associated with that status including use of bathrooms, locker rooms, clothing/appearance and any other conduct. Therefore, the Texas court reasoned, the EEOC guidance imposed requirements on employers that go beyond *Bostock* and thus beyond what Title VII actually requires. As such, the Texas District Court declared the EEOC Guidance unlawful. While we do not yet know whether the EEOC will appeal, it would not be surprising if it does.

In considering the impact of this decision, it is important to recognize that the decision is limited to the EEOC Guidance. EEOC Guidance on its own is not controlling precedent, but rather simply an indication of what the EEOC interprets the laws to mean. As generally guidance, it is information employers can use to limit their risk or exposure to a charge of discrimination, but it is not

the law.

Even under the Texas court's narrower interpretation of *Bostock*, the Supreme Court's decision still prohibits terminating an employee based on their gender identity or being transgender. This means there is a very fine line between discrimination on the basis of "status", which is certainly unlawful under *Bostock*, and employer action motivated by "conduct" closely related to a protected status. Moreover, as we discussed previously, gender dysphoria (a term that refers to psychological distress that often arises when a person's gender identity does not align with their sex assigned at birth) could give rise to protections or claims under the Americans with Disabilities Act.

Ultimately, the larger question for employers is how far the *Bostock* protections extend in actual American workplaces. The fact that the EEOC guidance has been declared unlawful by the Texas District Court (at least for now), does not mean that another federal court ruling in which litigation involving an employee would follow the same reasoning or reach the same conclusion. Rather, much like in cases involving other protected statuses, we would expect courts to take into consideration the employee's conduct as evidence of their protected status.

In deciding how to address this issue, it is important to note that nothing (in the Texas court's ruling or otherwise) prohibits employers from *choosing* to follow the EEOC's guidance or otherwise implementing policies that explicitly protect certain conduct closely associated with its LGBTQ+ employees' protected status. It is also important to consider not only federal laws, but also state and local laws that you are subject to following. Many states laws and courts, (including Illinois), have held that gender identity protections extend to not only "status," but also "conduct", such as the use of the restroom that aligns with an employee's gender identity. As such, it is important for employers to consult with experienced labor and employment law counsel when dealing with these sensitive issues to avoid the pitfalls, risks and liability of discrimination claims.

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