RECENT DEVELOPMENTS IN EQUAL-PROTECTION LITIGATION FOR TRANSGENDER PEOPLE

A look at *Bostock v. Clayton County* and *Grimm v. Gloucester County School Board.*

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Eighteen months ago, the U.S. Supreme Court reshaped employment law by holding, in *Bostock v. Clayton County,* that Title VII prohibits firing an employee because of the employee's status as gay or transgender.[1] Although the court emphasized that *Bostock* was a statutory-construction decision limited to Title VII,[2] its effects beyond Title VII—and particularly in equal-protection litigation for transgender plaintiffs—were immediate and unmistakable.

But while *Bostock* had an important effect on equal-protection litigation, change was already brewing. This article examines the rapidly developing area of equal-protection litigation for transgender people and *Bostock*'s role in that development.

Bostock: "Because of Sex"

Bostock addressed three cases brought by plaintiffs fired for being gay or transgender.[3] The question the court presented was, Does Title VII's prohibition against firing someone "because of" that person's sex prohibit the firing of someone for their status as gay or transgender?[4] The court's holding was "simple and momentous."[5] In a majority opinion authored by Justice Neil Gorsuch, the court determined that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[6]

The court focused on two issues. First, the court noted that Title VII emphasized the experience of an individual, rather than a group.[7] Therefore, the court rejected the idea that a gender-identity discrimination policy that discriminated equally between transgender men and transgender women would "balance out" because both men and women were generally treated the same; the question was not whether groups were treated fairly overall, but whether the individual plaintiff was treated fairly.[8]

Second, the court viewed sexual-orientation and gender-identity discrimination as rooted in an intolerance for traits or behaviors in one gender that would be accepted in another.[9] This is true, the court noted, regardless of whether the employer perceives its discrimination to be sex-based.[10]

In a spirited and lengthy dissent, Justice Samuel Alito (joined by Justice Clarence Thomas) criticized the reasoning of the court's decision.[11] Alito also expressed concern about its scope. He said that "the Court's decision may exert a gravitational pull in constitutional cases," particularly equal-protection cases.[12]

Alito's prediction that *Bostock* may affect future equal-protection claims for transgender people proved true.[13] Yet a closer look reveals that *Bostock* was only part of a story already being written.

The Underlying Equal-Protection Framework

In evaluating a claim under the Equal Protection Clause of the 14th Amendment[14]—i.e., an attack on a law because it treats similarly situated people differently—the pivotal question is the level of scrutiny applied to the law at issue.[15] Most classifications are considered benign and are upheld as long as they are rationally related to a legitimate state interest.[16] Race-based classifications, by contrast, are "inherently suspect," must be "strictly scrutinized," and typically fail equal-protection challenge.[17]

Classifications based on gender, considered a "quasi-suspect" class, fall somewhere in between, and are subject to a "heightened scrutiny" or "intermediate scrutiny" standard.[18] This standard requires that the law be substantially related to a sufficiently important governmental interest to survive.[19]

Given that *Bostock* held discrimination against transgender people to be sex-based, it is easy to understand why Alito said the court's holding may be expanded to the equal-protection context. But the next case on this topic, *Grimm v. Gloucester County,* painted a more complex picture.

Grimm v. Gloucester County School Board: Heightened Scrutiny Without *Bostock*

Just two months after *Bostock,* the U.S. Court of Appeals for the 4th Circuit issued its opinion in *Grimm v. Gloucester County School Board.*[20] The court affirmed summary judgment granted for Gavin Grimm, a transgender boy who sued his local school board over its school-restroom policy (requiring students to use restrooms according to the gender assigned them at birth) and its refusal to amend his school records to reflect the gender shown on his amended birth certificate.[21]

The 4th Circuit held that the board's policy failed heightened scrutiny under the Equal Protection Clause and that it violated Title IX by discriminating against Grimm on the basis of sex.[22]

But while *Grimm* considered *Bostock* in its opinion, it applied *Bostock* to Grimm's statutory Title IX claims *only*.[23] The 4th Circuit found that heightened scrutiny applied to Grimm's equal-protection claims for two independent reasons—neither of which depended on *Bostock.*

First, the court concluded that the board's actions created sex-based classifications because they necessarily referred to gender for their application, both by referring to the gender marker on Grimm's original birth certificate to determine how he should be

treated, and also because the board treated Grimm differently because "he was viewed as failing to conform to the sex stereotype propagated by the Policy."[24] In so doing, the court cited a long line of cases from across the country that had reached similar conclusions.[25]

Second, the court alternatively concluded that heightened scrutiny applied because transgender people constitute a suspect or quasi-suspect class.[26] The court evaluated whether transgender people as a class: (1) have historically been subject to discrimination; (2) possess a defining characteristic that does not relate to their ability to perform or contribute to society; (3) may be defined as a discrete group by obvious, immutable, or distinguishing characteristics; and (4) constitute a minority lacking political power.[27]

The court held transgender people satisfy all four factors, independently justifying the application of heightened scrutiny.[28] Under that standard, the court concluded that the board's restroom policy was not substantially related to its important interest in protecting students' privacy, and that its refusal to update Grimm's school file was not substantially related to its important interest in maintaining the accuracy of school records.[29]

A Simpler Analysis: *Bostock* = Heightened Scrutiny?

While *Grimm* and other courts have concluded that transgender individuals independently qualify as a quasi-suspect class entitled to heightened scrutiny, other post-*Bostock* courts have adopted the analysis Alito predicted: that because *Bostock* held that discrimination based on transgender status is sex-based discrimination for purposes of Title VII, it is also discrimination subject to heightened scrutiny under the Equal Protection Clause.

For example, in *N.H. v. Anoka-Hennepin School District No. 11,* a transgender boy challenged a school requirement that he use a separate area of the boys' locker room under the equal-protection clause of the Minnesota Constitution.[30] Although the court rejected the boy's argument that his claim should be governed by a strict-scrutiny standard, it noted that the *Bostock* decision "equated transgender discrimination with sex discrimination," and therefore intermediate scrutiny should apply.[31]

Other courts rely on both lines of cases. In *Hecox v. Little,* transgender and cisgender female athletes challenged an Idaho law that barred transgender women from participating in women's sports teams, established a dispute process that would require students to undergo a potentially invasive sex verification process, and created a private cause of action against schools for any student who was harmed or deprived of athletic opportunity due to the participation of transgender women on a women's team.[32]

In assessing which standard to apply, the court relied both on district precedent determining that transgender people qualify as a quasi-suspect class and *Bostock*'s determination that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[33]

Conclusion

Alito predicted that courts may extend *Bostock* beyond its statutory-construction origins. But *Grimm* and its predecessors make clear that change was already in progress before *Bostock*. And although the court denied review of *Grimm,* it will have other opportunities to review the application of heightened scrutiny to transgender people. What it will decide then is anyone's guess. **TBJ**

NOTES

1. *Bostock v. Clayton Cty., Ga.,* 140 S. Ct. 1731 (2020) (citing 42 U.S.C. §§ 2000e–2(a)(1)).
2. *Id.* at 1753.
3. *Id.* at 1737.
4. *Id.* at 1738–39.
5. *Id.* at 1741.
6. *Id.*
7. *Id.* at 1740.
8. *See id.* at 1741.
9. *Id.*
10. *Id.* at 1742.
11. *See id.* at 1754–1822 (Alito, J. dissenting).
12. *Id.* at 1783.
13. *See id.* (citing, inter alia, *Grimm v. Gloucester Cty. Sch. Bd.,* No. 19–1952 (4th Cir. Nov. 18, 2019) and Complaint in *Hecox,* No. 1:20-CV-00184, both discussed *infra*).
14. U.S. Const. amend. XIV, § 1.
15. *See Grimm v. Gloucester Cty. Sch. Bd.,* 972 F.3d 586, 606–07 (4th Cir. 2020), *cert. denied,* 2021 WL 2637992 (U.S. Jun. 28, 2021).
16. *Id.*
17. *See id.*
18. *Id.* at 607–08.
19. *Id.* at 608.
20. *See supra* n. 15.
21. *Id.* at 593–94.
22. *Id.* at 616.
23. *See id.*
24. *Id.* at 608.
25. *Id.* at 608–09.
26. *Id.* at 610.
27. *Id.* at 611–13 (citing *Bowen v. Gilliard,* 483 U.S. 587 (1987) and *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985)).
28. *Id.* Several other courts have reached the same conclusion. *See, e.g., Brandt v. Rutledge,* 4:21CV00450 JM, ___ F. Supp. 3d ___, 2021 WL 3292057 at *2 (E.D. Ark. Aug. 2, 2021), appeal filed; *Ray v. McCloud,* 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); *F.V. v. Barron,* 286 F. Supp. 3d 1131, 1144–45 (D. Idaho 2018); *Evancho v. Pine-Richland Sch. Dist.,* 237 F. Supp. 3d 267, 288–89 (W.D. Pa. 2017); *Adkins v. City of New York,* 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).
29. 972 F. 3d at 614–15.
30. 950 N.W.2d 553 (Minn. Ct. App. 2020).
31. *Id.* at 570. *See also Taking Offense v. State,* 66 Cal. App. 5th 696, 281 Cal. Rptr. 3d 298, 322 (Cal. Ct. App. July 16, 2021) (reaching same conclusion under California and U.S. Constitutions), appeal filed.
32. 479 F. Supp. 3d 930 (D. Idaho 2020), appeal filed.
33. *Id.* at 973–74 (citing *Barron,* 286 F. Supp. 3d at 1143–45 and *Karnoski v. Trump,* 926 F.3d 1180, 1201 (9th Cir. 2019), and quoting *Bostock,* 140 S. Ct. at 1741). *See also Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth (BAGLY) v. U.S. Dep't of Health and Human Services,* No. 20-11297-PBS, __ F. Supp. 3d __, 2021 WL 3667760 at *15 (D. Mass. Aug. 18, 2021) (interpreting Fifth Amendment).

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