

CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Fall 2020

From the Desk of the Chairperson

Dear Civil Rights Section Members,

I am honored to be stepping into the role of Chair for our section—equal parts excited and daunted by trying to fill the shoes of Immediate Past Chair, Stephen Haedicke, and our not-so-immediate past Chair, Wylie Stecklow.

The very good news is that Stephen and Wylie have left our section in excellent shape. We have once again been honored with the FBA's Section and Division Recognition Award—one of only three sections and divisions to be honored this year. The award is a testament to our strength and focus on continuing legal education programs, as well as this very newsletter you are reading, which Steve Dane has steered for years now to provide our members with a meaningful and diverse set of topics every quarter. If you have not yet read [our summer edition on COVID-19 and civil rights law](#), I urge you to do so!

In preparing to take on the responsibilities of section Chair, I have been conducting a listening tour, talking with current and past officers and committee members, as well as recent members who have jumped on our monthly calls for the first time. It's been great to hear how interested and engaged these folks are in our section, and their genuine interest and passion for civil rights law and for getting to know other practitioners from around the country. Truly, where else can you meet and get to know folks from Kansas, Louisiana, D.C., Virginia, Utah, Boston, Michigan, Pennsylvania, Illinois, and on and on, who are all working in the same area of law, but from both sides of the "v", and –



Robin B. Wagner

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Supreme Court Preview – Fall 2020

By Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Carney v. Adams,

No. 19-309; set for argument October 5, 2020

In a case originally set last spring but delayed due to the pandemic, the Court will consider whether the First Amendment invalidates a Delaware constitutional provision limiting judges of any one political party to no more than a “bare majority” on the state’s three highest courts. James Adams, a political independent and retired lawyer, insists that he has the right to run for office whatever his party affiliation. Delaware’s governor argues that judges are policymakers whose party affiliation he can properly consider: the provision, even subjected to strict scrutiny, passes muster because it’s narrowly tailored to the compelling interest of promoting public confidence in the courts.

The target provision, which has been on the books for more than 50 years, enforces balance between the parties; a newer provision allows only members of a “major political party.” The Court required briefing on Adams’ standing and on the severability of the provisions; the [Third Circuit held](#) that they were not severable and ruled them unconstitutional.

Torres v. Madrid,

No. 19-292; set for argument October 14, 2020

In another pandemic holdover, the Court will hear arguments from Roxanne Torres, whose excessive force case the Tenth Circuit held must be dismissed because there was no “seizure” when she managed to drive away from the police officers who had shot her. The Eighth, Ninth, and Eleventh Circuits have held that even an unsuccessful attempt to detain a suspect counts as a seizure; in going the other way, the Tenth Circuit joins the D.C. Circuit.

Jones v. Mississippi,

No. 18-1259; set for argument November 3, 2020

Does the Eighth Amendment require an express factual finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole? In *Miller* and *Montgomery*, the Court held that the Eighth Amendment bars life without parole “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” In announcing the substantive right, the Court did not specify an enforcement procedure. Mississippi insists that merely considering the offender’s youth is enough.

After the Mississippi trial court sentenced Brett Jones to life without parole without declaring him permanently incorrigible, the state appellate court affirmed, and the Mississippi Supreme Court heard argument before dismissing its writ by a 5-4 vote. The Court will have the opportunity to resolve a split among the states, about half of which require an explicit finding.

Fulton v. City of Philadelphia, Pennsylvania,

No. 19-123; set for argument November 4, 2020

Catholic Social Services refuses to certify same-sex couples as foster parents, and thus no longer receives referrals per Philadelphia’s policy. The free exercise plaintiffs, having lost in the lower courts, have obtained review on three questions: first, a standard of proof question on which there is a circuit split; second, whether the Court should overturn its holding in *Employment Division v. Smith* that states can burden religious practices as long as the laws are “neutral” or “generally applicable”; and third, the merits of the free exercise claim, namely whether the city violates the First Amendment by conditioning eligibility for the foster care system on recognizing same-sex couples in contradiction of the agency’s religious beliefs. On the proof question, CSS urges the Court to accept the broader view—and the one more popular with the circuit courts—by holding that any evidence of a lack of neutrality or general applicability can come in. The City defends the narrower view, according to which a plaintiff must prove that the government would allow the same conduct by someone who held different religious views.

Brownback v. King,

No. 19-546; set for argument November 9, 2020

The government seeks review of the [Sixth Circuit’s ruling](#) that, when a court dismisses a Federal Tort Claims Act for lack of subject matter jurisdiction, that dismissal does not activate the FTCA’s judgment bar. Wearing plainclothes but with their badges on lanyards, an FBI agent and a Grand Rapids detective approached James King, mistaking him for a suspect in a home invasion. As the encounter unfolded, King believed that he was being mugged and tried to run—the detective tackled him, and the ensuing beating lasted over a minute. When passersby began filming, a later-arriving officer ordered them to delete their footage.

King brought excessive force claims against the officers and an FTCA claim against the United States. The trial court dismissed the FTCA claim (citing both Rule 12 and Rule 56), concluding that King could not show that the government would be liable under Michigan law based on that state’s qualified immunity rule. The trial court then ruled for the defendants on the remaining claims, applying the FTCA’s judgment bar. The Sixth Circuit reversed, noting that the FTCA is a waiver of sovereign immunity, and thus a limited jurisdictional grant. When the trial court dismissed the FTCA claim, it was noting its own lack of subject matter jurisdiction; and thus, the Sixth Circuit reasoned, it could not rule on the merits of the FTCA claim, meaning the judgment bar could not be activated and the *Bivens* claim was free to proceed.

King filed his own conditional petition asking whether members of joint state-federal task forces act under color of state law, but the Court granted only the government's petition.

Uzuegbunam v. Preczewski,

No. 19-968; not yet set for argument

Chike Uzuegbunam, a student at Georgia Gwinnett College, ran afoul of school policy while distributing religious literature. The school changed its policy after he sued, and the trial court and Eleventh Circuit concluded he had not pleaded compensatory damages claims and that his nominal damages claims were moot. Although two other circuits allow governments to moot claims for nominal damages by abandoning the challenged policy if that policy was never enforced against the plaintiff, only the Eleventh Circuit allows a government official to escape liability after enforcing a policy, then abandoning it post-suit. Six circuits hold that a subsequent policy change does not moot nominal damages claims. Uzuegbunam's counsel come from the Alliance Defending Freedom; amici include rivals like the American Humanist Association, who find themselves on the same side for this one.

Edwards v. Vannoy,

No. 19-5807; not yet set for argument

The Court will decide whether its decision upholding unanimous juries applies retroactively to cases on federal collateral review. In last term's decision in *Ramos v. Louisiana*, authored by Justice Gorsuch, the Court

announced that the Sixth Amendment right to a jury trial requires a unanimous jury for conviction. Edwards urges the Court to hold that *Ramos* did not announce a new rule at all. Amici include professors who note Louisiana's unique legal history in support of that conclusion. Edwards argues in the alternative that, if it announced a new rule, *Ramos* announced a watershed, and that either way the state's expected floodgates arguments do not match the reality that only a relatively small number of prisoners would be helped by a decision in favor of retroactivity. At press time, Louisiana's attorney general has not yet filed a brief.

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

Appear in the
Civil Rights
Insider!

Call for Articles for the Civil Rights Insider

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your

contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane, Dane Law LLC, at sdane@fairhousinglaw.com or Violet Rush at vrush@hobbsstrauss.com.

best of all – want to get to know you and learn from you and with you about the law?! This is and remains our great strength!

Our successes past and future depend on our bench strength, and that continues with the 2020-21 term. Our newly elected officers are:

Kyle Kaiser, Chair-Elect
Eric Foley, Secretary
Kate Simpson, Treasurer
Alison Slagowitz, Membership Chair
Steve Dane, Newsletter Chair
And, of course, Stephen Haedicke, our Immediate Past Chair.

This group is tremendously able and we are very excited to lead our section in 2020-21. Our first order of business, though is to thank Wyle Stecklow and Rob Sinsheimer, whose terms as officers have ended. Wylie is not going anywhere, though, as you will hear much from him over the next few months regarding our third national Civil Rights Étouffée, which will be held on January 28-29, 2021, virtually but in a New Orleans state of mind. Rob has left our membership with strong numbers and continued renewals from year to year, and we thank him.

Chair-Elect Kyle Kaiser hails from Utah, where he serves as an Assistant Attorney General and all-around “professor” for our section when it comes to the First Amendment, for one topic. Kyle served on our last board as Secretary and is helping to lead the charge on our Qualified Immunity task force. Secretary Eric Foley has recently moved from New Orleans to D.C., where he continues to work for the MacArthur Justice Center on issues of police excessive force and protestor rights—talk about relevant these days! Eric previously served as our Treasurer. New to our leadership, but not to the FBA is Kate Simpson, who just received an Outstanding Chapter Leader Award for her role in the Kansas and Western District of Missouri Chapter, and will step into the Treasurer position. Kate has organized an extraordinary day-long CLE co-sponsored by the Civil Rights Section and her chapter for October 15, 2020. [Click here to learn more](#). Alison Slagowitz is new to the FBA, but she’s made a quick splash by organizing a webinar on the Fair Housing Act that we will be hosting on October 28, 2020. (Details to follow.) Alison has great ideas and energy to bring to growing our membership. And last but not least, Steve Dane will continue

to lead our newsletter, for which we are all incredibly grateful. As for me, I started off in this section as the liaison to the Young Lawyer’s Division, then I became Secretary for several years and this last year served as Chair Elect. I am an associate at the Detroit-area firm Pitt McGehee Palmer Bonanni & Rivers and practice primarily plaintiff’s side employment discrimination and fair housing law.

I’m also very happy to share with you the news that our section received a \$1,000 grant from the Foundation of the Federal Bar Association to use towards Diversity initiatives. We will be using these funds in two related ways: first, to develop continuing legal education content related to disability law, and second, to support any costs related to accessibility of our civil rights programming. We are very grateful to member Bill Goren, a renown disability-law expert, to join our leadership team in an advisory capacity to help us become more aware of accessibility issues and the opportunities to weave disability-rights issues into our programming.

In addition to these elected officers, we are welcoming a number of new members to committees and other essential roles in our section. Erica Brody and Allie O’Connell from the Boston firm Brody, Hardoon, Perkins & Kesten, are joining our Defense of Government Entities and Education Law committees, respectively, and providing much-appreciated support to our long-time committee leaders Eileen Rosen and Caryl Oberman. And Liz Barton, who is in the general counsel’s office of the Chicago Public Schools is also joining the Defense of Government Entities committee. Jeremy Gunn, an associate at Shook Hardy & Bacon, is joining our team as the liaison to the Young Lawyer’s Division, and Violet Rush, an associate with Hobbs Straus Dean & Walker, has joined the newsletter team!

We have a lot of new faces and new energy being added to our section, and that’s a great way to start the year! Please join us on our monthly section calls – third Wednesdays of the month—drop me a line at rwagner@pittlawpc.com and I will add you to the meeting invite. We will be doing a “lightening” round on something new and interesting in each of the committee’s areas of the law and running through our plans for upcoming programs.

Thank you so much for being part of our section—I’m looking forward to seeing you soon at one of our events!

Sexual Orientation and Gender Identity Discrimination Claims and The Fair Housing Act After *Bostock v. Clayton County, Georgia* By Rigel C. Oliveri, Professor of Law, University of Missouri

This summer the Supreme Court handed down a landmark decision in *Bostock v. Clayton County, Georgia*,¹ ruling by a vote of 6-3 that Title VII of the Civil Rights Act of 1964² protects gay, lesbian and transgender employees from discrimination. Some lower courts had previously permitted LGBTQ plaintiffs to bring discrimination claims on the theory that discrimination based on sexual orientation and gender identity constitutes impermissible sex stereotyping.³ Confusion arose around the question of whether a plaintiff needed to show that employers held specific stereotyped beliefs about the plaintiff, or whether it was enough to argue that any discrimination against LGBTQ individuals automatically contains some component of sexually-stereotyped thinking about their gender-nonconforming behavior.⁴

Bostock cleared up these arguments. It held that Title VII's prohibition against discrimination in employment "because of . . . sex" necessarily applies to discrimination based on sexual orientation and gender identity. In other words, there is no need for LGBTQ plaintiffs to rely on stereotyping theory because the sexual orientation and gender identity are themselves traits inextricably linked to sex.

The federal Fair Housing Act (FHA),⁵ has identical language prohibiting discrimination in housing "because of . . . sex." Courts have been similarly divided about whether and how fair housing plaintiffs could bring sexual orientation and gender identity claims under the framework of sex discrimination and stereotyping.⁶ In the wake of *Bostock*, it is clear that courts should now interpret the FHA to prohibit discrimination based on sexual orientation and gender identity. Courts have long used Title VII cases to guide their interpretation of the FHA. This makes sense, because the language, structure, and purpose of both statutes are similar.⁷ However, Title VII analysis developed for the workplace context does not always translate seamlessly into the housing context. Differences in context or underlying legal frameworks sometimes justify a departure from Title VII.⁸ On this issue, however, there are no relevant legal or contextual differences that would justify a dissimilar result.

It is also true that the Court does not always apply the same analysis in cases involving statutes with identical statutory language. In such cases, the Court usually justifies the distinction by pointing to differences in legislative history between the two statutes.⁹ This presents a potential hurdle for the argument that *Bostock* should apply to the FHA. The difficulty comes with the issue of mixed motives. Whether discrimination is "based on sex" is ultimately a causation argument. The court must determine what role the characteristic of "sex" played in the defendant's decision to discriminate against an LGBTQ individual. Defendants in

discrimination cases often offer a non-prohibited reason for their actions. Where there are two possible motivations behind a discriminatory act (one permissible and one prohibited), the court is confronted with a mixed motives scenario.

The Supreme Court, interpreting the phrase "because of sex," set forth a manner for plaintiffs to proceed under such circumstances in Title VII cases.¹⁰ Congress then amended Title VII to explicitly allow plaintiffs to proceed under mixed motives theory whenever there was evidence that discrimination was a motivating factor for the defendant, even as it altered the Supreme Court's framework.¹¹ The Supreme Court has never addressed the issue of mixed motives under the FHA, nor has the statute been amended as Title VII was. If *Bostock's* reasoning relies on mixed motives theory, these differences might give courts pause in applying its conclusions to the FHA.

Fortunately for fair housing advocates, this is not the case. Although much of the *Bostock* opinion is taken up with examining the causal role that sex plays in sexual orientation and gender identity discrimination, it does *not* create a mixed motives question. *Bostock* does not hold that defendants who discriminate against LGBTQ individuals are motivated by both discrimination based on sex *and* discrimination based on sexual orientation or gender identity. Rather, *Bostock* holds that discrimination based on sexual orientation and gender identity is a form of sex discrimination. The characteristics are inextricably linked. Thus, the mixed motive issue never arises, and the differences between the two statutes on this point are irrelevant.¹²

Gay, lesbian, and transgender individuals experience significant discrimination in housing.¹³ The problem is particularly acute for older LGBTQ people seeking to live in facilities for senior living.¹⁴ There are few legal protections in place for them: Only 21 states and the District of Columbia prohibit discrimination in housing based on both sexual orientation and gender identity.¹⁵ If *Bostock* is applied to the FHA, it would be a welcome development for housing equity.

Rigel Oliveri is the Isabelle Wade and Paul C. Lyda Professor of Law at the University of Missouri. She was formerly a Trial Attorney for the United States Department of Justice, Civil Rights Division, in the Housing & Civil Enforcement Section.

Endnotes

¹ 140 S. Ct. 1731 (2020).

² 42 U.S.C. § 2000e et. seq.

³ The Supreme Court first recognized that sex stereotyping was a form of sex discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, the plaintiff, Ann

Hopkins, demonstrated that she was denied partnership at her firm because the male partners believed she did not look, dress, or behave in a sufficiently feminine manner.

⁴ As one court noted: “When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that [s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (internal citations omitted).

⁵ 42 U.S.C. § 3601 et. seq.

⁶ Compare *Walsh v. Friendship Village*, 352 F.Supp.3d 920 (E.D. Mo. 2019) (lesbian plaintiffs could not bring a sexual orientation claim under the FHA because such discrimination was distinct from sex discrimination) with *Smith v. Avanti*, 249 F.Supp.3d 1194 (D. Colo. 2017) (plaintiff who alleged discrimination based on sexual orientation and gender identity could bring a FHA claim, but only to the extent that such claims were based on defendant’s stereotyped views).

⁷ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015) (“This similarity in text and structure is all the more compelling given that Congress passed the FHA in 1968—only four years after passing Title VII.”).

⁸ *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018), provides a good example. In that case, the court was considering a plaintiff’s claim that her landlord should be liable for harassment she suffered from her fellow tenants. The court could have relied on Title VII precedent for employee claims of harassment by co-workers, but declined, citing differences in the agency relationship between landlords and tenants as compared to employers and employees.

⁹ This was the situation in *Gross v. FBL Seivices, Inc.*, 557 U.S. 167 (2009). In that case, the Court was asked to interpret

language in the 1967 Age Discrimination in Employment Act (ADEA) that was identical to a provision in Title VII. The Court refused to apply the same interpretation it had used for Title VII to the ADEA, because Congress had amended Title VII to incorporate the Court’s analysis, but did not amend the ADEA, even though it contemporaneously amended the ADEA in several other ways.

¹⁰ See *Price Waterhouse v. Hopkins*, 490 U.S. at 250 (1989). A plurality of the Court held that the burden of proof would shift to the defendant to demonstrate that it would have taken the same action absent the impermissible motive.

¹¹ Specifically, the statute makes clear that burden of proof for the causation issue still shifts to the defendant. 42 U.S.C. § 2000e-2(m). A defendant may avoid damages liability if it can prove that it would have taken the same action absent the impermissible factor. The presence of any impermissible motivation, however, means that the defendant may still be liable for declaratory judgment and attorneys’ fees. 42 U.S.C. § 2000e-5(g)(1)(B).

¹² To put the final point on this, the Court emphasized that “nothing in our analysis depends on the motivating factor [but-for cause] test” that it uses for mixed motives analysis. *Bostock*, 140 S. Ct. at 1740.

¹³ URBAN INST., *A Paired-Testing Pilot Study of Housing Discrimination Against Same-Sex Couples and Transgender Individuals* (June 2017), https://www.urban.org/research/publication/paired-testing-pilot-study-housing-discrimination-against-same-sex-couples-and-transgender-individuals/view/full_report

¹⁴ EQUAL RIGHTS CTR., *Opening Doors: An Investigation of Barriers to Senior Housing for Same-Sex Couples*, (2014), https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf. This was the case for the plaintiffs in *Walsh v. Friendship Village*.

¹⁵ See <https://www.hrc.org/state-maps/housing>.

**Social
Media
Announce-
ment**

Do you have civil rights news to share?

We’d like to keep the conversation going on social media. If you have civil rights news from your city, state, region, or circuit that you would like to share with the Section, please email Benjamin de Seingalt (bdeseing@tulane.edu) with links to source material. Court decisions, journal articles, legal journalism (e.g. ATL, Law360), and non-legal journalism are welcome, so long as the focus is on unfolding issues that may affect civil rights law. These news items do not need to relate to specific ongoing or settled cases or legal challenges – we welcome any news that may be relevant to the practice of civil rights law now or in the future. If you would like to start a discussion about a current issue in civil rights, please let us know even if you aren’t able to find related articles. We look forward to hearing from many of you soon!

Seattle Baseball Fans Stuck at the “Back of the Bus” When it Comes to Wheelchair Accessible Seats

By Conrad Reynoldson, Washington Civil & Disability Advocate, Seattle, Washington

The Seattle Mariners’ home stadium, T-Mobile Park, was one of the first major sports arenas designed and constructed following the Americans with Disabilities Act of 1990 and the accompanying implementation of sweeping improvements in construction requirements for access to facilities by people with disabilities. Unfortunately, after years of putting up with a second class experience at T-Mobile Park, four plaintiffs, all wheelchair users, filed suit in the U.S. District Court for the Western District of Washington in an attempt to remedy more than a dozen categories of barriers faced by wheelchair users at the stadium, an important one being: why are there so few wheelchair accessible seats near the front of the stadium?

With an unfortunate bench verdict behind them, 403 F. Supp.3d 907 (W.D. Wash. 2019), where the District Court “regrets” that it found ADA compliance despite the fact that T-Mobile Park “significantly limited seating choices and that the lion’s share of seats available to [wheelchair users] at the Park are in less than ideal locations,” Plaintiffs now take this issue, commonly identified as “vertical distribution” of wheelchair accessible seats, to the Ninth Circuit, where the answer hinges on the proper interpretation of Section 4.33.3 of the 1991 ADA Standards. Section 4.33.3 requires that wheelchairs users be provided with lines of sight and seating choices that are “comparable to those for members of the general public.” While few courts have directly addressed the issue, a common theme and guideline has emerged generally requiring an equal (or at least similar) opportunity for the same experience.

Courts examining the issue of wheelchair accessible seating distribution under Section 4.33.3 have made it clear that seating arrangements based in tokenism and ghettoization are not ADA compliant. 1991 ADA Standards undoubtedly requires vertical distribution of seating in order to prevent stadium operators from “simply designat[ing] a few token wheelchair seats in the better seating areas, and cluster[ing] the majority of wheelchair seats in the last row or in other undesirable locations.” *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 709 (D. Ore. 1997). The obvious opposite of tokenism is to ensure

that offerings to customers using wheelchairs generally match the offerings for the general public. *Colorado Cross-Disability v. Colorado Rockies*, 336 F.Supp.2d 1141, 1145 (D. Colo. 2004) (“good and bad, expensive and inexpensive, which generally matches those of ambulatory spectators” quoting *Paralyzed Vet. of Amer. v. Ellerbe Becket Architects*, 950 F.Supp. 393, 404 (D. D.C. 1996) and *Berry v. City of Lowell*, 2003 WL 22050772). This cannot be accomplished by “ghettoiz[ing] many of the wheelchair spaces” in the rear rows and undesirable locations. *Id.* at 1148.

The District Court’s conclusion that T-Mobile Park’s seating arrangement is sufficiently dispersed – with only 8 wheelchair accessible seats anywhere close to the field, and all the remaining wheelchair accessible seats either at the rear row of the first level or up on the balcony levels – is inapposite to the guidance and approaches of other courts.

Plaintiffs have now appealed the decision to the Ninth Circuit (No. 19-36075). Opening briefs as well as an amicus brief, which includes many of the top disability rights organizations across the country, have been filed. Oral argument is scheduled for December 10. Hopefully the higher court will agree, and, on this 30th anniversary of the ADA, respond that the promise of “equal” in “full and equal enjoyment of goods, services, and facilities” includes a prohibition on relegation of wheelchair users to second class seating at their favorite team’s games.

Conrad Reynoldson is the founder and the lead attorney of the 501(c)(3) nonprofit law firm of Washington Civil & Disability Advocate. He was born in Tacoma and is a lifelong Washingtonian. Conrad attended college at Seattle Pacific University and graduated Summa Cum Laude with a double major in History and Political Science in 2009, then went on to graduate from the University of Washington School of Law in 2014. Conrad is a Blackstone Legal Fellow and is admitted to practice in front of the Ninth Circuit, as well as in Washington State and Federally in the Western and Eastern Districts.

CREEC's Fast Advocacy for Communication Program

By Martie Lafferty, Director, Accessibility Project, Civil Rights Education and Enforcement Center (CREEC)

The Fast Advocacy for Communication (FAC) program addresses communication barriers impacting people with disabilities. The Civil Rights Education and Enforcement Center (CREEC) <https://creeclaw.org/> provides FAC at no cost to clients.

CREEC is a nonprofit membership organization whose goal is to ensure that everyone can fully and independently participate in our nation's civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity. CREEC's Accessibility Project fights with urgency to make real the promises of the Americans with Disabilities Act (ADA) and similar disability rights laws. Our FAC program is a crucial part of our strategy to address disability discrimination and ensure equal access.

The ADA requires businesses and government entities to provide effective communication to people with disabilities.¹ This means that businesses and government offices are required to ensure that their communications with people with disabilities are "as effective as communications with others."² In order to ensure effective communication, it is often necessary to provide sign language interpreters and other auxiliary aids and services.³ Interpreters and other aid/services must be provided free of charge to people with disabilities.⁴

CREEC's FAC program allows us to respond quickly and proactively when businesses or government offices refuse to provide Deaf, Deaf-Blind, Deaf-Disabled, or Hard of Hearing (DDBDDHH) people with sign language interpreters or other auxiliary aids and services necessary for effective communication. The highest demand for FAC is in regard to communication barriers in medical settings. However, we also use this approach to resolve denials of effective communication in other settings such as entertainment venues, adult educational settings, government programs, and attorneys' offices.

The FAC process begins when a DDBDDHH person contacts us about the refusal of a business or government entity to provide effective communication for a future interaction such as an upcoming appointment or meeting. We are often able to complete intake the same day and, if FAC seems appropriate for the situation, to enter a retainer limited to FAC services. We then quickly send an educational letter to the business or government office explaining the ADA's effective communication requirement and our client's need for an auxiliary aid/service to ensure effective communication. The letter also provides links to resources for the requested

aids/services. In most instances, the letter results in the entity agreeing to provide a sign language interpreter or other needed communication aid/service. When needed, we follow up with the provider to further discuss the situation. Over 80% of our FAC cases result in successful outcomes. For those that do not, we may offer additional services to our client including litigation when appropriate.

CREEC's FAC program has resulted in successful outcomes including the following: 1. a rehabilitation center provided sign language interpreters for a 94-year-old Deaf man during his recovery from a stroke, 2. a birthing center provided sign language interpreters for a Deaf couple so that they could fully participate in the birth of their child, 3. a concert venue provided sign language interpreters so that a Deaf fan could enjoy one of her favorite performers, and 4. a county detention center provided sign language interpreters to a Deaf inmate for classes and installed a videophone so that he could equally participate in its phone program.

Currently most of our FAC work occurs in Colorado and Tennessee but we are working to expand this program nationwide. Please contact me at mlafferty@creeclaw.org if you are interested in more information about becoming a cooperating attorney for FAC in your state. Please also consider referring DDBDDHH people to CREEC for possible FAC or other assistance with barriers to effective communication. A downloadable FAC flyer is available online at <https://creeclaw.org/fac/>. Potential clients can contact us at intakes@creeclaw.org or (VP) 518-249-6088.

Martie Lafferty is the Director of the Accessibility Project at CREEC. With more than 20 years practicing disability rights law, Martie's work has remedied effective communication barriers in multiple settings.

Endnotes

¹ Title II of the ADA covers state and local government entities. 42 U.S.C. § 12131. Federal government entities and government entities that receive federal financial assistance are covered by Section 504 of the Rehabilitation Act (RA). 29 U.S.C. § 794. Because the requirements of ADA Title II and the RA are largely identical, we only discuss the ADA herein. Title III of the ADA covers places of public accommodation. 42 U.S.C. § 12181.

² 28 C.F.R. § 35.160(a)(1); see also 28 C.F.R. § 36.303(a), (c).

³ 28 C.F.R. § 35.160(b)(1); 28 C.F.R. § 36.303(b).

⁴ 28 C.F.R. § 35.130(f); 28 C.F.R. § 36.301(c).

Bostock Changes the Causation Paradigm

By William Goren

Recently, the United States Supreme Court decided the case of *Bostock v. Clayton County, Georgia*,¹ where it held that sexual orientation and transgender identity are protected under Title VII of the Civil Rights Act. That case has had an immediate impact. For example, recently the Eleventh Circuit decided that a transgender person has the right to use a restroom of their choice, basing its decision on *Bostock*. The court reasoned that since Title VII protects transgender individuals, such individuals are also protected under title IX. Further, it meant that a heightened equal protection standard applies to transgender discrimination. Under this framework, the school could not furnish substantial reasons to meet that standard.² In addition, a federal judge recently threw out the Trump administration's rule that removed protections for LGBTQ individuals under the Affordable Care Act.³ However, what is less known about the *Bostock* majority opinion, is how it transformed the causation analysis.

I Justice Gorsuch's Majority Opinion

Justice Gorsuch found that sexual orientation and transgender identity are protected under Title VII because causation is but-for causation. Justice Gorsuch then goes on to explain the meaning of but-for causation. First, Title VII of the Civil Rights Act prohibits employers from taking certain actions because of sex. The ordinary meaning of "because of" is "by reason of" or "on account of." Second, a but-for test directs us to change one thing at a time and see if the outcome changes. If so, but-for causation exists. Third, events often have multiple but-for causes. For example, if a car accident occurs both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, each is a but-for cause of the collision. Fourth, so long as the plaintiff's sex was one but-for cause of that decision, a court may find discrimination. Fifth, if Congress did not want to incorporate but-for causation into the law, it could have said as much. For example, Congress could have included in the law that actions taken because of multiple factors are not discriminatory (the Rehabilitation Act, 29 U.S.C. §794, works that way). Another possibility is that Congress could have used the term "primarily because of" to indicate that the protected trait was the main cause of the defendant's decisions. Yet, if anything, Congress moved in the opposite direction by amending Title VII in 1991 to allow a plaintiff to prevail by showing that a protected trait, such as sex, is a motivating factor. Sixth, the but-for causation standard continues to afford a viable, if no longer exclusive, path to relief under Title VII. Seventh, it simply does not matter that other factors besides the plaintiff's sex contributed to the employer's decision. Eighth, under Title VII, it does not matter when two causal factors may be in play. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met and liability may attach. For example, intentionally burning down a neighbor's house is still arson even if the

perpetrator's ultimate intention or motivation was only to improve his own view. Ninth, Title VII makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of the law. Tenth, it is no defense for an employer to discriminate intentionally against an individual only in part because of sex. Eleventh, an employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention or motivation. Twelfth, the plaintiff's sex need not be the sole or primary cause of the employer's adverse action. So, it has no significance if another factor might also be at work or even plays a more important role in the employer's decision. Thirteenth, where sex is not the only factor or maybe even the main factor, there still can be liability under Title VII if it is a but-for cause. Fourteenth, often in life and in law, two or more factors combined to yield a result that could have also occurred in some other way. For example, if it's a nice day outside and your house is too warm, you might decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That decision doesn't change just because you would have also opened the window had it been warm outside and cold inside. Finally, for employer's to say that sex must be the sole or primary cause of an adverse employment action for Title VII liability is at odds with everything known about Title VII.⁴

II Justice Alito's Dissent

Justice Alito wrote a vigorous dissent. First, the dissent said sexual orientation and gender identity do not appear in Title VII's list of what employers may not discriminate against. Second, since Congress never amended Title VII to include sexual orientation and transgender identity, Title VII's admonition that sex discrimination is prohibited means what it has always meant. Third, the concept of discrimination because of sex is entirely different than the concept of discrimination because of sexual orientation or transgender identity. Finally, there is not a shred of evidence that any member of Congress interpreted the statutory text to include sexual orientation or transgender identity when Title VII was enacted.⁵

III Justice Kavanaugh's Dissent

Justice Kavanaugh dissented and argued that the responsibility to amend Title VII belongs to Congress and the President, not the Court. In addition, bills to include sexual orientation in Title VII have always failed in Congress. Further, Title VII did not include disability discrimination or age discrimination when enacted. Congress had to pass separate laws to address these issues. Finally, executive orders and federal regulations also reflect the common understanding that sexual orientation is not the same as sex discrimination.⁶

IV

Thoughts/Takeaways

First, this case is going to be absolutely huge for persons with disabilities in several respects. For example, we know from *University of Texas Southwestern Medical Center v. Nassar*⁷ that a but-for analysis is used in retaliation claims. It was debatable as to whether but-for causation applied to Title I (employment) matters, but now that discussion is academic. In addition, we now know that but for causation can still exist even if the protected trait is not the sole cause of the adverse action. That is, *Bostock* makes clear that there can be more than one but-for cause. Often times, in employment matters there is more than one but-for cause. So, the debate over whether Title I has a different causation standard than the retaliation provision of Title V is now academic. It's pretty clear that the rule is but for. However, but for does not mean sole cause. Over and over again, Justice Gorsuch says in his opinion that multiple but-for causes are perfectly possible. Where any one of those but-for causes exist, liability attaches regardless of whether it is just one part of a larger whole. It also means that cases, such as *Serwatka v. Rockwell Automation*,⁸ which take a very narrow view of but-for causation, are no longer good law.

Second, this case will have a huge impact on people with disabilities in the area of equal protection and in the area of sovereign immunity. Both of those areas involve figuring out what equal protection classification persons with disabilities fall into. From there, you figure out whether the Equal Protection Clause was violated or not. On the sovereign immunity side, the classification matters because that is what dictates whether the scheme is proportional to the harm being redressed. When it comes to persons with disabilities, we know per *Tennessee v. Lane*,⁹ that with respect to accessing the courts, persons with disabilities are at least in the intermediate if not higher level of scrutiny. However, everything else is on a case-by-case basis when it comes to persons with disabilities. For example, with respect to employment, employers' adverse actions against people with disabilities are only subject to rational basis review under *Board of Trustees of the University of Alabama v. Garrett*.¹⁰ Since sexual orientation and transgender discrimination are now sex discrimination, an argument is now being made successfully that, for the purposes of the Equal Protection Clause and for the purposes of sovereign immunity litigation, people alleging discrimination based upon sexual orientation or transgender status receive a heightened level of scrutiny. If that is the case, then people facing discrimination on the basis of sexual orientation or transgender status are often times in a higher equal protection classification than persons with disabilities.

Third, this case is likely to have a huge impact on Rehabilitation Act claims. Under 29 U.S.C. §794 causation is, "solely by reason of." That means under *Bostock* that causation in Rehabilitation Act matters is truly a sole cause because the statute specifically says, "solely by reason of."¹¹ As such, look for more Rehabilitation Act cases to go for defendants on causation grounds than might have been the case prior to

Bostock. Depending on the results of the upcoming election, there could be an effort to amend the Rehabilitation Act to delete the word, "solely" from 29 U.S.C. §794.

Fourth, when I was teaching people how to be paralegals, one of the classes I taught was an introduction to philosophy course. In that course, students learned that the slippery slope argument is a logical fallacy. That is, every issue depends upon its facts, especially in the law, and, thus, slippery slopes do not exist. That may not be the case here. We are already seeing litigation over bathrooms, and in Connecticut we are seeing litigation over whether transgender students can compete on athletic teams of the gender they identify with rather than their biological sex. As mentioned earlier, there is litigation over failure to provide coverage in violation of the Affordable Care Act for sex reassignment surgery. Of course, you have the litigation over how the military currently treats transgender people. It is also perfectly realistic to expect litigation against religious-based entities that discriminate on the basis of sexual orientation or transgender status where that individual is not a minister. Also, continued litigation over sexual orientation and transgender with respect to their classification under the Equal Protection Clause is likely. For persons with disabilities, *Bostock* likely means that discriminatory actions against LGBTQ people may be subject to higher scrutiny, which also has implication for sovereign immunity, than persons with disabilities.

Fifth, in my Understanding the ADA blog, I went through all of Justice Gorsuch's opinions on disability rights to try and figure out how he might handle disability-related cases in the future. From that review, I noticed a stream going through his opinions of how common sense matters. You see some of that in his decision in *Bostock*. I recently read his book, *A Republic If You Can Keep It*, to see if I could find a basis for his majority opinion. I found two chapters indicating that his opinion could have been predicted to be more like Justice Alito's or Justice Kavanaugh's. In a prologue to one of the chapters, he discusses the importance of the equality of justice for all. He also returns to that theme in his access to justice chapters. So, I am not sure if Justice Gorsuch's opinion could have been predicted, but it was possible based upon his writings.

Finally, it is very unclear whether a transgender person would even consider bringing an ADA claim when they can now proceed under Title VII. After all, the ADA has an exception that can make it difficult for transgender person to proceed under the ADA.¹²

**William D. Goren, Esq., of William D. Goren, J.D., LL.M. LLC in Decatur, GA, has 30 years of experience dealing with the ADA as an Attorney. His law and consulting practice as well as his blog, Understanding the ADA, <http://www.williamgoren.com/blog/> (a member of the ABA Top 100 for five consecutive years, 2014-2018- there was no ABA 100 in 2019), all focus on understanding the ADA so that the client understands what it means to comply with that law. In particular, he provides consulting, counseling, representation, and training services involving compliance with the Americans with Disabilities Act, Rehabilitation Act of 1973, and related laws. Mr. Goren also*

brings a deep, personal understanding of what it means to have a disability, equipping him with exceptional insight on how the ADA actually works. He is deaf with a congenital bilateral hearing loss of 65–90+ decibels, but functions entirely in the hearing world thanks to hearing aids and lip-reading. For reasons independent of his deafness, he also uses voice dictation technology to access his computer. He is also a frequent presenter, a trained mediator, a FINRA arbitrator, and an arbitrator on the CPR employment panel. Finally, he is the author of *Understanding the ADA*, now in its 4th edition (ABA 2013), and numerous other articles on the rights of persons with disabilities. Interesting fact: He trained his miniature poodle to be a hearing dog while he practices virtually.

Endnotes

- ¹ *Bostock v. Clayton County, Georgia*, 590 U.S. _____ (June 15, 2020).
- ² *Adams v. School Board of St. Johns County, Florida*, Docket No. 18-13592 (11th Cir. August 7, 2020).
- ³ *Walker v. Azar*, Docket No. 20-CV-2834 (E.D. N.Y. August 17, 2020).
- ⁴ *Bostock*, 590 U.S. _____ .
- ⁵ *Id.* (J. Alito dissenting opinion).
- ⁶ *Id.* (J. Kavanaugh dissenting opinion).
- ⁷ 570 U.S. 338 (2013).
- ⁸ *Serwatka v. Rockwell Automation*, 591 F.3d 957 (7th Cir. 2010).
- ⁹ *Tennessee v. Lane*, 541 U.S. 509 (2004).
- ¹⁰ *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).
- ¹¹ 29 U.S.C. §794.
- ¹² 42 U.S.C. §12211.

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