WORKPLACE EQUALITY FOR LGBT PEOPLE: *BOSTOCK v. CLAYTON COUNTY*

Elvert Barnes/Wikimedia Commons, used under a CC BY-SA 2.0 license

The "Protect LGBTQ Workers Rally" in front of the United States Supreme Court on the morning of October 8, 2019, when oral arguments were heard in the case of *Bostock v. Clayton County*.

What happens when an employee at a company casually mentions he is part of a gay persons' softball league? Or when a long-time employee reveals to her employer that she is transgender? These employees did not expect to be fired for these actions. But that is what happened to two of the plaintiffs (people suing) in the case of *Bostock v. Clayton County*, for which the Supreme Court of the United States issued its landmark decision on June 15, 2020.

Landmark cases like *Bostock* are cases with history-changing significance. They usually change the way the government treats people by expanding a constitutional protection of individual rights. One example is *Loving v. Virginia* (1967), a case in which the Supreme Court held (decided) that state laws banning interracial marriage were unconstitutional. Another is *Roe v. Wade*, a 1973 case that restricted the government's power to interfere with a woman's right to privacy in choosing whether to have an abortion. And landmark cases also include the 2008 case of *District of Columbia v. Heller* that affirmed an individual's fundamental right to own firearms for lawful purposes, like home defense, under the Second Amendment.

Bostock was not the first case to recognize the rights of lesbian, gay, bisexual, and transgender (LGBT) people. In two other landmark decisions, the U.S. Supreme Court expanded constitutional protections for LGBT people: *Lawrence v. Texas* in 2003 (protecting the right to privacy of same-sex couples equal to that of other couples) and *Obergefell v. Hodges* in 2015 (protecting the fundamental right of same-sex couples to marry). In both these cases, the court showed increasing willingness to affirm the civil rights of gay and lesbian people.

Federal government policies related to the employment rights of LGBT people have not always shown a similar willingness. Congress has yet to pass a law banning hiring and employment discrimination based on sexual orientation (covering lesbian, gay, or bisexual people) and gender identity (covering transgender people). But presidents have used executive orders from time to time in this area. President Bill Clinton issued an executive order to protect federal employees' rights based on sexual orientation. And President Barack Obama similarly issued an order against discrimination in hiring based on gender identity.

State laws have also been inconsistent. The state of Pennsylvania banned sexual-orientation workplace discrimination in public sector (government) jobs in 1975. Since then, 21 states and three territories (Washington, D.C., Guam, and Puerto Rico) outlaw employment discrimination based on gender identity and sexual orientation. And that means discrimination in both the public and private sectors. Pennsylvania and Michigan currently have outlawed such discrimination through their governors' executive orders. But more than half of U.S. states have no such protections written into law.

Facts of the Cases

Into this patchwork of laws and policies, three cases arose from people fired from their jobs simply for

expressing themselves as members of the LGBT community. These three firings became lawsuits that eventually became the case we know as *Bostock v. Clayton County*.

In one case, Gerald Bostock was a child welfare advocate who worked for the juvenile courts in Clayton County, Georgia. [The case, of course, gets its name from the parties involved: the one suing (plaintiff) and the one being sued (defendant).] He began working in this job in 2003. Ten years later, he joined a gay softball league and promoted it at work. Soon after, he was fired. The reason his employer gave was conduct "unbecoming" of a county employee.

L to R: Gerald Bostock and Aimee Stephens, both of whom were fired from their jobs after they told their employers that they were either gay (Bostock) or transgender (Stephens).

In another case, a man named Donald Zarda was a skydiving instructor. In 2010, he told a female customer that he was gay in order to make her more comfortable being strapped close to him during instruction. Soon after, he was fired. The company argued that Zarda was fired for inappropriately touching the customer. Zarda maintained (and the federal court agreed) that it was discrimination because he said he was gay.

In a third case, Aimee Stephens worked at a funeral home in Michigan. When she was hired, she presented herself as a man, which was what she had done her whole life. But throughout her adulthood, Stephens privately identified as a woman. After working for the funeral home for two years, she sought clinical help for depression. A counselor advised her to begin living as a woman, and Stephens then came out to her wife and family as transgender.

Stephens also informed her employer that she would begin living and working as a woman. Stephens's employer believed that the Bible teaches that sex — male or female — is unchangeable. The employer fired Stephens, telling her "this is not going to work out."

Bostock, Zarda, and Stephens all filed lawsuits against their employers under Title VII of the Civil Rights Act of 1964. Title VII prohibits hiring, firing, and other treatment of employees based on "race, color, religion, sex, or national origin." To bring a legal action against an employer under Title VII, the employee first files a complaint with the Equal Employment Opportunity Commission (EEOC). Title VII created the EEOC to handle employment discrimination cases. If either side appeals the EEOC's decision, the case goes to federal court, and potentially up to the U.S. Supreme Court.

Sexual orientation and *gender identity* are not listed in Title VII along with race, color, religion, sex, and national origin. The question for the EEOC, the federal district courts, and ultimately the Supreme Court in these three cases was whether "sex" would cover discrimination based on sexual orientation and gender identity.

The three plaintiffs' cases made their way to federal appeals courts. In Gerald Bostock's case, the court held that Title VII did not prohibit Clayton County from firing him for being gay. In Donald Zarda's case, however, a different court held that sexual orientation is protected under Title VII. And in Aimee Stephens's case, yet another court held that Title VII does protect workers from gender-identity discrimination.

When different federal appeals courts disagree with each other on the same legal question, there is a good chance that the U.S. Supreme Court will decide to hear the case. This is especially true on questions of great social or economic importance nationwide.

The Supreme Court decided to hear the cases. The court heard oral arguments for all three cases together on the same day, October 8, 2019.

The Decision

The single question the Supreme Court had to answer was this: Does Title VII's employment protection based on sex also cover sexual orientation (for Bostock and Zarda) and gender identity (for Stephens)?

In a 6-3 decision, the Supreme Court answered the question *yes*. Writing for the majority, Justice Neil Gorsuch said:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. 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.

Gorsuch was joined by Chief Justice of the United States John Roberts, as well as Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.

In his reasoning, Justice Gorsuch outlined the role of the court in these cases. Unlike many other landmark cases, the court here was not applying part of the U.S. Constitution or its amendments. Instead,

Gorsuch explained that the court was interpreting a statute (a law written by legislators). The court was, in other words, exercising its constitutional power of *judicial review*: the task of the court not to make law but to say what the law is.

An important part of *statutory interpretation* is for the court to define terms in the statute. The part of Title VII of the Civil Rights Act (CRA) at issue stated that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . because of such individual's race, color, religion, sex, or national origin."

Here, Gorsuch sought to define terms according to their "ordinary public meaning" in 1964, the year the CRA was passed. Gorsuch first defined the term *sex* as a word referring only to "biological distinctions between male and female."

Then he turned to the phrase *because of* in the CRA. Gorsuch argued that "because of" is traditionally defined — in legal terms — as *but-for* causation. In other words, a but-for cause is one that changes the outcome of an event. And events can have multiple but-for causes, like a car accident in which one car runs a red light while the other makes an unsafe left turn. But for *either* of those causes, the accident would not have happened.

Gorsuch also noted that the term *individual* in the CRA shows that the law was not meant to apply to groups. In other words, each case of alleged employment discrimination is judged for how an employer treats an individual employee, regardless of how the employer generally treats a class of persons, such as LGBT persons.

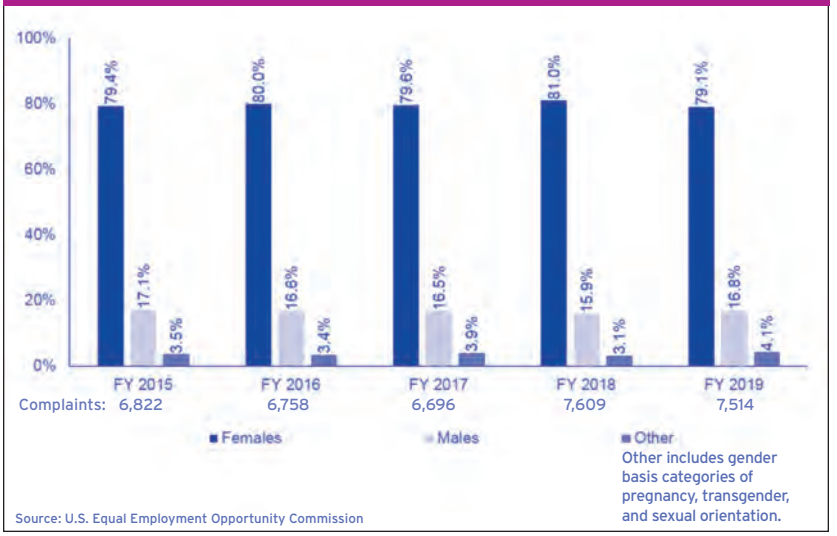
With the key terms defined, Gorsuch applied them to the cases before the court. It is the sex of each of the three employees, he said, that was a but-for cause for the employers firing them. It does not matter that there may be other but-for causes, such as an employer's open homophobia (hostility to gay men and lesbians) or transphobia (hostility to transgender people), which are not covered in the plain language of the CRA.

In fact, an employee's homosexuality or transgender status is irrelevant to the majority's decision. "That's because," wrote Gorsuch, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." If Gerald Bostock, for example, had been biologically female, then Bostock's attraction to men would not have seemed "unbecoming" (offensive) to Bostock's employer.

The situation is similar with a transgender employee. Gorsuch gave the example of an employer who fires someone like Aimee Stephens who now identifies as female but identified as male at birth. That same employer then keeps another employee who has identified as female since birth. The employer would then be firing the employee who changed identifications precisely because of that employee's sex identified at birth. And that "individual employee's sex" would play "an unmistakable and impermissible role" in the firing.

Some of the most controversial issues in society surrounding transgender identities have dealt with transgender people using gendered public bathrooms and school locker rooms or participating in gender-specific sports. But the majority opinion limited the reach of the *Bostock* case. "Under Title VII, too," wrote Gorsuch, "we do not purport to address bathrooms, locker rooms, or anything else of the kind." The case only relates to employment discrimination.

Sexual Harassment Complaints Filed With the U.S. Equal Employment Opportunity Commission by Gender of Filer - Fiscal Year 2015 to 2019



Source: U.S. Equal Employment Opportunity Commission

Dissenting Opinions

Justice Samuel Alito wrote a hotly worded dissent, joined by Justice Clarence Thomas. Alito called it a "radical decision" and rejected the way Gorsuch applied the word "sex" from the CRA. He argued that if Congress had meant for the term *sex* to cover any category of people other than male and female, it would have said so:

> [T]he question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not.

Alito cited numerous attempts by Congress over the years to amend the CRA to add "sexual orientation," as well as "gender identity," to the list of protected classes (along with race, color, religion, etc.). All these attempts have failed, either because both houses of Congress did not pass them, or because they never made it out of a congressional committee for a vote.

Supreme Court of the United States

The majority opinion in the Bostock case was written by Associate Justice Neil M. Gorsuch.

"Today, many Americans know individuals who are gay, lesbian, or transgender," wrote Alito, "and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is."

In a separate dissent, Justice Brett Kavanaugh argued that the underlying issue is separation of powers in the Constitution. "We are judges" wrote Kavanaugh, "not members of Congress." And it is Congress's power to amend Title VII, if it chooses, and not the Supreme Court's.

A Battle Won

Justice Gorsuch was Republican President Donald Trump's nominee to replace Justice Antonin Scalia who died in 2016. Justice Scalia is still known as one of the leading thinkers in the legal philosophy of *textualism*. A textualist interprets a law according to the meaning of the law's text at the time the law was written.

Textualism is almost always associated with more socially conservative viewpoints, and Justice Gorsuch is a textualist. So many conservatives and liberals alike were surprised by Gorsuch's opinion. In the *Bostock* case he used a textualist approach to reach the majority's decision, even though the dissenters thought he was too literal in looking at the term *sex* from the CRA.

For the three employees, however, as well as for millions of LGBT people across the country and their allies, the majority's decision got the law right. Tragically, only one of the three employees survived to see the decision made. Donald Zarda died in 2014 while BASE jumping (leaping from a great height with a parachute). Aimee Stephens died of kidney failure in May 2020, just a month before the decision was handed down.

Gerald Bostock was the survivor. "I can't say loud enough," Bostock said in an interview, "how proud I am that I was able to stand by Aimee Stephens and the Zarda family during this battle in our fight for equality."

WRITING & DISCUSSION

1. Describe how the three cases arrived at the Supreme Court.
2. The three employees in this case were known for satisfactory or even outstanding work performances. They did their jobs well. Would it have made any difference in the case if they had been unsatisfactory workers? Why or why not?
3. Legal experts for the Service Employees International Union wrote this response to the case: "But yesterday's ruling was not only a victory for LGBTQ workers. *Bostock* was also a victory for heterosexual cisgender* women who . . . work in traditionally male-dominated fields." Why do you think they made this argument? [*cisgender (*adjective*): relating to a person whose gender identity matches their sex at birth.]

ACTIVITY: Assessing the Case

After the *Bostock v. Clayton County* decision, many people on the political right and left, expressed their agreement or disagreement with the decision. In a small group or online breakout room, discuss each of the two opinions below. Decide as a group which description of the *Bostock* case your group thinks is more accurate. Use evidence from the article in your decision and choose a spokesperson to report back to the whole class.

1. The Court has now rewritten [Title VII of the Civil Rights Act of 1964] itself. (*The Wall Street Journal* Editorial Board, June 15, 2020.)
2. The opinion in *Bostock v. Clayton County* fulfills the best promises of textualism. (Sarah Rice, assistant attorney general for the state of Maryland, June 15, 2020.)

Standards Addressed

Workplace Equality for LGBT People: Bostock v. Clayton County

National Civics Standard 18: Understands the role and importance of law in the American constitutional system and issues regarding the judicial protec-tion of individual rights. **High School Benchmark 1:** Understands how the rule of law makes possible a system of ordered liberty that protects the basic rights of citizens. **High School Benchmark 5:** Understands how the individual's rights to life, liberty, and property are protected by the trial and appellate levels of the judicial process and by the principal varieties of law (e.g., con-stitutional, criminal, and civil law).

National U.S. History Standard 31: Understands economic, social, and cultural developments in the contemporary United States. **High School Benchmark 5:** Understands major contemporary social issues and the groups involved (e.g., the emergence of the Gay Liberation Movement and civil rights of gay Amer-icans).

California State HSS Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (4) Explain the controversies that have resulted over changing interpretations of.

California HSS Framework (2016), Chapter 16, Grade Eleven: "Students also examine the emergence of a movement for LGBT rights, starting in the 1950s . . . ." (p.421).

California HSS Framework (2016), Chapter 17, Grade Twelve: "Subsequent Court cases addressed the rights of . . . the lesbian, gay, bisexual, and transgender community . . . ." (p. 445).

Common Core State Standards: SL 11-12.1, SL 11-12.3, RH 11-12.1, RH 11-12.2, RH 11-12.3, RH 11-12.4, RH 11-12.10, WHST 11-12.1, WHST 11-12.2, WHST 11- 12.9, WHST 11-12.10

Standards reprinted with permission:

Sources

Workplace Equality for LGBT People: Bostock v. Clayton County

Bigham, Brett. "Teacher: I Was Fired for Being Gay. Now It Can't Happen to Anyone Else." Education Week, 23 June 2020, edweek.org/tm/arti-cles/2020/06/23/teacher-i-was-fired-for-being-gay.html. Accessed 1 Sep. 2020. · Bostock v. Clayton County, 590 U.S. ___ (2020). Justia, supreme.jus-tia.com/cases/federal/us/590/17-1618/. Accessed 1 Sep. 2020. · Eyer, Katie. "Symposium: Progressive Textualism and LGBTQ Rights." SCOTUSblog, 16 June 2020, scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/. · Fitzsimons, Tim. "Supreme Court sent 'clear message' with LGBTQ ruling, plaintiff Gerald Bostock says." NBC News, 16 June 2020. nbc-news.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190. Accessed 1 Sep. 2020. · "LGBT employment discrimination in the United States." Wikipedia, 26 Sep. 2020. en.wikipedia.org. Accessed 27 Sep. 2020. · Ortiz, Aimee. "Aimee Stephens, Plaintiff in Transgender Case, Dies at 59." The New York Times, 12 May 2020, nytimes.com/2020/05/12/us/aimee-stephens-supreme-court-dead.html. Ac-cessed 2 Sep. 2020. · Rice, Sarah. "Symposium: The strength of the written word fulfills Title VII's promise." SCOTUSblog, 15 June 2020, scotusblog.com/2020/06/symposium-the-strength-of-the-written-word-fulfills-title-viis-promise/. Accessed 24 Sep. 2020. · Ring, Trudi. "The Gay and Trans People Who took their Cases to the Supreme Court." The Advocate, 15 June 2020. advocate.com/news/2020/6/15/gay-and-trans-people-who-took-their-cases-supreme-court. Accessed 1 Sep. 2020. · Skrmetti, Jonathan. "Symposium: The Triumph of Textualism: 'Only the Written Word Is the Law.' " SCOTUSblog, 16 June 2020, scotusblog.com/ 2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/. Accessed 1 Sep. 2020. · The Editorial Board. "Opinion: Another Win for the Kagan Court." The Wall Street Journal, Dow Jones & Company, 15 June 2020, wsj.com/ar-ticles/another-win-for-the-kagan-court-11592264430?mod = searchresults. Accessed 1 Sep. 2020. · Zarda, Melissa. "My Brother Was Fired After Re-vealing He Was Gay. Now I'm Continuing His Fight at the Supreme Court." Time, 1 July 2019, time.com/5617310/ zarda-supreme-court-lgbtq/. Accessed 1 Sep. 2020. ·

SPECIAL NOTICE

Some Future Issues of *Bill of Rights in Action* Will Only Be Available Electronically!

We will publish two issues of the quarterly *Bill of Rights in Action* in electronic format only and two issues in print and electronic format. To receive notification of when the electronic edition is available for download, sign up at **www.crf-usa.org/bill-of-rights-in-action.**

Constitutional Rights Foundation

601 South Kingsley Drive
Los Angeles, CA 90005
213.487.5590
Fax 213.386.0459
crf@crf-usa.org
www.crf-usa.org

About Constitutional Rights Foundation

Constitutional Rights Foundation is a non-profit, non-partisan educational organization committed to helping our nation's young people to become active citizens and to understand the rule of law, the legal process, and their constitutional heritage. Established in 1962, CRF is guided by a dedicated board of directors drawn from the worlds of law, business, government, education, and the media. CRF's program areas include the California State Mock Trial, Expanding Horizons Internships, Civic Action Project, Cops & Kids, teacher professional development, and publications and curriculum materials. Learn more at **www.crf-usa.org.**