



BATHROOMS AND PRONOUNS

Theresa Lynn Sidebotham, Esq.

tls@telioslaw.com

This seminar focuses on SOGI-related legal and social problems. It discusses the current unsettled legal landscape and ways to comply with the law, safeguard employees' anti-discrimination rights as well as religious beliefs and rights, and maintain Godly workplace culture.

He Said, She Said: Employee Rights

A. *Bostock* and Legal Protections for SOGI Rights

1. A number of states have laws forbidding employment discrimination on the basis of sexual orientation and gender identity (SOGI).
2. In addition, the U.S. Supreme Court has decided in *Bostock v. Clayton County* that when Title VII outlaws discrimination on the basis of sex, that also applies to SOGI status.¹



Bostock was a consolidated case where several employees were fired after they respectively (1) joined a gay softball league; (2) were discovered to be gay; and (3) transitioned from male to female.



The result of this decision is that it is unlawful to take sexual orientation or transgender status into account in making employment-related decisions.



This applies to employers with 15 or more employees, but state or local law would cover other employers in many jurisdictions.

¹ *Bostock v. Clayton County*, evaluating Title VII of the Civil Rights Act.

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.



Bostock did note that it was not directed at limited religious rights.

3. The EEOC has issued guidance on this topic under its policy.²



The EEOC takes the position that customer or client preferences may not be considered in decision-making either.



The EEOC takes the position that you can have sex-segregated bathrooms but you may not deny access based on gender identity. Therefore, people with the biological features of a man may access woman's shower rooms, bathrooms, etc., and vice versa.



Using pronouns the individual does not like can be harassment, though it must be severe or pervasive.

4. In 2022, the EEOC's position was found unlawful and vacated by the US. District Court for the Northern District of Texas.³



The court held that *Bostock* referenced discriminating because of status, but did not address all conduct. The majority opinion in *Bostock* disclaimed addressing bathrooms, locker rooms, dress codes, etc. It also did not address religious liberties issues.

² <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>

³ *Texas v. EEOC et al.*, 2:21-CV-194-Z (N.D. Tex.). It is interesting that the link to the case on the EEOC website will not load.

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.



The court held that by prohibiting conduct relating to dress codes, bathrooms, and pronouns, the EEOC went too far.



And also that the EEOC should have and did not follow proper rulemaking procedures to give such detailed guidance.

5. In *Lusardi v. Dep't of the Army*, the EEOC held:



A federal agency that denied an employee equal access to a common bathroom corresponding to the employee's gender identity discriminated on the basis of sex.



The agency could not condition this right on the employee undergoing or providing proof of surgery or any other medical procedure.



The agency could not avoid the requirement to provide equal access to a common bathroom by restricting a transgender employee to a single user restroom instead.⁴

B. Background and Legal Protection for Religious Liberty Rights for Employees and Employers

1. A recent U.S. Supreme Court case, *Groff v. DeJoy*,⁵ broadened religious accommodations. The *Groff* case involved a mail carrier who need an accommodation regarding working on Sundays.

⁴ *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)

⁵ *Groff v. DeJoy*, 600 U.S. 447 (2023).

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.



The previous standard for accommodations had stated that “undue hardship” involved only a “more than *de minimis*” burden. This was an odd standard, given the very different standard for disabilities, where the ADA defined “undue hardship” as “significant difficulty or expense.” Employers could usually meet this very minimal standard easily.



Under *Groff*, an employer may deny religious accommodations only when “the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”



In *Groff*’s case, needing to have other employees cover Sunday shifts for him and making other employees work overtime did not create an undue hardship.

2. This may affect other cases in the intersection of civil rights around SOGI and civil rights around religion. For instance, a music teacher sued his employer after it withdrew a religious accommodation that allowed him to refer to students by their last names.⁶



The case was remanded after *Groff*.

3. *Bear Creek Bible Church & Braidwood Management, Inc. v. EEOC*,⁷ evaluated what *Bostock* had left untouched. In this case, both a church and a Christian business filed suit based on their religious beliefs that homosexual behavior is immoral and marriage is between one man and one woman. The court held that some of their policies violated Title VII. But there were defenses for the organizations.

⁶ *Kluge v. Brownsburg Community School Corp.*, 64 F.4th 861. (7th Cir.); 2023 WL 4842324.

⁷ 571 F. Supp. 3d 571 (N.D. Texas, 2021).

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.



Title VII exception for religious organizations. The court determined that the church was exempt under this standard.



Ministerial exception (applied to the church)



Under the First Amendment, the district court found that Title VII's burdens on religion trigger strict scrutiny.



Religious Freedom Restoration Act. The company was not exempt under Title VII as a religious organization, but was protected under RFRA, because the government did not have a compelling interest to make it hire employees against its religious beliefs.



In addition to free speech, the court found expressive association.

4. On appeal, in *Braidwood Management v. EEOC*,⁸ the court reversed in part but affirmed in part. It reversed a class certification. The ruling that the church was a religious organization not burdened by Title VII was left alone. The court affirmed that the policies violated Title VII on their face, but also affirmed the RFRA defense.
5. A free speech case, *303 Creative LLC v. Elenis*,⁹ may also apply. This case was about a wedding photographer who did not want to create sites for gay weddings, though she would serve anyone. The Court held that a Christian business owner had a constitutional right to engage in free speech that disagreed with DEI standards, and could also refuse to engage in expressive activity. This case applies nationwide, but is limited to speech issues. But because it specifically protects for-profit speech about a person's specific

⁸ 70 F.3d 914 (5th Cir. 2023).

⁹ 143 S.Ct. 2298 (2023).

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.

beliefs, it may apply to attorneys. This case upheld the rights of business owners not to engage in expressive speech they disagreed with.

6. A federal district court case that went against a religious organization, *McMahon v. World Vision*,¹⁰ held that for a religious organization to rescind a job offer to an applicant in a same-sex marriage based on its statement of faith was discriminatory under Title VII and the Washington statute.



World Vision claimed the religious organization exception, but the court refused to apply that to sexual orientation.



World Vision argued that a BFOQ should apply. The court disagreed.



World Vision argued for a ministerial exception and the court determined the job was secular.



The court also rejected First Amendment arguments.

7. In *Meriwether v. Hartop*,¹¹ a professor refused to use a student's preferred pronouns. He attempted a compromise, but was disciplined. The court held the university had violated his free speech and free exercise rights.
8. In *Kluge v. Brownsburg Community School Corp.*¹², another teacher proposed a religious accommodation in the "preferred pronouns" problem. The school first accepted it, then revoked it. The court held that Mr. Kluge has a prima facie discrimination case for failure to accommodate.

¹⁰ 2023 WL 8237111.

¹¹ 992 F.3d 492 (6th Cir. 2021).

¹² No. 21-2475 (7th Cir. 2023).

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.

9. In *Vlaming v. West Point School Board*,¹³ a teacher was fired for refusing to use a student’s preferred pronouns (inconsistent with biological sex). The court reinstated the case, commenting that “[a]bsent a truly compelling reason for doing so, no government . . . can lawfully coerce its citizens into pledging verbal allegiance to ideological views that violate their sincerely held religious beliefs.”
10. In *Haskins v. Bio Blood Components*,¹⁴ an employee refused to call a fellow employee, a biological female who identified as male, by male pronouns. Haskins requested an accommodation, but the employer denied the request outright. The court held that Haskins’ claim was viable.

Navigating Competing Rights

A. Policies That Protect Everyone’s Rights

An employer should draft policies that address all the relevant rights. If the employer is a religious entity, it will want to specify any doctrinal limitations. Generally, policies would include:

1. No sexual or other harassment



Intentionally refusing to use preferred names and pronouns could be harassment and could create a hostile work environment.

2. Good reporting options in place for employees and members to raise concerns
3. Interactive discussion for accommodations around disability and religion, as required
4. Dignity and respect for all, including a respectful environment. While employees may have First Amendment free exercise and expressive rights NOT to say certain things, rude or disrespectful speech is not appropriate.

¹³ <https://adfmedialegalfiles.blob.core.windows.net/files/VlamingDecision.pdf>

¹⁴ 1:22-cv-586 (W.D. Mich. Feb. 27, 2023).

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.

5. Religious beliefs of the organization (if relevant)

B. Good Documentation

1. If applicable, employers should have detailed job descriptions with any religious requirements, especially for ministerial jobs.
2. If applicable, employers should have clear organizational statements of faith that outline religious beliefs.
3. Interactive discussions should also be documented carefully.

C. Good Faith Interactive Discussion

1. An employee may request an accommodation about pronoun use based on religious beliefs.
2. This requires a good-faith interactive dialogue to discuss reasonable accommodation. An accommodation must be provided unless it would result in substantial increased costs to the business.
3. The interactive accommodation should also include consideration about how to show respect for employees with SOGI issues. While such employees are not entitled to accommodation (unless they assert disability or religious rights), they are entitled to an environment free from harassment.

D. Approaches Related to Bathrooms

1. Consider the interests and risk factors of different stakeholders.



Approximately 25% of women have been sexually abused, usually by men. Having to share a bathroom or locker room space with biological males can be retraumatizing for them and feel very unsafe.

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.



The vast majority of child sexual abuse of both boys and girls is committed by biological males. Statistically girls are abused at a much higher rate than boys (1 in 4 girls to 1 in 20 boys). Allowing adult biological males into intimate spaces with female children is not best practices for child safeguarding.



Transgender and gay individuals, especially children, are statistically more likely to be abused, usually by biological males. Therefore, bathroom and locker room safety are also a concern for them, especially for children.

2. Ministries such as churches are not considered public accommodations and generally have the right to organize their bathroom spaces as they see fit. However, safety considerations still apply.
3. Other employers may be in violation of the law if they do not allow transgender individuals to use the bathroom of their choice.



Employers may want to consider renovating bathrooms and locker rooms to be unisex and single stall. This can be done by creating all single bathrooms. It can also be done by creating solid stalls that can be locked and that go all the way to the floor within a multiple-stall bathroom or changing room.

Conclusion

Employers should think through their policies carefully and attempt to guard the rights of all stakeholders, making sure everyone is treated with respect.

This resource is for informational purposes only and may not apply to a given place, time, or set of facts. It is not intended to be legal advice, and should not be acted upon without specific legal advice based on the particular situation.