BOSTOCK AND ITS PROGENY: A PATH TO PROTECTION FOR THE LGBTQ+ COMMUNITY

*By: Colton Shelly**

TABLE OF CONTENTS

* M.A. Graduate of Texas State University - Legal Studies Program (Aug. 2023), B.S., Angelo State University (Dec. 2021). This paper was part of my applied research project as part of the M.A. in Legal Studies program. I would like to thank Dr. Mari Garza for helping me develop this piece with her substantive thoughts and suggestions. Her careful review of this article provided for a stronger paper for which I am deeply appreciative of. Many thanks to the editors of *Cardozo Journal of Equal Rights and Social Justice* for pushing the article to perfection through their diligent work.

INTRODUCTION

Laws precluding the LGBTQ+ community of full citizenship have divested class members of the ability to implement policies to protect and advance their members.[1] In a confiscation of their rights, courts and legislatures have been disinclined to extend security against discrimination toward individuals based on their sexual orientation and gender identity.[2] Yet, there is growing awareness of the confirmed living situations and challenges that depict the LGBTQ+ community's reality.[3] The U.S. Supreme Court has made considerable efforts to remove the stigmatizing laws and barriers that affect those identifying with the LGBTQ+ community.[4] More specifically, the momentous ruling of *Bostock v. Clayton County, Georgia* has achieved the unprecedented task of providing federal employment protections for the LGBTQ+ community against discrimination.[5]

The *Bostock* case was a groundbreaking decision that allowed sexual orientation or gender identity discrimination claims to be brought under Title VII of the Civil Rights Act of 1964 ("Title VII") as discrimination based on sex.[6] This determination resulted in various related and reactionary disputes that arose in front of federal and state courts.[7] Section I of this Article examines the *Bostock* decision and highlight the main points of the Court's majority opinion. Section II identifies succeeding cases that utilized the *Bostock* explanation in their analogous labor discrimination suits based on sexual orientation or gender identity. Section III reviews *Bostock*'s influence in cases involving issues with Title IX of the Education Amendments ("Title IX") among schools and universities regarding discrimination in bathroom policies and extracurricular activities. Lastly, Section IV explores rulings that connect *Bostock* and Title VII with similar expectations in discrimination statutes and regulations at the state level.

---

[1] *See* Andrew S. Park, *Respecting LGBTQ Dignity Through Vital Capabilities*, 24 J. GENDER RACE & JUST. 271, 272-73 (2021) (referencing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

[2] *See* Judy Bennett Garner & Sandy James, *Employment Discrimination Against LGBTQ Persons*, 14 GEO. J. GENDER & L. 363, 364 (2013).

[3] *See* Park, *supra* note 1, at 273.

[4] *Id.*

[5] *See* Linda Sharp, Annotation, *Definition of "Sex" Under Title VII of Civil Rights Act, 42 U.S.C.A. §§ 2000e et seq., Concerning Discrimination on Basis of Sexual Orientation, Gender Conformance, or Transgender Status—Post-Bostock*, 67 A.L.R. Fed. 3d Art. 14 (2022).

[6] Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

[7] *See, e.g.*, Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1025 (10th Cir. 2021); Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796-97 (11th Cir. 2022); Vroegh v. Iowa Dep't of Corrections, 972 N.W.2d 686, 693 (Iowa 2022).

I. THE *BOSTOCK* FACTS AND MAJORITY OPINION

Very few laws in history compare to the position of the Civil Rights Act of 1964 as one of the most important pieces of federal legislation.[8] Title VII states: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual concerning his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin."[9] The question presented to the Court in *Bostock* was whether an employer could lawfully fire an employee simply for being gay or transgender.[10] The answer, according to the Court, was that such action would be a violation of Title VII as discrimination based on sex.[11]

Bostock involved three cases which were presented to the Supreme Court and ruled on in conjunction with each other.[12] All of the cases involved an employer firing a long-time employee quickly after finding out they were gay or transgender, which was undisputed and acknowledged by the employers.[13] The first case involved Gerald Bostock, who was a child welfare advocate for Clayton County, Georgia.[14] After a long employment history with the county, which included winning national awards for his leadership, he began playing in a gay recreational softball league.[15] This sparked disapproval from members of the Clayton County community and eventually led to the termination of his job for "conduct 'unbecoming' [of] a county employee."[16] The U.S. District Court for the Northern District of Georgia, the trial court, dismissed Bostock's employment discrimination lawsuit with prejudice.[17] The basis for dismissal stood on an Eleventh Circuit Court of Appeals decision finding that sexual orientation was not protected under Title VII—binding precedent for the trial court.[18] Bostock then appealed the district court's dismissal of his employment discrimination suit

[8] *See Bostock*, 590 U.S. at 649.

[9] 42 U.S.C.A. § 2000e-2(a)(1) (West 2008) (emphasis added).

[10] *Bostock*, 590 U.S. at 649.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 653, 665.

[14] *Id.* at 653.

[15] *Id.*

[16] *Id.* at 653-54.

[17] Bostock v. Clayton Cnty., No. 1:16-CV-1460-ODE, 2016 WL 9753356, at *8 (N.D. Ga. July 21, 2016), *overruled by Bostock*, 590 U.S. 644.

[18] Bostock v. Clayton Cnty., 723 Fed. App'x 964 (11th Cir. 2018) (citing Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("[Plaintiff] next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent foreclosed such an action.")).

to the Eleventh Circuit Court of Appeals.[19] The Eleventh Circuit dismissed Bostock's case and held that no laws prohibited firing employees for being gay.[20]

The second case involved Donald Zarda, who was gay and worked as a skydiving instructor at Altitude Express.[21] He was fired just days after mentioning he was gay at work.[22] The trial court's ruling that Zarda's sexual orientation status was not protected under Title VII was vacated by the Second Circuit Court of Appeals.[23] The Second Circuit held that Zarda's termination of employment for being gay did violate Title VII and he was entitled to bring a claim.[24]

Lastly, the third case involved a transgender female, Aimee Stephens, who was fired from R.G. & G.R. Harris Funeral Homes because her being transgender "[wa]s not going to work out."[25] She presented as a male when she started the job, but was eventually diagnosed with gender dysphoria.[26] She began living as a woman and notified her employer, which resulted in her losing her job.[27] In response to her termination, the Equal Employment Opportunity Commission ("EEOC") brought a Title VII claim against the funeral home on her behalf.[28] The U.S. District Court for the Eastern District of Michigan ordered that the funeral home's motion for summary judgment be granted in part and denied in part; the court denied the EEOC's motion for summary judgment.[29] The Sixth Circuit Court of Appeals reversed the district court's ruling, finding that the funeral home fired Stephens due to "failure to abide by the employer's stereotypical conception of her sex."[30] The Sixth Circuit aligned with the Second Circuit's reasoning in *Zarda v. Altitude Express, Inc.*[31] and declared that transgender status was protected under Title VII.[32]

---

[19] *Id.*

[20] *Id.* at 965; *see also Bostock*, 590 U.S. at 654.

[21] *Bostock*, 590 U.S. at 653-54.

[22] *Id.*

[23] Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018); *see also Bostock*, 590 U.S. at 653-54.

[24] *Zarda*, 883 F.3d at 132; *see* also *Bostock*, 590 U.S. at 654.

[25] *Bostock*, 590 U.S. at 653-54.

[26] *Id.*

[27] *Id.* at 654.

[28] *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594 (E.D. Mich. 2015), *overruled by* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *and Bostock*, 590 U.S. 644.

[29] *E.E.O.C.*, 100 F. Supp. 3d at 603-04.

[30] *E.E.O.C.*, 884 F.3d at 600.

[31] Zarda v. Altitude Express, Inc. 883 F.3d 100, 132 (2d Cir. 2018).

[32] *Bostock*, 590 U.S. at 654.

All three cases were appealed to the U.S. Supreme Court and consolidated.[33] The *Bostock* majority began its opinion by laying a foundation for the expectations and the law before the Court.[34] When interpreting a statute, a textualist Court typically looks to how that statute and its terms would have been understood at the time the statute was enacted.[35] Using this method of interpretation, the Court in *Bostock* looked to the terms of the Civil Rights Act.[36] The Court had to exercise caution in interpreting these terms, so as to not risk impermissibly constructing legislation by amending the statute "inspired by extratextual sources and [their] imaginations reserved for elected officials."[37] Therefore, the Court's first task was to orient itself in the context of when Title VII was adopted to determine "the ordinary public meaning" of the statute's terms at that time.[38] The Court began by looking at the primary characteristic at issue in the suit—sex—and determining what this meant in 1964.[39] The Court stated that clarification was needed as to what Title VII says about sex before tackling the questions in this case.[40] The Court aligned with the definition of "sex" as argued by the employers that sex "refer[s] only to biological distinctions between male and female."[41]

Furthermore, the Court held that the phrase "because of" in the statute implicated a "but-for" test, which assesses whether one change to the set of facts presented would affect the outcome.[42] In other words, would the outcome have been avoided "but for" the purported cause?[43] Applying the but-for test to Title VII meant that simply citing a factor other than sex for the cause of an employment decision did not safeguard the employer from liability.[44] If sex was even one but-for cause of the employment decision, a violation of Title VII occurred.[45] The Court then grappled with how discrimination was defined in 1964, and concluded that it had the same meaning then as at the time of the case.[46] The majority emphasized that discrimination meant "treating [an] *individual* worse than someone similarly

---

33 *Id.*

34 *Id.*

35 *Id.* at 655 (citing New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538-39 (2019)).

36 *Id.* at 654.

37 *Id.*

38 *Id.* at 655.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 656.

43 *Id.*

44 *Id.*

45 *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013)).

46 *Id.* at 657.

situated."[47] This meant that Title VII carries discrimination against individuals, not groups.[48] It aims to equally protect individuals of both sexes from discrimination.[49]

Taking all of these foundational principles together, the straightforward reading of Title VII makes it unlawful for an employer to intentionally fire an employee based in part on sex.[50] The Court stated that an individual's sex "is not relevant to the selection, evaluation, or compensation of employees" and thus should not be a factor considered in the hiring and firing decisions of employers.[51] Similarly, "[a]n individual's homosexuality or transgender status is not relevant to employment decisions" and, thus, discriminating against someone for being gay or transgender necessarily discriminates against that person on the basis of sex.[52] The Court analyzed a scenario in which two employees, one a man and one a woman, are materially identical to the employer despite the difference in sex.[53] Both the man and woman are attracted to men, yet the man is fired for this characteristic while the woman retains her job.[54] An employee of one sex was faced with an adverse employment decision for traits or characteristics otherwise tolerated in another employee of a different sex.[55] This created a but-for cause for the employment decision and constituted a violation of Title VII for discrimination based on sex.[56] This analysis applies to a transgender employee that is fired as well; the gender with which the transgender employee identifies is tolerated in a cisgender employee, but is not tolerated in the transgender employee.[57] A transgender male—someone who was identified as a female at birth and now identifies as male—is fired for their gender, while someone who was identified male at birth and still identifies as male retains his job.[58] The trait of identifying as a male is penalized for the person assigned female at birth, but not for the person assigned male at birth.[59] In this scenario, sex was automatically factored into the employment decision and "play[ed] an unmistakable and impermissible role in the

[47] *Id.* (referencing Webster's New International Dictionary 745 (2d ed. 1954)) (emphasis added).

[48] *Id.* at 658-59.

[49] *Id.* at 659.

[50] *Id.*

[51] *Id.* at 660 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion)).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

discharge decision," triggering Title VII.[60] The Court stated that homosexuality and transgender status are bound together with sex in Title VII language.[61]

The remaining points of the majority opinion discussed Congress' lack of exceptions or clear explanations for broad rules.[62] The employers argued that if Congress had wanted to include sexual orientation and gender identity in Title VII, Congress would have explicitly referenced them separately from sex.[63] The Court agreed that homosexuality and transgender status are distinguishable from sex, but that it has already ruled that they are bound together by the law.[64] Furthermore, if Congress does not include exceptions to a broad rule, the courts have the authority to apply the broad rule.[65] Besides, allowing speculation about why Congress refused to adopt or amend a particular piece of legislation is "particularly dangerous" to use in an interpretation of existing law, according to the Court.[66] The employers also argued that very few people in 1964 would have considered gay and transgender individuals to be protected by Title VII.[67] However, the Court pointed out that gay and transgender employees began bringing Title VII suits almost immediately after Title VII was passed.[68] Therefore, "some people foresaw this potential application," in addition to the debates of the Equal Rights Amendment that occurred several years later.[69]

II. ANALOGOUS LABOR DISCRIMINATION CASE LAW IN FEDERAL COURTS

The *Bostock* ruling laid a path for individuals to be protected under Title VII if they were discriminated against by their employer based on their sexual orientation or gender identity.[70] This section synthesizes labor discrimination disputes that relate or cite to the *Bostock* opinion and focuses on the reasoning behind each court's decision.

---

60 *Id.*

61 *Id.* at 660-61.

62 *See generally id.* at 673-82.

63 *Id.* at 669.

64 *Id.* at 661, 669.

65 *Id.* at 669-70.

66 *Id.* at 670.

67 *Id.* at 673.

68 *Id.* at 676.

69 *Id.*

70 *See also* Anne Elisabeth Poe, *Title VII's Hidden Agenda: Sex Discrimination, Transgender Rights, and Why Gender Autonomy Matters*, 72 ALA. L. REV. 641, 667 (2021) (noting that *Bostock* marked a crucial milestone for transgender equity).

A. Tudor v. Southeastern Oklahoma State University

Dr. Tudor, a transgender woman, began working at Southeastern Oklahoma State University ("Southeastern") as a tenure-track assistant professor in 2004.[71] At the start of Dr. Tudor's teaching, she presented as a male, but in 2007 she informed human resources that she was transitioning from male to female.[72] The tenure application process is an extensive procedure that navigates multiple entities, all of which issue recommendations to the university president who makes the final tenure determination.[73] The first year after transitioning, Dr. Tudor submitted her tenure portfolio, but the committee voted against tenure.[74] She reapplied the following year with proof of the necessary criteria—teaching, scholarship, and service—and the committee and department chair recommended tenure.[75] However, the Vice President and President denied tenure, and, as a result, Dr. Tudor filed grievances against them for lack of an explanation for the decision.[76] She was made to believe she could reapply the following year in 2010, but the new department chair received a memorandum from the Vice President in October 2010 that Dr. Tudor would not be allowed reapplication, because it was "in the best interests of the university."[77]

While the appeals in Dr. Tudor's case were pending, the *Bostock* ruling was issued by the Supreme Court, and the Tenth Circuit Court of Appeals subsequently "appl[ied] *Bostock* in resolving [the] appeal."[78] The court acknowledged Title VII and that *Bostock* held that discrimination based on transgender status *is* discrimination based on sex, overruling *Etsitty v. Utah Transit Authority*, which had held that transgender individuals were not protected under Title VII.[79] Southeastern conceded that *Bostock* invalidated their arguments based on *Etsitty*, but still appealed the district court's denial of its motion for summary judgment.[80] However, given the holding in *Bostock*, the Tenth Circuit determined that Southeastern's arguments thus "ha[d] no merit in light of *Bostock*."[81] The Tenth Circuit also concluded that there was sufficient evidence to find that Dr. Tudor was denied tenure and

71 Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1025 (10th Cir. 2021).

72 *Id.* at 1025.

73 *Id.*

74 *Id.* at 1026.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 1028.

79 *Id.* (citing Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007)).

80 *Id.*

81 *Id.* at 1031.

the opportunity to reapply on account of her sex.[82] Testimony worth mentioning came from Dr. Tudor, Dr. Cotter-Lynch, and Dr. Mischo, who all stated that they had "never heard of any rules that barred tenure reapplication after a denial."[83] In addition, Dr. Tudor and one of her colleagues testified that the administration had never denied a tenure application after the faculty committee recommended granting tenure.[84] The Tenth Circuit affirmed the district court's ruling and stated that Dr. Tudor was discriminated against because of her sex.[85]

B. Olivarez v. T-Mobile USA, Incorporated

Elijah Olivarez, a transgender male, was an employee discharged by T-Mobile based on alleged transgender discrimination under Title VII.[86] Olivarez claimed that a supervisor made offensive and demeaning comments about Olivarez's transgender status.[87] After reporting the supervisor to human resources, Olivarez alleged the company retaliated against him by reducing his hours from full-time to part-time.[88] The following year, Olivarez underwent egg preservation and a hysterectomy, for which he missed work.[89] The following month, Olivarez requested and was granted some paid leave, but mostly unpaid leave.[90] He was later granted an extension of leave but was subsequently denied a second request for an extension.[91] He was then fired about a month later and filed suit against T-Mobile and Broadspire, the company that managed the leave programs for T-Mobile, alleging, in part, a Title VII violation.[92]

The district court dismissed the Title VII claim because Olivarez failed to allege he was treated less favorably than other "similarly situated employees outside of Olivarez's protected class."[93] Olivarez appealed the decision to the Fifth Circuit Court of Appeals, where he relitigated the Title VII claim.[94] The Fifth Circuit affirmed the district court's ruling that Olivarez failed to state a plausible discrimination claim based on gender

82 *Id.* at 1031-32.

83 *Id.* at 1032.

84 *Id.* at 1026.

85 *Id.* at 1049.

86 Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 598 (5th Cir. 2021).

87 *Id.* at 598.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 599.

94 *Id.*

identity under Title VII.[95] The ruling was based on the court's holding in *Swierkiewicz v. Sorema N.A.*, which required two elements to support a "disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a plaintiff *because of* [their] protected status."[96] There was no dispute that Olivarez suffered an adverse employment action.[97] However, his discrimination claims depended on circumstantial evidence, and there was no allegation that any non-transgender employee received more favorable treatment for similar conduct under the same supervisor.[98] In other words, there were no facts in the complaint that allowed for a reasonable inference that Olivarez was terminated on account of gender identity (his protected class).[99] Moreover, Olivarez did not include any comparators in his amended complaint.[100] The amended complaint only indicated that he took several months of leave and then was terminated after requesting additional leave.[101] Therefore, the second element failed.[102]

Olivarez further argued that the district court should have reconsidered its decision under Federal Rule of Civil Procedure 59(e), which "allows a party to seek to alter or amend a judgment 'when there has been an intervening change in controlling law.'"[103] Olivarez contended that *Bostock* lowered the standard for those alleging gender identity discrimination; therefore, according to Olivarez, an intervening change in the law was present and warranted consideration of Rule 59(e).[104] The Fifth Circuit disagreed, citing the standard for discrimination suits at both the pleading stage and the summary judgment stage.[105] At the pleading stage, Olivarez needed to allege sufficient facts to make it plausible that he was discriminated against *because of* his protected status.[106] At the summary judgment stage, he had to show a more favorably treated comparator to establish discrimination, especially when evidence of his discrimination is circumstantial.[107] The Fifth Circuit stated that *Bostock* did not alter these two

95 *Id.* at 596, 603.

96 *Id.* at 599-600 (quoting Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 767 (5th Cir. 2019)).

97 *Id.* at 600.

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 601 (quoting Schiller v. Physicians Res. Grp., Inc., 342 F.3d 563, 567-68 (5th Cir. 2003)).

104 *Id.*

105 *Id.*

106 *Id.* (citing Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 767 (5th Cir. 2019)).

107 *Id.* at 601; *see* Bostock v. Clayton Cnty., 590 U.S. 644, 660 (2020):

standards and, therefore, no intervening change of law occurred that allowed for reconsideration under Rule 59(e).[108]

C. Boshaw v. Midland Brewing Company

Boshaw was an openly gay man who worked as a server for Midland Brewing and was approached by his supervisor with offers for leadership positions.[109] The following day, the same supervisor told Boshaw that, before presenting the opportunity to the owner, Boshaw would need to start acting more masculine, change his hairstyle, and remove his Facebook relationship status that indicated he was dating a man.[110] Boshaw did change his hairstyle and deleted the Facebook relationship status but never removed Instagram pictures of him and his partner along with his two children.[111] Boshaw was still promoted to an hourly managerial position and then promoted two more times; during this time, he reposted his relationship status on Facebook and continued posting pictures of his partner and kids.[112] Despite these comments, Boshaw and his supervisor maintained a very positive relationship throughout his employment.[113] At one point when Boshaw was considering quitting, the same supervisor persuaded Boshaw to stay with Midland.[114] The owner of Midland eventually found out about the supervisor's comments regarding the promotion and promised to make it right.[115] While Boshaw was promoted, his work ethic was often criticized, primarily due to his communication skills and organization, which caused problems in the workplace.[116] He was ultimately fired after missing a mandatory meeting and not showing up for work the same evening, when there was plenty of evidence that he knew he needed to be there.[117]

Boshaw filed a complaint with the EEOC and they gave him a right-to-sue letter.[118] However, the district court granted summary judgment in favor

> Consider . . . an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

Bostock, 590 U.S. at 660.

108 *Olivarez*, 997 F.3d at 602.

109 Boshaw v. Midland Brewing Co., 32 F.4th 598, 601 (6th Cir. 2022).

110 *Id.* at 601.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 602.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

of the defendants, and Boshaw appealed to the Sixth Circuit.[119] Midland argued that Boshaw's timing in filing the complaint violated the statute of limitations from when the initial matter occurred, but the Sixth Circuit disagreed.[120] Boshaw filed suit within the ninety-day limit of receiving the right-to-sue letter from the EEOC.[121] Moving forward, Boshaw was required to show sufficient evidence that a rational jury would find that he suffered an adverse employment action because of discrimination in order to win a motion for summary judgment.[122] One of Boshaw's sex discrimination theories was that he was discriminated against for his sexual orientation when he was asked to remove his relationship status on Facebook for his promotion.[123]

The Sixth Circuit acknowledged the *Bostock* ruling that sexual orientation discrimination was applicable to his case because it is a protected class under Title VII.[124] Nevertheless, the court said that, for Boshaw to survive a motion for summary judgment, he would have needed to show that his promotion was denied or delayed (an adverse employment action) because of his sexual orientation.[125] The record indicated that, despite his supervisor's comments, he was still promoted shortly after and was subsequently promoted two more times.[126] Because of this, the Sixth Circuit ruled that Boshaw's "subjective belief that [his supervisor] discriminated against him was not enough for a rational trier of fact to find that discrimination occurred."[127]

III. *BOSTOCK* AND TITLE IX ISSUES

Over the course of several years, Congress passed laws to secure "specific aspects of civil rights from infringement."[128] One such law, Title IX, reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[129] Several federal statutes prohibit discrimination based on sex for which the *Bostock* ruling could consequently affect future

[119] *Id.*

[120] *Id.* at 603.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 604.

[126] *Id.*

[127] *Id.*

[128] *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 756 (1999).

[129] 20 U.S.C. § 1681(a).

decisions interpreting those laws.[130] This section explores rulings with Title IX disputes using influence from the *Bostock* decision.

A. Adams by and through Kasper v. School Board of St. Johns County

Drew Adams was a transgender male that attended Allen Nease High School within the St. Johns School District ("the School"), which provided female, male, and sex-neutral bathrooms for its students.[131] Sex-neutral bathrooms with single stalls were provided to accommodate students who were uncomfortable using the bathrooms that corresponded with their biological sex.[132] The School, however, maintained an unwritten bathroom policy which stated that each person was expected to use the bathroom that matched their biological sex and distinguished boys and girls based on the biological sex listed on their birth certificates.[133] The bathroom policy was expected to address the privacy, safety, and welfare concerns of students pursuant to the School board's duties.[134] Adams, who identified as a male but was biologically female, was using the male bathrooms in violation of the bathroom policy.[135] Adams was warned that he had to use either the "communal female bathroom or the single-stall sex-neutral bathrooms."[136] Adams filed suit against the School, alleging that the bathroom policy violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.[137] The district court ordered the School board to allow Adams to use the male bathroom.[138] The School board appealed the district court's order.[139]

The Eleventh Circuit Court of Appeals held that the bathroom policy did not violate the Equal Protection Clause because it did not discriminate based on sex or against transgender students.[140] The court reasoned that transgender status and gender identity were absent from the bathroom policy's classification because the classification was based on biological sex.[141] Adams relied on the *Bostock* ruling to argue that the policy singled

130 Bostock v. Clayton Cnty., 590 U.S. 644, 724-25 (2020) (Alito, J., dissenting); *Bostock*, 590 U.S. at 791 (Kavanaugh, J., dissenting).

131 Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 796-97 (11th Cir. 2022).

132 *Id.* at 797.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* at 798.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* at 808.

141 *Id.*

out transgender students.[142] However, the court disagreed with this argument, highlighting that the Supreme Court refused to address sex-separated bathrooms in its decision.[143] In its decision, the Court had specifically stated:

> Under Title VII . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."[144]

The circuit court distinguished Adams' appeal, stating that the *Bostock* decision was about the workplace, not schools and children.[145] Therefore, the question of whether discrimination based on sex included discrimination based on sexual orientation or transgender status was not a question on appeal.[146] Rather, the question was whether discrimination based on biological sex necessarily entails discrimination based on transgender status.[147] The court stated that the bathroom policy divides students based on biological sex, which includes transgender students.[148] The court opined that "a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status."[149]

Moving to the Title IX discussion, the court interpreted the meaning of the word "sex" in the specific context of Title IX.[150] The court ruled that it could not interpret sex to mean the same thing as it did in Title VII, as was argued in *Bostock*, because Title IX has "express statutory and regulatory carve-outs" that distinguish the sexes for the purposes of living and bathroom facilities.[151] The court officially ruled that Title IX allowed schools to separate bathrooms based on biological sex, which validated the School's policy and position that they did not violate Title IX.[152]

---

142 *Id.*

143 *Id.* at 808 (citing Bostock v. Clayton Cnty., 590 U.S. 644 (2020)).

144 *Bostock*, 590 U.S. at 681.

145 *Adams*, 57 F.4th at 808.

146 *Id.* at 808-09.

147 *Id.* at 809.

148 *Id.*

149 *Id.* (citing Nguyen v. I.N.S., 533 U.S. 53, 60 (2001)).

150 *Id.* at 811.

151 *Id.*

152 *Id.* at 817.

B. Grimm v. Gloucester County School Board

Gavin Grimm identified as a female when he first enrolled in Gloucester High School.[153] Grimm began to identify as a male as he felt he related to male characters and officially disclosed himself as transgender.[154] He was eventually diagnosed with gender dysphoria and prepared to start living and presenting himself as a male in his daily life.[155] Part of this change included using bathrooms consistent with his gender identity, so he began using men's restrooms in public with no issues.[156] However, the bathrooms in the school were all single-sex and multi-stalled, located throughout the school.[157] Because of this, Grimm was initially only able to use the bathroom in the nurse's office, which he found to be stigmatizing, until he finally received permission to use the boys' bathroom.[158] He used this bathroom for several weeks without any problems, but once the adults in the community found out, they complained.[159] This resulted in a school board member proposing a policy in which students must use the restrooms and locker room that matched their "biological genders."[160] Additionally, those with "gender identity issues [were] provided an alternative appropriate private facility."[161] The policy was passed by the school board along with other agreements to construct single-stall unisex restrooms.[162] Grimm was notified that he could no longer use the boy's bathroom until these restrooms were finished.[163] During this time, Grimm also transitioned and received a state court order stating that he was a male and an amended birth certificate to accurately reflect his gender.[164] However, despite having an amended birth certificate, the school board refused to amend Grimm's school records to reflect his gender as male.[165] Grimm brought suit against the school board, and the district court granted his motion for summary judgment on the Title IX claim.[166]

153 Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597-98 (4th Cir. 2020).

154 *Id.* at 598.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 599.

161 *Id.*

162 *Id.* at 600.

163 *Id.* at 600.

164 *Id.* at 593, 599-600.

165 *Id.* at 593.

166 *Id.* at 603.

Grimm alleged that the bathroom policy and the school board's refusal to amend his school records violated Title IX.[167] To grant summary judgment on the Title IX claim, the court had to find "(1) that he was excluded from participation in an education program 'on the basis of sex'; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that improper discrimination caused him harm."[168] The first two elements were easily satisfied because bathrooms are a part of the education program and the school board received federal funding.[169] The third element, whether the school board made its policy decisions based on sex and whether that constituted unlawful discrimination that harmed Grimm, remained at issue.[170] On appeal, the Fourth Circuit Court of Appeals recognized the *Bostock* decision, making it easy for them to determine that "precluding Grimm from using the boy's restrooms discriminated against him 'on the basis of sex.'"[171] The court noted that the *Bostock* interpretation of Title VII guided the evaluation of these Title IX claims.[172] The court further stipulated that excluding Grimm from the boy's bathroom was impossible without referencing his "biological gender," which was defined as the sex marker on his birth certificate.[173] Therefore, sex "remains a but-for cause for the Board's actions [and] the policy excluded Grimm from the boy's restrooms on 'the basis of sex.'"[174] The third element was easily satisfied; the court held that Grimm was clearly harmed through emotional distress, suicidal thoughts, stigmatization, and isolation by having to use separate bathrooms.[175] The Fourth Circuit therefore affirmed the holding of the district court that the bathroom policy and refusal to amend students' records violated Title IX.[176]

C. A.M. by E.M. v. Indianapolis Public Schools

A.M. was a ten-year-old transgender female who received medical treatment and puberty blockers to address her gender dysphoria.[177] A.M.'s sex at birth was assigned male, but she had been living as a girl and using female pronouns since the age of four.[178] By age ten, she had her gender

167 *Id.* at 601.
168 *Id.* at 616.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.* at 616.
174 *Id.* at 616-17.
175 *Id.* at 617.
176 *Id.* at 594, 620.
177 A.M. v. Indianapolis Pub. Sch., 617 F. Supp. 3d 950, 954-55 (S.D. Ind. 2022).
178 *Id.* at 954.

marker changed to female and her legal first name changed to her preferred name on her birth certificate by an Indiana state court.[179] She began to play on an Indianapolis Public Schools girls' softball team, but shortly after joining the team, Indiana passed a statute which made it impossible for A.M. to continue playing on the girls' team.[180] The statute read: "A male, based on a student's biological sex at birth in accordance with the student's genetics and reproductive biology, may not participate on an athletic team or sport designated under this section as being a female, women's, or girls' athletic team or sport."[181] A.M., through her mother and friend, E.M., alleged that the new statute violated Title IX and sought a preliminary injunction to enjoin the enforcement of the statute.[182]

The federal district court in the case stated that a preliminary injunction was appropriate where a party shows the following three elements: "(1) it will suffer irreparable harm in the period before the resolution of its claim; (2) traditional legal remedies are inadequate; and (3) there is some likelihood of success on the merits of the claim."[183] In expanding on the Title IX claim, A.M. used the *Bostock* decision to support her argument by asserting that she was being treated differently than her cisgender classmates because of the statute.[184] The state responded that *Bostock* refused to prejudge other questions involving sex discrimination outside of the Title VII context.[185] The court's opinion pointed out that institutions covered by Title IX may not:

> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; (3) Deny any person such aid, benefit, or service; (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment.[186]

Since it was undisputed that the school was covered by Title IX, the question before the court was whether A.M. had a strong likelihood of showing that she was discriminated against on account of her sex.[187] The court recognized that the *Bostock* decision considered the meaning of "sex" in a Title VII context, but determined that it was still influential in Seventh

---

179 *Id.* at 955.

180 *Id.*

181 IND. CODE. ANN. § 20-33-13-4(b) (West 2022).

182 *A.M.*, 617 F. Supp. 3d at 954.

183 *Id.* at 961 (quoting HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cnty. of Marion, 889 F.3d 432, 437 (7th Cir. 2018)).

184 *Id.* at 962.

185 *Id.*

186 *Id.* at 963-64; 34 C.F.R. § 106.31(b) (2010).

187 *A.M.*, 617 F. Supp. 3d at 964.

Circuit Court of Appeals cases when defining "sex" under Title IX.[188] In *Bostock*, the Supreme Court recognized a distinction between homosexuality or transgender statuses and sex since Title VII did not mention either.[189] Yet, the district court in this case also acknowledged that the Supreme Court still found that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."[190] The court justified looking to *Bostock* for guidance since the opinion there did not "foreclose the application of its holding to the Title IX context."[191] Further, there was also binding precedent from a Seventh Circuit case, *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, decided three years before *Bostock*, which informed the district court's holding in this case.[192] The *Whitaker* decision held that barring a transgender boy from using the boy's bathroom was a violation of Title IX.[193] Because A.M. satisfied the requirements of both *Whitaker* and *Bostock*, the court ruled that "A.M. ha[d] established a strong likelihood that she will succeed on the merits of her Title IX claim."[194] The district court granted A.M.'s motion for a preliminary injunction against the statute and enjoined the school from disallowing A.M. to play on the girls' softball team.[195]

D. Soule by Stanescu v. Connecticut Association of Schools, Incorporated

The plaintiffs in this case consisted of four female Connecticut high school students who ran track competitively for their high schools at the state level.[196] The plaintiffs were all cisgender—they identified as the gender listed on their original birth certificates—and they alleged that the transgender participation policy ("Policy"), implemented by the Connecticut Interscholastic Athletic Conference ("CIAC"), violated Title IX.[197] The Policy allowed students to compete on athletic teams consistent with their gender identity, even if that identity was different from their sex as listed on their birth certificate.[198] The plaintiffs argued that students who are born female have "fewer opportunities for victory, public recognition, athletic

188 *Id.* (citing Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047 (7th Cir. 2017) and Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997)).

189 *Id.* at 964 (citing Bostock v. Clayton Cnty., 590 U.S. 644, 681 (2020)).

190 *Id.* (citing *Bostock*, 590 U.S. 644).

191 *Id.* at 965.

192 *Id.* (discussing *Whitaker*, 858 F.3d 1034 and *Bostock*, 590 U.S. 644).

193 *Id.* (discussing *Whitaker*, 858 F.3d 1034 and *Bostock*, 590 U.S. 644).

194 *Id.* at 965-66.

195 *Id.* at 970.

196 Soule v. Conn. Ass'n of Schs., Inc. 57 F.4th 43, 48 (2d Cir. 2022).

197 *Id.* at 47.

198 *Id.*

scholarships, and future employment 'than students who are born male.'"[199] They requested damages and two injunctions: one that barred enforcement of the Policy and one that altered records to remove achievements earned by two transgender girls who had participated in the girls' competition consistent with the Policy.[200]

On appeal, the Second Circuit Court of Appeals first discussed the elements necessary to satisfy standing.[201] To establish the constitutional requirements of standing, plaintiffs must show:

> (1) [T]hey have suffered an "injury in fact–an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[202]

The court further noted that, in seeking injunctive or declaratory relief, it was insufficient to rely on past injury; instead, plaintiffs had to show a likelihood of future injury to satisfy the standing requirements.[203] This anticipated injury had to be "impending to constitute injury in fact," meaning that "possible future injury" was insufficient.[204] The court decided that the plaintiffs' argument that the Policy would deny them a chance to be champions and deprive them of future employment opportunities failed to establish injury in fact.[205] Furthermore, the argument that correcting the records would redress the harm claimed also failed to meet the redressability requirement.[206]

The circuit court further reasoned that the language in Title IX is identical to the language in Title VII that prohibits discrimination based on sex.[207] The court acknowledged the *Bostock* holding that discrimination based on sex included discrimination based on transgender status.[208] The court opined that the Policy allowing transgender students to participate on teams consistent with their gender identity was intended to prohibit discrimination.[209] The Policy was not forbidden by Title IX.[210] "The Policy

---

199 *Id.*

200 *Id.*

201 *Id.* at 50.

202 *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

203 *Id.* (citing McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 284 (2d Cir. 2004)).

204 *Id.* (citing Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).

205 *Id.* at 50-51.

206 *Id.*

207 *Id.*

208 *Id.* (citing Bostock v. Clayton Cnty., 590 U.S. 644 (2020)).

209 *Id.*

210 *Id.*

could not be considered 'intentional conduct that violates the clear terms of [Title IX] . . . given *Bostock*.'"[211] The Second Circuit thus affirmed the district court's ruling in dismissing the plaintiffs' complaint.[212]

IV. *BOSTOCK* IN STATE-LEVEL DISPUTES

The Court's ruling in *Bostock* opened the door for sexual orientation and gender identity discrimination litigation not only at the federal level, but at the state level as well.[213] This section identifies state court cases where *Bostock* had substantial influence on the rulings.

A. Vroegh v. Iowa Department of Corrections

In this case before the Iowa Supreme Court, Jesse Vroegh claimed discrimination under Title IX.[214] Vroegh was a registered nurse employed by the Iowa Department of Corrections in the Iowa Correctional Institute for Women.[215] Vroegh was identified as a female at birth, but a few years after his employment began, he began presenting as a male.[216] He changed every source of identification to reflect his male gender and notified his supervisor that he was transgender and planning to transition.[217] During his transition, Vroegh requested permission from his supervisor to use male restrooms and locker rooms at work, but he was told that allowing this would be controversial.[218] There were single-stall unisex bathrooms in the facility that Vroegh was eventually required to use on a permanent basis.[219] Vroegh sought to have a double mastectomy for his transition, but his state health insurance, a plan provided to him by his employer, excluded coverage for gender reassignment surgeries.[220] Vroegh was terminated later that same year for allegedly providing confidential information about an inmate to a third party.[221] Vroegh sued based on sex and gender identity discrimination on account of the bathroom requirement and lack of healthcare coverage for his transition.[222] The jury found in his favor on the discrimination claims

[211] *Id.* at 56 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 642 (1999)).

[212] *Id.*

[213] *See* Jennifer S. Palmer, *The Gender-Based Pay Gap in Idaho and Beyond*, IOWA STATE BAR ASS'N, https://isb.idaho.gov/blog/the-gender-based-pay-gap-in-idaho-and-beyond (last updated July 1, 2022).

[214] Vroegh v. Iowa Dep't of Corrections, 972 N.W.2d 686, 693 (Iowa 2022).

[215] *Id.* at 693.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* at 694.

[221] *Id.* at 693.

[222] *Id.*

against the Department of Corrections and the Prison Warden for the bathroom and locker room dispute.[223] The jury also found in his favor in the discrimination claim against the Department of Administrative Services for denying health insurance coverage.[224] The state appealed both verdicts to the Iowa Supreme Court.[225]

Part of the court's opinion and relevant discussion involved whether or not transgender status discrimination can be included in sex discrimination claims.[226] Gender identity was added to the Iowa Civil Rights Act ("ICRA") in 2007 as its own separate characteristic with its own definition, so the Iowa Supreme Court affirmed the jury's verdict for the gender identity discrimination claims.[227] On the sex discrimination claim, however, the court looked first to its precedent in *Sommers v. Iowa Civil Rights Commission*, where it had found that the ICRA did not include sexual orientation or gender identity.[228] In the precedential ruling, the Iowa Supreme Court held that the purpose of the ICRA was "to place women on an equal footing with men in the workplace" and that there was no acknowledgment that transgender status was involved in that discussion.[229] Vroegh argued that the *Bostock* holding that gender identity discrimination is "based in part because of sex" superseded the *Sommers* ruling.[230] However, the Iowa Supreme Court blatantly disagreed with the *Bostock* ruling and rejected Vroegh's argument.[231] The court referenced the dissenting opinions in *Bostock*, claiming that the majority opinion "loads the dice," because discrimination can happen against someone who is transgender without discriminating against that person because of their sex.[232] The Iowa Supreme Court, therefore, reversed the jury's verdict on the sex discrimination claims and ruled against Vroegh.[233]

B. Tarrant County College District v. Sims

Amanda Sims was a former employee of Tarrant County College District ("College"), which she sued with claims of discrimination due to her

---

223 *Id.*

224 *Id.*

225 *Id.* at 695.

226 *Id.* at 700.

227 *Id.* at 703.

228 *Id.* at 701 (citing IOWA CODE ANN. § 601A.6 (West 1981) and Sommers v. Iowa C.R. Comm'n, 337 N.W.2d 470, 472-73 (Iowa 1983)).

229 *Id.* at 693.

230 *Id.*

231 *Id.*at 702.

232 *Id.* at 693 (citing Bostock v. Clayton Cnty., 590 U.S. 644, 696 (2020) (Alito, J., dissenting)).

233 *Id.* at 703.

sexual orientation.[234] She claimed she was fired shortly after revealing to her supervisor that she was a lesbian.[235] She also stated that, after revealing her sexual orientation to her religious supervisor, she began experiencing a hostile work environment and that the supervisor had negative views of the LGBTQ+ community.[236] After complaining to the Fort Worth Human Relations Commission about the discrimination, the College placed Sims on administrative leave, and she was eventually terminated for "what Sims claimed were 'pretextual reasons.'"[237] In her suit, Sims alleged violations of the Texas Whistleblower Act and the Texas Constitution.[238] The College filed a plea to the jurisdiction and a motion to dismiss the claims.[239]

Sims argued before the district court that the facts she presented in the complaint were violations of the Whistleblower Act and the Texas Constitution.[240] The College argued that it was entitled to dismissal because the remedy for Sims' claims fell under the Texas Commission on Human Rights Act ("TCHRA"), which had not been pleaded.[241] The TCHRA states:

> An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment; or (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.[242]

Sims responded that her constitutional claims could not be preempted by the TCHRA because that statute did not prohibit discrimination based on sexual orientation, and the Texas Constitution preempts all state laws.[243] The trial court judge agreed that the case was "a situation where there is no remedy [under the TCHRA] for the underlying conduct of being discriminated against based on sexual orientation."[244] The College appealed the decision.[245]

---

234 Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 325 (Tex. App. 2021).

235 *Id.* at 326.

236 *Id.* at 326.

237 *Id.*

238 *Id.*

239 *Id.*

240 *Id.* at 325.

241 *Id.* at 326.

242 TEX. LAB. CODE ANN. § 21.0015 (West 2015); *see Sims*, 621 S.W.3d at 328.

243 *Sims*, 621 S.W.3d at 326.

244 *Id.*

245 *Id.* at 327.

On appeal before the Texas Court of Appeals in Dallas, the College argued that the trial court erred in denying its plea to the jurisdiction on the whistleblower and constitutional claims.[246] The appeals court pointed out that a plea to the jurisdiction challenges the court's authority to "determine the subject matter of the cause of action."[247] If a plea to the jurisdiction challenging the pleadings occurs, the court must determine if there were sufficient facts alleged to demonstrate the court's authority to hear the case.[248] If the facts are insufficient but the jurisdictional defect is curable, plaintiffs are allowed the opportunity to amend their pleadings.[249]

Part of the College's defense was that it did not waive governmental immunity.[250] However, the court stated that TCHRA suits automatically waive governmental immunity.[251] The Court of Appeals further found that the TCHRA was enacted with the purpose of fighting discrimination and retaliation in the workplace and to conform with Title VII.[252] There was, however, no state-level precedent in Texas that had decided whether sexual orientation discrimination was prohibited under the TCHRA.[253] Yet, there had been a commonality in the federal circuit courts that sexual orientation and gender identity are not protected under Title VII.[254] Nevertheless, the court of appeals recognized that the *Bostock* opinion was issued four months after the trial court decision.[255] As already noted, the *Bostock* ruling held that adverse employment actions against an employee for being gay or transgender violates Title VII.[256] Since there was no Texas precedent, in this case of first impression, the appellate court decided it must follow the *Bostock* ruling and read TCHRA's discrimination based on sex to include discrimination based on sexual orientation and gender identity.[257] This meant that Sims' discrimination claims could be properly brought under TCHRA, which foreclosed her relief under the Whistleblower Act.[258] The court explained that if the jurisdictional defect is curable, the plaintiff must have an opportunity to amend.[259] Since Sims claimed she was fired because of her

246 *Id.*

247 *Id.* (citing Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000)).

248 *Id.* (citing Ryder Integrated Logistics, Inc. v. Fayette Cnty., 453 S.W.3d 922, 927 (Tex. 2015)).

249 *Id.* (citing Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004)).

250 *Id.* at 326.

251 *Id.* at 328.

252 *Id.*

253 *Id.* at 323.

254 *Id.* at 328.

255 *Id.*

256 *Id.* (citing Bostock v. Clayton Cnty., 590 U.S. 644, 681 (2020)).

257 *Id.* at 329.

258 *Id.*

259 *Id.*

sexual orientation, she mischaracterized this conduct to fall under the Whistleblower Act and should have brought the claim under TCHRA.[260] The court of appeals remanded the case to give Sims an opportunity to amend her pleadings.[261]

C. Clark County School District v. Bryan

This case involved a Title IX dispute before the Nevada Supreme Court.[262] Two sixth graders, Ethan and Nolan, attended Greenspun Junior High, where they experienced bullying that included homophobic name calling and inappropriate touching from two other students.[263] One event involved Nolan getting stabbed in the groin with a pencil, with the perpetrator claiming it was done to find out if Nolan was a boy or a girl.[264] Ethan's mother learned about the details of this bullying and emailed his teacher and school counselor to report it.[265] Nolan's mother also learned about the incidents and spoke to the dean and vice principal.[266] The bullies' homophobic remarks and sexual harassment continued over a significant period of time and caused both Ethan and Nolan to experience serious stress and thoughts of suicide.[267] Both of their mothers filed a Title IX lawsuit against the Clark County School District ("CCSD").[268]

Mixed testimony from the district court included CCSD employees stating that they believed the incidents were being investigated and others who had no knowledge of the bullying.[269] Furthermore, no administrator could recall completing the necessary investigation of bullying complaints as required under Nevada law.[270] The relevant Nevada law states:

> A member of a governing body, any employee of a governing body, including, without limitation, an administrator, teacher or other staff member, a member of a club or organization which uses the facilities of any school, regardless of whether the club or organization has any connection to the school, or any pupil shall not engage in discrimination based on race,

---

260 *Id.*

261 *Id.* at 331. The case was settled in 2023. *See* Miranda Suarez, *Tarrant County College Settles Discrimination Lawsuit That Expanded LGBTQ Workplace Protections*, KERA NEWS (Mar. 9, 2023, 1:33 PM), https://www.keranews.org/news/2023-03-09/tarrant-county-college-settles-discrimination-lawsuit-that-expanded-lgbtq-workplace-protections.

262 Clark Cnty. Sch. Dist. v. Bryan, 136 Nev. 689 (Nev. 2020).

263 *Id.* at 690.

264 *Id.*

265 *Id.*

266 *Id.*

267 *Id.* at 691.

268 *Id.*

269 *Id.*

270 *Id.*

> bullying or cyber-bullying on the premises of any school, at an activity sponsored by a school or on any school bus.[271]
>
> A teacher, administrator, coach or other staff member who witnesses a violation of NRS 388.135 or receives information that a violation of NRS 388.135 has occurred shall report the violation to the administrator or his or her designee as soon as practicable, but not later than a time during the same day on which the teacher, administrator, coach or other staff member witnessed the violation or received information regarding the occurrence of a violation.[272]
>
> Except as otherwise provided in this subsection, upon receiving a report required by subsection 1, the administrator or designee shall immediately take any necessary action to stop the discrimination based on race, bullying or cyber-bullying and ensure the safety and well-being of the reported victim or victims of the discrimination based on race, bullying or cyber-bullying and shall begin an investigation into the report. If the administrator or designee does not have access to the reported victim of the alleged violation of NRS 388.135, the administrator or designee may wait until the next school day when he or she has such access to take the action required by this subsection.[273]

Because of these Nevada statutes, the district court found CCSD liable for the harassment towards Nolan and Ethan because the school district failed to properly investigate the conduct as required by the laws, and CCSD appealed.[274]

The Nevada Supreme Court, required to follow federal law that oversees Title IX claims for harassment, recognized that Title IX liability requires harassment suits to be "on the basis of sex."[275] In addressing the issue, the court looked to Title VII because "the prohibition there is substantially similar to Title IX's prohibition."[276] The court understood that several conflicts had arisen over whether Title IX protected individuals based on their sexual orientation and gender identity.[277] The ruling was aided by the *Bostock* decision, where the Supreme Court found discrimination based on sexual orientation and gender identity to be sex discrimination under Title

---

271 NEV. REV. STAT. ANN. § 388.135 (West 2021).

272 § 388.135(1).

273 § 388.135(2).

274 *Bryan*, 136 Nev. at 691-92.

275 *Id.* at 692.

276 *Id.* at 693 (citing Grimm v. Gloucester Cnty. School Bd., 972 F.3d 586, 616 (4th Cir. 2020) (explaining that case law interpreting Title VII "guides our evaluation of claims under Title IX")); Adams v. School Bd. of St. John's Cnty., 57 F.4th 791, 817 (11th Cir. 2022) ("using caselaw interpreting Title VII to address whether a school's bathroom policy discriminated against transgender status in violation of Title IX because both titles prohibit discrimination based on sex and use a but-for causation standard.").

277 *Bryan*, 136 Nev. at 693.

VII.[278] The Nevada Supreme Court, applying the *Bostock* Court's reasoning to the facts before them, concluded that Title IX prohibits discrimination against homosexual and transgender individuals as sex discrimination.[279] The court further opined that harassment based on perceived sexual orientation falls within Title IX because sexual orientation was a motivating factor in the bullying.[280] Therefore, the harassment perpetrated against Ethan and Nolan was prohibited by Title IX.[281]

However, despite identifying harassment based on sexual orientation as prohibited under Title IX, the court stated that a Title IX claim requires "deliberate indifference,"[282] in that "the defendant acted with 'deliberate indifference' to the harassment."[283] The deliberate indifference standard is strict and requires more than mere negligence.[284] The Nevada Supreme Court held that, in this case, the "deliberate indifference" element was not satisfied without further investigation.[285] In other words, the district court focused too much on considering the school's violation of state statutes as deliberate indifference by not addressing whether CCSD was more than negligent, whether its inaction was unreasonable given the circumstances, and whether that the inaction either caused the harassment or caused the plaintiff to be subjected to it.[286] The case was remanded for further investigation to see if the events constituted deliberate indifference under the applicable federal case law standards.[287]

CONCLUSION

The U.S. Supreme Court has extended protections for individuals of the LGBTQ+ community under Title VII, which now protects them against employment discrimination.[288] If sexual orientation or gender identity was a motivating factor for an adverse employment action against an employee, that employee has standing to sue under Title VII through the *Bostock* holding.[289] The idea that sexual orientation and gender identity

[278] *Id.* at 694 (citing Bostock v. Clayton Cnty., 590 U.S. 644 (2020)).

[279] *Id.* (citing *Grimm*, 972 F.3d at 616-17 ("construing Title IX as encompassing discrimination against transgender individuals pursuant to *Bostock*")).

[280] *Id.*

[281] *Id.*

[282] *Id.* at 697 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999)).

[283] *Id.* (citing *Davis*, 526 U.S. at 643).

[284] *Id.*

[285] *Id.* at 701.

[286] *Id.*

[287] *Id.*

[288] *See generally* Amanda Hainsworth, Bostock v. Clayton County, Georgia, *590 U.S. ___, 140 S. Ct. 1731 (2020)*, 64 BOS. BAR J. 22 (2020).

[289] *See generally id.* at 23-24.

discrimination necessarily involves sex discrimination has broad applicability because of several laws, both at the federal and state level, prohibiting discrimination based on sex.[290]

Supreme Court decisions are binding across all other courts in the country and courts often use Title VII cases as guidance in their decisions in civil rights cases.[291] However, while some courts followed *Bostock* as binding precedent, others ruled that it was inapplicable to them, and others completely disagreed with the decision and refused to follow it completely.[292] Title IX has been and continues to be a popular law used to interpret sex discrimination claims; it was inevitable that the *Bostock* ruling would influence those disputes as well.

Each court in the United States, at both the federal and state levels, is likely to have its own interpretation of precedent, and it is crucial for everyone—from the law practitioner to an individual considering bringing a sexual orientation or gender identity discrimination claim—to understand these decisions due to their binding authority among the courts within their jurisdiction. Given the ripeness of this topic, knowing the intricacies of these court rulings, as well as staying updated on newly issued opinions, can give an idea of how to navigate future discrimination disputes given the circumstances of a case.

[290] *See generally id.*

[291] *See generally id.*

[292] *See, e.g.*, Vroegh v. Iowa Dep't of Corrections, 972 N.W.2d 686, 672 (Iowa 2022) ("We disagree with the *Bostock* majority on this issue and thus reject Vroegh's argument advancing it," referring to the argument that sex discrimination included gender identity and that an employer could discriminate against transgender status without knowing the sex of the individuals); Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1025 (10th Cir. 2021) (the circuit court notes that transgender discrimination is discrimination based on sex under Title VII, according to *Bostock*, which overrules the circuit court's prior ruling that transgender status is not protected by Title VII).