

PRESENTED AT
UT School Law Conference

February 17-18, 2022
Austin, TX

LGBTQIA+ Update

Andrea L. Mooney

Author Contact Information:
Andrea L. Mooney
Eichelbaum Wardell
Hansen Powell & Muñoz, P.C.
Plano, TX
alm@edlaw.com
972.377.7900



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

LGBTQIA+ Update

By Andrea L. Mooney, Shareholder

Co-Authored by Holly B. Wardell and Emma J. Darling¹

EMPLOYEES

On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*, which held that the prohibition against sex discrimination in 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. 140 S. Ct. 1731 (2020).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (EEOC) issued guidance declaring the following employment decisions to be in violation of Title VII if made on the basis of an individual's sexual orientation, transgender status, failure to conform with gender norms or stereotypes:

- Hiring
- Firing, furloughs, or reductions in force
- Promotion
- Demotion
- Discipline
- Training
- Work assignments
- Pay, overtime, or other compensation
- Fringe benefits
- Other terms, conditions, and privileges of employment.
- Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity

Bathrooms, Locker Rooms, Showers: The EEOC has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that

¹ My most sincere thanks to Holly B. Wardell and Emma J. Darling for their outstanding efforts on this paper.

corresponds to the employee's gender identity. *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity). In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

Pronouns and Names: According to the EEOC, unlawful harassment includes unwelcome conduct that is based on gender identity. To be unlawful, the conduct must be severe or pervasive when considered together with all other unwelcome conduct based on the individual's sex including gender identity, thereby creating a work environment that a reasonable person would consider intimidating, hostile, or offensive. In its decision in *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, the EEOC explained that although accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

[Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov/eeoc/statistics/enforcement/discrimination.cfm)

Policy Update: Board policy DAA(LEGAL) has now been updated to include: "The prohibition against discrimination because of sex includes discrimination on the basis of an individual being gay or transgender. *Bostock v. Clayton County, Georgia*, 17-1618, 2020 WL 3146686, (U.S. June 15, 2020)."

STUDENTS

BIDEN EXECUTIVE ORDER – JANUARY 20, 2021

President Joseph Biden released "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" on January 20, 2021. In this executive order, the Biden administration pronounced that *Bostock v. Clayton County* would also apply to other discrimination laws. The order states: "Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: LGBTQIA+ Update

First appeared as part of the conference materials for the
37th Annual School Law Conference session
"LGBTQIA+ Update"