

States that Lack Express Statutory Protections Against Sexual Orientation and Gender Identity Discrimination but in which Courts, State Agencies, or State Officials Are Now Following *Bostock* in Interpreting Their State Sex Discrimination Laws to Prohibit Such Discrimination

(as of 3/13/23)

The United States Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020), in which the ACLU represented two of the three prevailing employees, is having major, positive impacts across the country.

The Supreme Court ruled in *Bostock* that Title VII, the federal law barring sex discrimination in employment, covers discrimination based on sexual orientation and gender identity because, as the Court explained, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The Court reasoned as follows: "Consider, for example, 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."

The Court further reasoned: "Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

While *Bostock* arose under the federal statute barring sex discrimination, it did not rest on anything unique to that statute's wording or legislative history, but rather on generally applicable logic. Because sexual orientation refers to the relationship between an individual's **sex** and the sex of those the individual is attracted to and being transgender refers to the relationship between the **sex** the individual knows themselves to be and the sex they were assigned at birth, sexual orientation and gender identity discrimination necessarily involve sex discrimination regardless of the focus of the law barring sex discrimination.

Courts, administrative agencies that enforce state antidiscrimination laws, and state government officials in 10 states that have statutory prohibitions on sex discrimination but do not currently have express state bans on sexual orientation or gender identity discrimination have recognized this. As detailed below, these courts, administrative agencies, and state officials have taken the position, since the issuance of the *Bostock* decision, that their state sex discrimination law covers sexual orientation and/or gender identity discrimination in at least some contexts. In addition, two state agencies and one state court reached similar conclusions before the Supreme Court decided *Bostock*, based on analogous reasoning.

As a result, while there currently are only 23 states that expressly provide at least some statewide protections against discrimination based on sexual orientation and/or gender identity, there now are 36 states in which individuals can file complaints regarding sexual orientation and/or gender

identity discrimination with their state administrative agencies that handle discrimination complaints in at least some contexts.

It's important to win comprehensive express protections against sexual orientation and gender identity discrimination at the federal level and in all states. There still is no federal law explicitly providing such comprehensive protections. In addition, express, comprehensive protections against sexual orientation and gender identity discrimination currently exist in only 21 states. But, until express, comprehensive antidiscrimination protections are secured at the federal level and in all states, it is an important move forward that so many additional states have followed the reasoning of *Bostock* to provide at least some state law protections against discrimination based on sexual orientation and/or gender identity.

Below is a rundown of the states that have taken this action. Individuals who experience discrimination based on sexual orientation or gender identity in these states should discuss with legal professionals in their state whether to file a complaint with their state's administrative agency responsible for receiving, investigating, and seeking to resolve complaints regarding discrimination in addition to or as alternative to filing a complaint with agencies in local jurisdictions that prohibit sexual orientation or gender identity discrimination or, with respect to discrimination in employment, housing, education, or health care, with the federal agencies that enforce nondiscrimination laws in those settings such as the U.S. Equal Employment Opportunity Commission, the Office of Fair Housing and Equal Opportunity of the U.S. Housing and Urban Development Department, the Office for Civil Rights of the U.S. Department of Education, and the Office for Civil Rights of the U.S. Department of Health and Human Services.

Alaska: The Alaska State Commission for Human Rights website indicates that the agency believes that Alaska law prohibits discrimination based on sexual orientation, gender identity, and gender expression in at least "some instances": <https://humanrights.alaska.gov/>

Arizona: The Civil Rights Division of the Arizona Attorney General's Office is now investigating cases involving workplace discrimination based on gender identity or sexual orientation: <https://www.phoenixnewtimes.com/news/arizona-ag-will-help-gay-and-transgender-people-fight-discrimination-11476671>; see also *Bruer v. State ex rel. Bronovich*, 2021 WL 4998467, *1 (Ariz. Ct. App. Oct. 28, 2021) (noting lower court's ruling that state agrees with plaintiff that state law bars sexual orientation and gender identity discrimination)

Florida: The Florida Commission on Human Relations now accepts claims of sex discrimination in employment and public accommodations based on sexual orientation or gender identity and claims of sex discrimination in housing for non-conformity with sex stereotypes: <https://fchr.myflorida.com/sexual-discrimination>

Kansas: The Kansas Human Rights Commission has begun accepting complaints of sexual orientation and gender identity discrimination in employment, housing, and public accommodations: <http://www.khrc.net/pdf/Kansas%20Human%20Rights%20Commission%20Concurs%20with%20the%20US%20Supreme%20Court%20Decision%20in%20Bostock%20v%20Clayton%20County.pdf>

Montana: Montana's Department of Labor and Industry has found that discrimination based on gender identity is a form of discrimination based on sex that violates the state's Human Rights Act: *Maloney v.*

Yellowstone County, et al., Cause No. 1570–019 & 1572–2019 (available at https://www.aclumontana.org/sites/default/files/field_documents/maloney.hod_crv.pdf)

Nebraska: Nebraska’s Equal Opportunity Commission now accepts complaints of sexual orientation and gender identity discrimination in employment and housing:

https://starherald.com/news/regional_statewide/state-agency-applies-u-s-supreme-court-ruling-on-lgbt-job-rights-to-housing-cases/article_50a37ed4-e90f-5709-a9a8-c72ed8495daa.html

North Dakota: The North Dakota Department of Labor and Human Rights is now accepting charges of discrimination based on sexual orientation and gender identity in employment, housing, public services, credit transactions, and public accommodations: <https://www.nd.gov/labor/news/nddolhr-now-accepting-and-investigating-charges-discrimination-based-sexual-orientation-and>

Ohio: The Ohio Civil Rights Commission now accepts charges of sexual orientation and gender identity discrimination in employment, housing, credit, and public accommodations:

<https://crc.ohio.gov/FilingaCharge/LGBTQ.aspx>

Texas: The Texas Court of Appeals has ruled that the Texas Commission on Human Rights Act’s ban on sex discrimination in employment and housing bars discrimination based on sexual orientation and gender identity: *Tarrant County College Dist. v. Sims*, 621 S.W.3d 323, 329 (2021).

West Virginia: A federal district court has held that West Virginia’s Human Rights Act’s ban on sex discrimination prohibits discrimination based on sexual orientation. *Jarrell v. Hardy Cellular Telephone*, 2020 WL 4208533, *2 (S.D. W. Va. July 22, 2020). A West Virginia state trial court ruled that the state’s Human Rights Act’s ban on sex discrimination also prohibits discrimination based on gender identity. See <https://woay.com/a-native-west-virginia-transgender-man-breaks-ground-regarding-lgbtq-rights/>

In addition, prior to *Bostock*, state agencies in Michigan and Pennsylvania came to the same conclusion:

Michigan: The state Department of Civil Rights held in 2018 that that the state’s statutory prohibition of sex discrimination also applies to sexual orientation and gender identity and that it would begin accepting complaints regarding such discrimination:

<https://www.detroitnews.com/story/news/local/michigan/2018/05/21/gay-trans-michigan-discrimination-protections/630204002/>. The Michigan Supreme Court agreed in *Rouch World, LLC v. Dept. of Civil Rights*, ___ N.W. 2d ___ 2022 WL 3007805 (July 28, 2022): [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwji0ZfL7-f6AhVdK0QIHerjDs4QFnoECBkQAQ&url=https%3A%2F%2Fwww.courts.michigan.gov%2F4a223d%2Fsiteassets%2Fcase-documents%2Fopinions-orders%2Fmsc-term-opinions-\(manually-curated\)%2F21-22%2Frouch-world-op.pdf&usg=AOvVaw2BJudNtecY9gROJLSHgOyl](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwji0ZfL7-f6AhVdK0QIHerjDs4QFnoECBkQAQ&url=https%3A%2F%2Fwww.courts.michigan.gov%2F4a223d%2Fsiteassets%2Fcase-documents%2Fopinions-orders%2Fmsc-term-opinions-(manually-curated)%2F21-22%2Frouch-world-op.pdf&usg=AOvVaw2BJudNtecY9gROJLSHgOyl). The Michigan legislature has now passed legislation to explicitly prohibit sexual orientation and gender identity discrimination under state law, which the state’s Governor is expected to sign: <https://www.michamber.com/news/elliott-larsen-civil-rights-amendment-bill-clears-house-and-senate-governor-expected-to-sign-soon/>.

Pennsylvania: The state Human Rights Commission ruled in 2018 that the state’s statutory prohibition of sex discrimination extends to sexual orientation and gender identity discrimination and that it would begin accepting such complaints: <https://www.psba.org/member-services/legal/psba-lgbtqia-legal->

[update/pennsylvania-human-relations-commission-phrc-guidance-august-2-2018/](https://www.attorneygeneral.gov/protect-yourself/civil-rights/lgbtq-equality/). The Pennsylvania Office of Attorney General's Civil Rights Enforcement Section has announced that it also will accept complaints of LGBTQ+ discrimination as complaints of discrimination on the basis of sex: <https://www.attorneygeneral.gov/protect-yourself/civil-rights/lgbtq-equality/>

Further, the **Missouri** Supreme Court ruled in *Lamley v. Missouri Comm. on Civil Rights*, 570 S.W.3d 16, 26 (2019) (en banc), that discrimination based on sexual orientation in employment may be actionable as a form of sex-stereotyping in an employment discrimination case brought by a gay man. It additionally ruled in *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (2019) (en banc), that discrimination claims based on sex may be brought by transgender individuals, allowing a transgender male student to sue his school under the state's ban on sex discrimination in public accommodations for excluding him from the boys' restrooms and locker rooms at school.