

LGBTQ+ Protections in the Workplace Post Bostock

By Pedro P. Forment & Michelle E. Phillips

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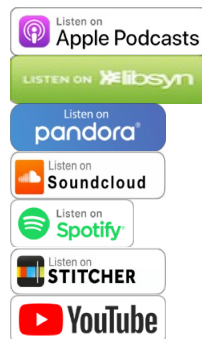
Details

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The Supreme Court in *Bostock* held that the prohibition against discrimination on the basis of “sex” includes discrimination on the basis of sexual orientation or gender identity.

This episode of *We get work™* explores how employers can reduce the risk of discrimination claims based on gender expression and foster a workplace culture where these issues do not become sources of tension in the employment relationship.

Jackson Lewis P.C. · LGBTQ+ Protections in the Workplace Post Bostock



Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast *We get work™*. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

Last year in the landmark case of *Bostock versus Clayton County*, the United States Supreme Court held that Title VII rendered unlawful the decision not to hire, fire, or negatively impact an employee based on their sexual orientation or gender identity. While providing needed clarity on federal non-discrimination employment protections, the decision left many unanswered questions. This episode of *We get work™* explores the impact of the *Bostock* decision on workplace issues, company inclusivity initiatives, and the actual lived experience of LGBTQ+ employees in our workplaces.

Our hosts today are Michelle Phillips and Pedro Forment, principals, respectively, in the White Plains and Miami offices of Jackson Lewis.

When Michelle counsels clients, she speaks from personal experience, and has dedicated her practice to advising clients on race, gender, ethnic, inter-generational, interfaith, LGBTQ+, and other inclusion issues. She conducts internal investigation, litigates and leads programs on employment discrimination, DE&I, and sexual harassment.

Pedro, a former attorney for the US Department of Labor's Office of the Solicitor specializes in OSHA and litigates all forms of employment discrimination. He is also a frequent lecturer on employment law, as well as workplace safety and health issues, and is a member and supporter of many diverse and minority legal associations, including the Minority Law Student Mentoring Program.

Michelle and Pedro, the question on everyone's mind today is what do employers need to do to ensure that the Supreme Court's mandate in Bostock is being complied with and truly embraced? And if they don't, how will that impact my business?

Michelle ([02:26](#)):

Well, thank you Alicia so much for having us. Pedro and I, we're both partners at Jackson Lewis. We both were the co-affinity group leaders of OPAL, which is out professionals and allies in law resource group. And Pedro, I miss you. I loved being co-partners with you, and it's so great to be doing this podcast together. It means a lot to me. And, I just think about all of the progress that we've made together from when we started working together. And when you look at the Bostock decision, there's this sort of what the law says, but then there's, for employers, what does that mean to the company? Right? So the Bostock decision said that, at least for companies that have 15 or more employees on a federal level, that gender identity and sexual orientation discrimination is prohibited.

So, that's the law, but then there's your lived experience. So, the question is, what do employers need to do for the lived experience? Taking the law, and where does that relate to in the workplace and where does that not relate to in the workplace? So, you take Pedro or myself, and we're going to run through our own coming out stories, and we're going to look at what did the Bostock decision say? What did it not say? We're going to take employers through from when the employee is hired, the hiring process, the whole life cycle of an employee. How do we incorporate the Bostock decision in terms of what employers need to do?

And I was thinking about just for myself and why I was so hesitant to come out. Here I am, like the poster child of LGBTQ, right? But yet, I was not comfortable coming out in this amazing firm that we both work for, which is really the national leader in the employment law space. And yet, due to my, whether it's my own internalized homophobia was there, it's the experience that I had working in other predecessor firms, all of which were mostly in the employment law arena, I did not feel comfortable coming out until I was a partner at Jackson Lewis.

And it's not like I didn't have great experiences working with people. I mean, I met my wife through one of the founders of Jackson Lewis, Bill Krupman. He literally introduced me to someone, Michael [Meaney 00:27:39], who is a former HR manager here, who then introduced me to Mary. Right? So you would think given

that track record, it would be the first thing I would do. But yet, that's the distinction between what the law says, and then maybe these things that we think in our mind. Like, "Yeah, okay. They accept me, but do they really accept me? And am I willing to put my career on the line under the hope? Am I willing to put my partnership on the line under the hope that they accept me?"

So that's just kind of an opening. Pedro, I wanted to give you an opportunity. You had a very different experience than I did. You've been out, loud, and proud from the day you got here. So, tell us.

Pedro ([05:40](#)):

So sure. Yeah. And I think what you're pointing out, Michelle, zeroes in on the issue, which is that it's really a two-part issue. One is, how does the employee who is LGBTQ feel about announcing it or making it public? But also, what's the potential reception that they're going to receive? And sort of those two lines of communication have to, at some point, come together.

And in my case, actually, it was a pretty interesting way to come out because my partner, who's now my husband, at the time, this was about 25 years ago, we were living in Tampa. And we had just moved there and only had one car, and he worked in Orlando. I worked in Tampa, and he would drop me off every morning in the Tampa office of this law firm that I was with, but he would never get off. He just dropped me off.

And, I had shared with some of the associates that I was gay, and they knew my partner at the time, but I had never, certainly, raised that issue with any of the partners. And one of the partners, the main partner of the office came to me one day and says, "Hey, Pedro, please feel free to have your partner come in the office and introduce himself to us." And it was really his way of letting me know, whatever feelings you have of trepidation or concern, I just want to put you at ease and let you know that we welcome you. We welcome all of you. We welcome your partner. And from that day on, really, it was not an issue.

It was rather surprising because I stayed with that firm for about 15 years. And during most of that time, I was the only openly gay partner. I eventually became a partner in the firm, but towards the later part of my time there, it was much more of an open issue, and a welcoming issue. And so, I think initially, years ago when this happened, there was an awkwardness around, how do you address these issues? Folks felt like they didn't want to be overly intrusive. Maybe it was a quote-unquote personal matter. And it was a personal matter, but it was something that, just like any other employee who would talk about their family member or their spouse or their children, LGBTQ employees or attorneys in a firm want to feel the same way. But they kind of have to feel that it's safe to do so.

And so, I think that messaging from that partner was a way to make that clear to me. And I think a lot of what we're going to talk about today has to do with the messaging. How do we create a culture where LGBTQ employees feel comfortable? They're getting that signal of, "Hey it's okay, and we welcome all of you."

Michelle ([08:20](#)):

As you can see, very different experiences. I want to talk a little bit about Bostock, what it held, what it didn't hold. And so if you think about the decision, there were three different cases, all held under the Bostock decision. And if you think about the courage that these three plaintiffs had, really, I mean, it's really amazing the trajectory.

I mean, the one that I think the most of is Aimee Stephens. I mean, Aimee Stephens was working in a funeral home in Michigan, working for the Rost family, which was a multi-generational Baptist-run funeral home, multi-family. And she had the courage to, after working for the funeral home from, I think it was like 2007 to 2013, she basically came out to her employer, and she wrote him a letter. And she said, "Listen, I'm going on vacation in August. And when I return from vacation, I'm asking you to support me. You know me as a man, but I'm going to be transitioning. And when I return for vacation, I'm going to be wearing women's clothes, and I'm going to be referred to as Aimee. And I ask you to support me in that." And I don't think she ever ended up returning from vacation, because he basically said no, and he fired her two weeks later. And that was in back in 2013.

She ended up suing, and the case went all the way. First she sued, and then the courts, the EEOC, held in one direction. It went up to the circuit court, and then the circuit court ruled one way, and then it went back down. I went back up to the circuit court, then it went up to the court of appeal. It basically made its way back and forth until finally, in 2019, it made it all the way to the Supreme Court.

And then ultimately, the decision was held in June 15th of 2020. And in that very important decision, it ruled in favor of Aimee Stephens. Unfortunately, she died earlier that year, so she never actually got to see the decision.

There were also two other people involved. There was the Zarda case, which involved a gay skydiver out on Long Island in New York here. And I don't know if anyone's ever been skydiving, but apparently when you go skydiving, you go in tandem. Your bodies are right next to each other when you're learning. So, because he was concerned that the people who were learning, their bodies would be right next to each other, he'd tell the trainee people, "Listen, I'm gay, don't worry about it."

But the boyfriend of the trainee got offended, so he ended up telling Skydiving Express, Air Express, "Listen, this guy saying he's gay." And then they fired him.

And then the third person was Bostock, [Jerry 00:11:04] Bostock, and he was based in Atlanta. And he had the audacity to join the gay softball league, which he was a child welfare social services coordinator, and then that ended up coming out. And so, he was also fired. And so, all of these three cases, percolating in three different jurisdictions, made its way to the Supreme Court. And in all cases, they basically ruled in a surprising decision, 6-3, that gender identity and sexual orientation discrimination is prohibited.

And that, while it's true that when Title VII came out in 1964, it's true. No, they were not thinking about LGBTQ issues. Definitely not. But that this emanates from gender, and that it's true that when in 1964, pregnancy wasn't being thought of, sexual harassment wasn't being thought of, sex stereotyping wasn't being thought

of, and that's also true, gender identity and sexual orientation weren't being thought of.

But this was all... It's implicit, and that it relates to gender, it relates to sex, and so we're going to hold what was always present, what was always the elephant in the room, and so for the first time, we're ruling on a federal level that you cannot discriminate based on gender identity and sexual orientation.

What the courts didn't rule on is they didn't cover... They covered Title VII. They didn't cover Title IX, so they didn't look at sports, right? It didn't look in the education context. It didn't cover transgender medical insurance. It didn't cover housing discrimination. It didn't cover medical insurance, the Affordable Care Act. It didn't cover restroom and locker room issues. It didn't cover gender non-binary. It didn't cover employers that were less than 15 employees. Right? And it didn't cover religious employers.

So, there's a lot that didn't get covered, although there's a lot that was covered. So, I wanted to turn it back over to you, Pedro, so we can talk about the practical implications of Bostock, and sort of this audit of the employment relationship. And if you want to talk about that a bit.

Pedro ([13:18](#)):

Sure. So, I think one of the things that we've all come to realize is that we're all more complex than we ever thought we were, and there are lots of variations. Some of them may be familiar to us, others may not. And part of the implications of Bostock really are that we have to sort of look at how we handle the HR process and the employment process from the very beginning until the end. And it's a good time to consider auditing that process so that we reduce the potential claims of discrimination based on gender expression and identity.

But also more importantly, really to foster a workplace culture where these issues don't become sources of tension, or what I refer to as sort of tender points in the employment relationship. And as with any culture, it's a gradual process. It's not about adding water and stirring, and all of a sudden, you have a culture that has all these things embedded. It starts from the top, and it goes down, and it goes down and up. And at this point, it's particularly timely, I think, because with COVID, many of us have been working from home.

And so on one level, there may have been a reduction in tension because the normal day-to-day interactions that sometimes spark the conversations that may lead to some conflict, or issues that need to be resolved, have artificially been wiped away because people aren't gathering around the water cooler or in the lunch room.

But at the same time, what it's done is, it's left everybody a little bit maybe unconnected from each other and from the workplace. And so, it's great as we all sort of return to work, maybe in more traditional environments, that we look at exactly how we manage this process in light of the Bostock decision, and take it from the very beginning.

And so, a good starting point is as an employer, where are we recruiting from? Are we using recruitment channels that provide for diverse candidates? Or are we

relying on recruitment agencies that maybe have traditional models and that either or weed out or impede bringing in candidates that might have diverse backgrounds, and specifically LGBTQ candidates.

Also very important to consider, and probably the most important is, how do we go about conducting interviews? Are we training the folks who conduct the interviews on how to conduct them? Or do we just assume that because somebody is a professional and they've been recruiting, or they need to hire somebody, that they know how to interview? And I think we all have a lot to learn in this space, so we can't take for granted that the folks that are doing the interviews know what's appropriate in terms of questions to ask or how to react when certain information is shared. Are we sending a message during the interview process that we affirmatively are looking for the most qualified candidates, but we also seek to have a diverse and inclusive workforce. And similar to my experience where the partner sort of let me know, "Hey, bring your partner in and introduce themselves," this is really the first time a candidate is meeting your company. And so, the message messaging that goes on during that interview process is critically important, and it can make the difference between a diverse candidate saying, "I can feel at home here, and I could bring my total self to work," versus, "The interviewer left me with the impression that maybe I'm not welcomed here."

And offering interviewers the types of training necessary to be successful while they're interviewing, including, how do they respond when the candidate is sharing information about their family or their children, and maybe it's not a traditional family or setup or something that the interviewer is comfortable with. And how do you make sure that the interviewer checks their own internal biases so that the follow up questions are not awkward, or the comments or the silences are not awkward, that sentence the message of, "Oh, we prefer not to discuss these things."

Looking at the interview process, I think, is critical. There's also a great opportunity in offer letters and communications to build in the messaging that we are a workplace that welcomes diversity, and we expect everybody to come and bring their whole selves to work. And that can be done in very discreet ways and more pronounced ways, right? So, we can take advantage of special events like Pride Month.

We are now June 1st, and it's Pride Month. And so, our firm sends out messages that reinforce the commitment that the firm has that we're all, in a sense, a work family, and that each of us is unique in our own way, but we're all part of it and welcomed and valuable members. And so, taking advantage of special events or celebrations, and including that in the messaging.

Also when there's local news that trigger LGBTQ issues, whether it's been a law that is to being voted on either locally or nationally, or an unfortunate tragedy, the company can take a stand in support of its LGBTQ employees and allies.

And then, I think also very importantly is looking at the internal processes for handling concerns that are raised by employees. Is the human resources department trained and competent to handle those particular types of concerns, or is there a tendency to not really address them because they don't feel comfortable? And so, they sort of boil over or become bigger problems.

And by the same token is HR training, its managers and supervisors, on the day-to-day issues where we know these types of conversations or issues may bubble up or come up. And whether they be tensions between employees who have issues related to this, maybe you have an employee who has a firmly held religious belief that gay employees or transgender employees are sinners, or against their religious beliefs, or are going to be condemned.

And how do we approach the employee who, one, holds those religious beliefs, to ensure that they understand and where the boundaries of those religious beliefs are, and how they can or cannot come into the workplace, to ensure that others are able to participate and not feel strained or isolated. And then also, assisting employees who are dealing with perhaps those reactions, or their own issues, on how to raise the concerns and have them be addressed.

And so we've got from recruitment, to conducting interviews, offer letters, communications, and then handling the internal concerns. And then, there are other issues, Michelle, that you might want to talk about that kind of go along the lifespan of employment.

Michelle ([21:18](#)):

Sure. I mean, just looking at policies, right? So do you have contained in your equal employment opportunity and anti-harassment policies, gender identity listed specifically? Sexual orientation listed specifically? Do you have healthcare coverage for surgical procedures, medical gender-affirming surgery? Do your domestic partner benefits cover same sex partners? I'm sure you do sexual harassment training, but when you do training, do you cover LGBTQ issues, and in more than in a perfunctory way?

I get called in a lot by employers when someone's transitioning in the workplace to cover LGBTQ issues, and specifically transgender issues. And when I say cover it, I'm talking about a deep dive to leave people with the terminology. So, for example, do you cover, what's the difference between gender identity, gender expression? What's cisgender, what's transgender? What's gender non-binary? What's gender nonconforming? How is that different from sexual orientation?

And also, are you teaching managers what the laws are in this area, and what are their obligations and responsibilities? Are you doing workshops that incorporate the restroom issue? I was just dealing with a situation earlier today where someone pretty high up in the company said to me, "Well, how could a man with a penis be allowed into the women's restroom? And can I ask for documentation around that?" And I was like, "Well, not anymore." The law has evolved in this area. Restroom issues is based on consistent gender presentation, it's not based upon having medical proof or legal proof. And gender itself is not only based on your body parts. Gender is based on your presentation, gender's based on how you present yourself, how you are perceived by the outside world, how you dress, how you talk, how you walk, and all these other aspects of your chromosomes, your secondary sex characteristics, a lot of different things.

And does your company have a gender transition plan? Do you have a transgender employment policy? Do you have training on unconscious bias, and does your DEI

training include transgender issues, sexual orientation issues? Do you talk about the restroom issue, and prejudices and fears that are around the restroom issue? Do you talk about how that relates to affinity bias? In the fabric of your training, are you truly creating, not just saying that you have diversity equity and inclusion, but are you truly creating an environment where people feel comfortable bringing their whole selves to work?

It's great to say that we're inclusive, but do you, through your words and your deeds, create a truly sense of belonging for people? Do you create an area where people can bring diversity of thought, where people want to be heard, want to be valued, want to be respected? You can have all the policies in the world, but if someone doesn't feel psychologically safe, doesn't feel that when they have a concern that anything's going to be done about it, the fear they're going to be retaliated against, that fear that they're going to be fired, or that they're going to be misunderstood.

For example, I have several male on male harassment complaints I'm dealing with. And when I say they're male on male, these are heterosexual men who are either being bullied by other men, or who men are making sexual comments to them, but they have absolutely no sexual interest in them. Or even if they do, it doesn't matter. The intentions of the accused are irrelevant. What matters is how it's received. I have grown men who fear comments from other grown men, and whether it's bullying or whether the person's gay, or heterosexual, or bisexual, is irrelevant. And does the investigator, who's looking into this, do they understand what matters, both from the legal perspective as well as under your policies? So you have to have the right people, to Pedro's point, who are trained properly to understand these distinctions when they're conducting these internal investigations.

I mean, we could go on. We're limited in time. We're very excited to be doing this podcast the first day of Pride. It's amazing that we're at a firm... We got 100% with HRC this year. We're very excited and proud of that. We're very happy, Pedro, to be co-presenting with you today. And please, if you have any questions, anything we talked about, please reach out to Pedro and I. We have a large practice group that deals with these issues. And thank you so much.

Pedro ([26:16](#)):

Thanks for listening to our podcast. Michelle, it's great to connect with you and spending time with you, and those that are listening. And we're here as a resource, so in addition to your in-house resources, know that we've got an entire firm of folks who are ready to assist, and we can assist no matter where you are on the spectrum of these issues.

So, whether you're just initially addressing them, or whether you've had these issues and are trying to understand more nuanced issues, we're there to assist. So, please feel free to reach out.

Alitia ([26:55](#)):

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