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Pushing Forward: The Need for State-Based Protections Post-Bostock

By Brendan Bertig, Esq.

The Supreme Court recently held that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 includes discrimination based on one's sexual orientation or gender identity (*Bostock v. Clayton County*, 2020). Because Title VII's provisions set forth the framework within which most employers must make their employment-based decisions, *Bostock* represented a crucial outcome for LGBTQ individuals long exposed to barriers in the workplace. Given the court's broad holding that one cannot "discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," it would not be difficult to conclude that the employment burdens borne by the LGBTQ community were extinguished by the dictates of a single verdict (*Bostock v. Clayton County*, 2020). It would be equally easy to assume that because other federal laws contain sex-based protections in education, housing and healthcare, *Bostock's* rationale extends without delay into these areas as well.

Unfortunately, this is not the case. It is true that Title IX of the Education Amendments Act of 1972 prohibits sex discrimination in federally funded education programs, just as the Fair Housing Act makes it unlawful to deny housing to individuals because of their sex (Gruberg, 2020). Section 1557 of the Affordable Care Act also contains such protections by incorporating Title IX's sex discrimination provisions (Gruberg, 2020). It would be erroneous, however, to assume that all relevant stakeholders will interpret *Bostock* as bringing the sex-based mandates of each of these federal laws into conformity with its holding. To the contrary, while the case law strongly supports

that result, opponents of LGBTQ equality have already initiated legal attempts to stall *Bostock's* full and proper implementation (Human Rights Campaign Foundation [HRCF], 2020). The consequence of these strategies is straightforward: each application of *Bostock* to other federal statutes will likely require years of litigation.

Therefore, the inevitable delay in *Bostock's* full application makes one thing clear: the Pennsylvania Legislature must sidestep opponents of LGBTQ equality by passing House Bill 300, which would update the Pennsylvania Human Relations Act (PHRA) to include protections for LGBTQ individuals in the areas of education, housing and public accommodations. Legislative action is especially important because, even once fully updated, existing federal protections do not outlaw sex-based discrimination in public spaces or for federally-funded services (HRCF, 2020). In other words, even when the dust has settled on the fight to apply *Bostock* to all relevant federal civil rights laws, *Bostock* is only capable of impacting those laws in which sex discrimination is *already* prohibited. The remaining gaps in these federal laws cannot be remedied through *Bostock*; they require the intervention of legislators committed to holistically promoting equality.

Key to that commitment is also understanding that even where federal protections *do* exist, state laws can provide even more expansive protections for LGBTQ individuals. Title VII, for instance, defines an "employer" as a person who has 15 or more employees (42 U.S.C. § 2000e(b)). The PHRA, on the other hand, provides broader employment protections

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by defining an “employer” as any person employing *four* or more persons (43 P.S. § 954(b)). Therefore, absent a change by lawmakers, the ability of LGBTQ Pennsylvanians to invoke legal protections counter-intuitively turns on the number of co-workers they already work with or are applying to join. Relatedly, failing to update the PHRA allows smaller, anti-equality employers to pass under the radar, even though it is precisely in these more insular environments that LGBTQ individuals are at risk of discrimination.

Despite the progress our Commonwealth has made toward accepting LGBTQ individuals, these intolerant environments persist. According to a recent report, more than one in three LGBTQ Americans faced discrimination in 2020, including roughly 62% of transgender Americans and 43% of LGBTQ people of color (Gruberg, 2020). When asked where these instances of discrimination occurred, “more than half ... said they experienced harassment or discrimination in a public place;” 36% responded that they were discriminated against in the workplace; 21% indicated discrimination in a school environment; and 20% reported discrimination in an apartment community (Gruberg, 2020).

No matter where it occurs, discrimination impacts the mental health of LGBTQ Americans. Predictably, one in two LGBTQ individuals report moderate or significant negative psychological impacts as a result of discrimination based on their sexual orientation or gender identity (Gruberg, 2020). Passing HB 300, which extends non-discrimination protections into the very spaces referenced above, gives legislators the ability to safeguard the emotional well-being of Pennsylvania’s LGBTQ citizens.

Further, by memorializing these protections in Pennsylvania law, legislators make our Commonwealth a more attractive place to live. At present, *more than half* of LGBTQ students live in states without statutory protections against sexual orientation and gender identity discrimination in education (Conron & Goldberg, 2020). Similarly, half of LGBTQ individuals live in states that do not statutorily prohibit such discrimination in public accommodations, while nearly half of LGBTQ adults live in states lacking statutory safeguards in the context of housing (Conron & Goldberg, 2020). By enacting fully-inclusive non-discrimination laws, Pennsylvania signals to residents, visitors and businesses that it genuinely values diversity and equity. In so doing, the Commonwealth promotes good policy *and* economic strength.

House Bill 300 must become law. Ever since its central location among the original 13 colonies, Pennsylvania has been known as the Keystone State — the stone on which the associated stones depend for support. As Pennsylvanians, we must recognize that like our Commonwealth, LGBTQ individuals are the keystone of an advancing society, representing the colorful array of diverse perspectives that animate our forward progress.

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