EMPLOYMENT DISCRIMINATION AGAINST LGBT PERSONS

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I. INTRODUCTION

This Article addresses the current state of legal protections for individuals facing employment discrimination due to their sexual orientation or transgender identity. Part II provides an overview of federal laws concerning sexual orientation and gender discrimination, including the 2020 United States (U.S.) Supreme Court ruling in *Bostock v. Clayton County*. Part III examines post-*Bostock* developments, including state reactions, limitations, and the state of pre-*Bostock* precedent. Part IV examines employment discrimination faced by LGBT persons in hiring and termination. Part V provides a survey of contemporary employment

benefits for LGBT persons and medical services for those seeking gender affirming treatments.

II. ESTABLISHING EMPLOYMENT DISCRIMINATION TOWARD SEXUAL MINORITIES & *BOSTOCK*

Title VII of the Civil Rights Act of 1964 established that "it shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[1] Under *Price Waterhouse v. Hopkins*, the statute was interpreted to mean that an impermissible consideration of sex cannot be a motivating factor in an employment practice.[2] To assert a valid sex discrimination claim under Title VII, the plaintiff must establish a *prima facie* case showing that discrimination on the basis of gender could be inferred from the defendant's conduct. Once that has been established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its action. If the employer then meets that burden, the plaintiff must provide evidence that the employer's conduct was "more likely than not" based wholly or partially on discrimination.[3] In 2020, the Supreme Court extended these protections to transgender employees, holding that "[a]n employer who fires an individual merely for being gay or transgender violates Title VII" in *Bostock v. Clayton County*, thereby creating a uniform system of federal interpretation.[4]

Section A of this Part discusses Title VII claims based on sexual orientation and gender identity prior to *Bostock*. Section B explains the *Bostock* decision, and how it provides a stronger avenue for redress against employers discriminating against LGBT persons.

A. PRE-*BOSTOCK* TITLE VII CLAIMS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

Prior to *Bostock*, LGBT plaintiffs succeeded under Title VII by building on the sex stereotyping theories of discrimination[5] articulated by the Supreme Court in *Price Waterhouse v. Hopkins*.[6] In *Price Waterhouse*, the Supreme Court significantly expanded the traditional definition of "sex" by incorporating discrimination based on noncompliance with gender stereotypes into Title VII's prohibition

1. *See* 42 U.S.C. § 2000e-2(2)(1) (2023).

2. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989).

3. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1108–09 (9th Cir. 2006); *see also* Menaker v. Hofstra Univ., 935 F.3d 20, 30 (2d Cir. 2019) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

4. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020).

5. *See* discussion *infra* Part II.B.

6. *See Price Waterhouse*, 490 U.S. at 251 (1989); *see also* Schroer v. Billington, 577 F. Supp. 2d 293, 300 (D.D.C. 2008).

on sex discrimination.[7] The plaintiff, Ann Hopkins, was rejected for partnership at an accounting firm because her employer felt she was too masculine and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[8] The Court determined that denying Hopkins partnership because she failed to comply with gender stereotypes was discrimination "because of sex."[9] The Court reasoned that, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[10] Additionally, the Supreme Court found that when an employee's gender (including their conformity to gender stereotypes) played a motivating part in an employment decision, the employer can avoid liability only through a finding that the same decision would have been made regardless of the impermissible consideration.[11]

In the Title VII suits leading up to *Bostock*, transgender plaintiffs followed two main legal theories,[12] choosing to file either sex discrimination claims or sex stereotyping claims.[13] Sex discrimination claims rely on the theory that the employer took an adverse action against the trans employee after learning of their gender identity (including whether the employee changes their gender identity, intends on changing it, or has previously changed it). For example, if an employer was willing to hire the plaintiff when the employer believed the plaintiff was a man but rescinded the offer upon learning that the plaintiff is a woman, the employee might allege that the employer discriminated against her based on sex and violated Title VII.[14] Alternatively, a trans plaintiff could assert a discrimination claim on a sex or gender stereotyping theory.[15] Under the stereotyping theory, the plaintiff argues that they were subjected to an adverse employment decision because of their failure to comply with the employer's subjective gender

7. *See Price Waterhouse*, 490 U.S. at 251.

8. *Id*. at 235.

9. *Id*. at 277.

10. *Id*. at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

11. *See Price Waterhouse*, 490 U.S. at 244–45.

12. The U.S. Equal Employment Opportunity Commission (EEOC) viewed the various strategies taken by trans plaintiffs not as many different legal questions, but rather as "simply different ways of describing sex discrimination," since Title VII must be interpreted to proscribe gender-based discrimination as well as biological sex-based discrimination. Specifically, the EEOC found that, regardless of an employer's motivation, discrimination against an employee because of transgender status first requires drawing a gender-based classification, which is impossible to separate from sex discrimination and was admonished in *Price v. Waterhouse*. *See* Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *6, *7, *10 (Apr. 20, 2012).

13. *See* Vanita Gupta & Sharon McGowan, *Symposium: Let's Talk About Sex: Why Title VII Must Cover Sexual Orientation and Gender Identity*, SCOTUSBLOG (Sept. 5, 2019, 3:53 PM), https://perma.cc/D93Y-XHWP.

14. *See Macy*, 2012 WL 1435995, at *10 (explaining that proving sex discrimination does not require showing evidence of gender stereotyping).

15. *Id*. For a full explanation of the sex stereotyping theory, *see Price Waterhouse*, 490 U.S. at 250–53.

expectation.[16] Thus, a trans woman employee could argue that she was fired because the employer believed she should dress in male clothing and present as male. The stereotyping theory is supported largely by *Price Waterhouse v. Hopkins*.[17]

Prior to *Bostock*, transgender plaintiffs generally were more successful when they utilized the sex stereotyping theory. While some courts recognized claims by transgender plaintiffs as sex discrimination under Title VII,[18] others were hesitant in the absence of an explicit gender stereotype non-conformity argument.[19] The Seventh and Tenth Circuits rejected claims by trans plaintiffs under a "discrimination because of sex" theory, arguing that discrimination based on one's changing gender identity was not within the legislative spirit or intent of Title VII.[20] On the other hand, some courts accepted such claims, reasoning that by requiring the employer to first take the plaintiff's sex into account, adverse actions due to transgender status constituted discrimination "because … of sex."[21] For example, in *Schroer v. Billington*, the U.S. District Court for the District of Columbia (D.C.) explained that an employee who is fired because of a change in status within a protected category (i.e. male to female) has a discrimination claim under Title VII, regardless of any clear animosity toward a particular group.[22]

Plaintiffs alleging discrimination on the basis of sexual orientation have relied on *Price Waterhouse*, arguing that the challenged conduct was, in fact, discrimination on the basis of noncompliance with gender stereotypes and therefore covered by Title VII's prohibition on sex discrimination. These arguments were successful in several jurisdictions. For example, the Fifth Circuit, in *Equal*

16. *See* Gupta & McGowan, *supra* note 13.

17. *See Macy*, 2012 WL 1435995, at *10; *see also Price Waterhouse,* 490 U.S. at 251.

18. *See* Barnes v. Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (quoting Smith v. Salem, 378 F.3d 566, 575 (6th Cir. 2004)) ("A label, such as 'trans[gender],' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (finding a valid sex discrimination claim when bank treated "a woman who dresses like a man differently than a man who dresses like a woman"); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that Title VII prohibits "discrimination because one fails to act in the way expected of a man or woman"); Finkle v. Howard Cnty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) (quoting Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 n.2 (10th Cir. 2007)) ("Plaintiff's claim that she was discriminated against 'because of her obvious transgender[ ]' status is a cognizable claim of sex discrimination under Title VII. To hold otherwise would be 'to deny trans employees the legal protection other employees enjoy merely by labeling them as trans.'").

19. *See Etsitty*, 502 F.3d at 1215 (upholding termination of transgender bus driver due to legitimate, non-discriminatory reason of liability concerns raised when person with male genitalia uses female restrooms during work hours); Dobre v. Nat'l R.R. Passenger Corp. (Amtrak), 850 F. Supp. 284 (E.D. Pa. 1993) (finding no sex discrimination against trans employee when employee conformed to gender stereotypes).

20. *Etsitty*, 502 F.3d at 1222; Ulane v. E. Airlines, 742 F.2d 1081, 1085 (7th Cir. 1981).

21. Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

22. *See id*. at 306–08 (comparing a hypothetical employee fired because of change in gender identity with one fired because of change in religion and finding a claim due to change in status regardless of a particular animosity against, e.g., Judaism or Christianity).

Employment Opportunity Commission v. Boh Bros. Construction Co., held that a "plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."[23] Likewise, the Ninth Circuit, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, held that firing a gay man because he did not conform to gender norms was a violation of Title VII.[24] However, the Second Circuit, in *Simonton v. Runyon*, barred Title VII relief for LGB plaintiffs, explicitly stating that "Title VII does not prohibit harassment or discrimination because of sexual orientation."[25]

Thus, the *Price Waterhouse* theory did not guarantee the relief sought by plaintiffs. In some circuits, employers were permitted to enforce policies regarding gender conformity that were equally burdensome to men and women.[26] For instance, in *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit upheld the termination of a female bartender after she refused to follow a company "Personal Best" policy requiring women to wear foundation or powder, blush, lipstick, and mascara.[27] In that court's judgment, the challenged policy did not violate Title VII because it imposed equally burdensome gender-differentiated standards on men and women.[28] In 2014, the court in *Ramirez v. County of Marin* found that "there was no evidence that anyone acted with discriminatory intent with respect to the dress code that required men but not women to wear collared shirts."[29] These Ninth Circuit rulings suggested that, at least in some jurisdictions, employers could make policies requiring employees to adhere to gender stereotypes.[30]

Thus, before *Bostock*, protections for trans employees varied greatly throughout the U.S. Twenty-three states were located in federal circuits that explicitly interpreted Title VII as including gender identity,[31] and twenty-two states and the D.C. had passed laws including gender identity as a protected class in employment.[32] *Bostock* created a uniform system of interpretation for lower courts and decreased the necessity of seeking routes to relief outside of Title VII.

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23. Equal Emp. Opportunity Comm'n v. Boh Bros. Constr. Co. 731 F.3d 444, 454 (5th Cir. 2013).

24. Nicholas v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001).

25. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).

26. *See, e.g.*, Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1081 (9th Cir. 2004) (holding that "employers are permitted to apply different appearance standards to each sex so long as those standards are equal"); *see also* Bauer v. Lynch, 812 F.3d 340, 351 (4th Cir. 2016) (holding that employers do not contravene Title VII when they distinguish between the sexes based on physical fitness standards but impose an equal burden of compliance on both).

27. *Jespersen*, 392 F.3d at 1083.

28. *Id.*

29. Ramirez v. Marin, 578 F. App'x 673, 676 (9th Cir. 2014).

30. *See id.*; *Jespersen*, 392 F.3d at 1081.

31. *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/3MHK-J9KK (last visited Jan. 16, 2020).

32. *Non-Discrimination Laws: Employment*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/YAC8-LG3G (last visited Feb. 25, 2023).

B. THE *BOSTOCK* DECISION

Bostock v. Clayton County was a landmark decision by the U.S. Supreme Court addressing three consolidated cases of workplace discrimination against homosexual or transgender employees. In each of these cases, an employer fired a long-time worker for being gay or transgender.[33] Clayton County, Georgia fired Gerald Bostock for conduct "unbecoming" of a county employee shortly after he began participating in a gay recreational softball league.[34] Altitude Express fired Donald Zarda days after he mentioned being gay, and R.G. & G.R. Harris Funeral Homes fired Aimee Stephens, who presented as male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman."[35] The issue before the Court was whether Title VII's prohibition on discrimination because of a person's "sex" encompassed discrimination based on sexual orientation or gender identity.[36] In a 6-3 opinion, Justice Gorsuch wrote that it does, reasoning that an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.[37] Indeed, sex plays a "necessary and undisguisable role in the decision, exactly what Title VII forbids."[38]

Title VII explicitly "prohibits employers from taking certain actions 'because of' sex," which the majority read as therefore banning discrimination against trans employees.[39] The Court further held that it was not a defense for an employer facing Title VII "because of sex" scrutiny to say it discriminates against men and women equally, because sex is still part of the employer's reason for firing the individual. Instead of avoiding Title VII exposure, then, such an employer doubles it.[40] The *Bostock* decision was widely regarded as a tremendous win for the LGBT community, providing future plaintiffs with a strong avenue to bring suit for disparate treatment as a result of sexual orientation or gender identity under Title VII.[41] However, Aimee Stephens, the transgender plaintiff in *Bostock*, died on May 12, 2020, just over a month before the Supreme Court ruled in her favor.[42]

The Court made it clear that the ruling in *Bostock* is limited, explicitly stating that it does not address religious exemptions to anti-discrimination laws or the

33. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734 (2020).
34. *Id.*
35. *Id.*
36. *Id.* at 1738.
37. *Id.* at 1737.
38. *Id.*
39. *Id.* at 1739.
40. *Id.* at 1741.
41. *See* Jon W. Davidson, *How the Impact of Bostock v. Clayton County on LGBTQ Rights Continues to Expand*, AM. C.L. UNION (June 15, 2022), https://perma.cc/WS59-MJ9R.
42. Amy Howe, *Opinion Analysis: Federal Employment Discrimination Law Protects Gay and Transgender Employees (Updated)*, SCOTUSBLOG (June 15, 2020, 12:28 PM), https://perma.cc/V2G3-HNSB.

ever-present topic of bathroom access.[43] Furthermore, exemptions to Title VII still allow many employers to fire trans employees on the basis of gender identity. Other exemptions to Title VII for certain employers (those with fewer than fifteen employers) allow small businesses to fire employees on the basis of sexual orientation and gender identity in several states.[44] Additionally, in *Bostock*, the Court declined to address how the ruling could apply either to sex-segregated bathrooms and locker rooms or to dress codes.[45] As developed in Section III.B, *infra*, states have challenged the Biden Administration's policies in these areas.

III. POST-*BOSTOCK* DEVELOPMENTS

The *Bostock* decision spurred developments and challenges in the area of LGBT employment discrimination protections. Section A discusses how states have reinterpreted their anti-discrimination statutes to cover sexual orientation, gender identity, or both, consistent with the reasoning articulated in *Bostock*. Section B discusses some pushback by the states, namely against the EEOC guidance published in June 2021.

A. STATE ANTI-DISCRIMINATION STATUTES

Bostock's influence on state anti-discrimination laws is crucial because, while federal civil rights laws provide consistent protections across the country, they are often narrower than state laws.[46] For example, federal law related to employment discrimination does not cover employers with fewer than fifteen employees.[47] In addition, state law can provide another avenue for recourse to those who do not want to engage in the federal process.[48]

Across ten states, courts, government officials, and administrative agencies that enforce state anti-discrimination laws have, since the *Bostock* decision, taken the position that their state sex discrimination law covers discrimination on the basis of sexual orientation, gender identity, or both in some contexts.[49] Additionally, two state agencies and one state court reached similar conclusions before *Bostock*, based on parallel reasoning.[50] As a result, while there are only twenty-three states that expressly provide at least some statewide protections for sexual orientation, gender identity, or both, there are thirty-six states where

43. *Bostock*, 140 S. Ct. at 1753.

44. *Id.* at 1753–55.

45. Alec Reed, *Beyond Bostock: Employment Protections for LBGTQ Workers Not Covered by Title VII*, N.Y.U. J. LEGIS. & PUB. POL'Y. 537, 539 (2021).

46. *See* Movement Advancement Project, *The Impact of Bostock on State Nondiscrimination Protections*, MEDIUM (Mar. 19, 2021), https://perma.cc/W8V3-SH7A.

47. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018).

48. *Id.*

49. The ten states are Alaska, Arizona, Florida, Kansas, Montana, Nebraska, North Dakota, Ohio, Texas, and West Virginia. *See State Sex Discrimination Laws Covering SOGI Discrimination*, AM. C.L. UNION (Oct. 17, 2022), https://perma.cc/ER7E-KWDP.

50. The two state agencies were in Michigan and Pennsylvania, while the state court was in Missouri. *Id.*

individuals can file complaints regarding sexual orientation or gender identity discrimination in at least some situations.[51] In Texas, one of the states that have reinterpreted their laws as a result of *Bostock*, a state court of appeals addressed whether *Bostock* applied to the Texas Commission on Human Rights Act (TCHRA), which bans discrimination "because of . . . sex."[52] In light of the ruling in *Bostock*, the court felt compelled to read the TCHRA's ban on sex discrimination as "prohibiting discrimination based on an individual's status as a homosexual or transgender person."[53] Similarly, the Commission on Human Relations for Florida, another state that reinterpreted its laws post-*Bostock*, issued a notice that it would begin following *Bostock* when investigating state-level sex discrimination cases.[54] The Michigan Supreme Court, yet another state that reinterpreted its laws after *Bostock*, ruled that discrimination on the basis of sexual orientation and gender identity is discrimination "because of sex," barred by the Michigan Elliott-Larsen Civil Rights Act, in *Rouch World, LLC v. Department of Civil Rights*.[55] These changes reduce the hardship that the LGBT community faces in seeking relief for discriminatory treatment.

B. LIMITATIONS AND CHALLENGES TO THE EEOC GUIDANCE

While many states have welcomed the *Bostock* opinion, there have been challenges to its scope under the Biden Administration. In June 2021, the EEOC issued guidance on employment discrimination based on sexual orientation or gender identity influenced by *Bostock*. The guidance says, among other things, that (1) employers cannot require a transgender employee to dress in accordance with the sex they were assigned at birth; (2) employers cannot deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity; and (3) use of pronouns or names that are inconsistent with an individual's gender identity could be considered harassment.[56]

The Attorneys General of twenty states filed suit, challenging the guidance on the grounds that it did not comply with the Administrative Procedures Act, which requires an agency to publish notice of the proposed rule and consider public comments before publishing a final rule.[57] The EEOC argued that the rules were merely interpretive and not a final agency action, for which a notice and comment process is not necessary.[58] A federal district court in Tennessee agreed with the states, determining the guidance constituted a final agency action that did not

51. *Id.*
52. Tarrant Cnty. Coll. Dist. v. Sims, 621 S.W.3d 323, 329 (Tex. App. 2021).
53. *Id.*
54. *Id.*
55. Michelle P. Crockett, Erica Jilek, Kirstina Magyari, & Megan Norris, *Michigan Supreme Court: Discrimination Based on Sexual Orientation Prohibited Under State Civil Rights Act*, JD SUPRA (Aug. 2, 2022), https://perma.cc/VQK3-VENL.
56. Fiona W. Ong, *Federal Court Blocks Enforcement of EEOC Sexual Orientation and Gender Identity Guidance*, SHAWE ROSENTHAL LLP (July 29, 2022), https://perma.cc/MUQ3-CA7M.
57. *Id.*
58. *Id.*

follow proper procedures.[59] The Tennessee court also found that the guidance extended beyond the *Bostock* decision, in which the Supreme Court declined to decide whether sex-segregated bathrooms, locker rooms, and dress codes violate Title VII.[60] As such, the court enjoined the EEOC from implementing this guidance in states where there is a law that prohibits providing bathroom or locker room access based on anything other than gender assigned at birth.[61]

C. CURRENT STATUS OF MILITARY EMPLOYMENT FOR TRANSGENDER PEOPLE

Those in favor of banning transgender individuals from military service often argue that gender dysphoria is a mental illness which makes it difficult for transgender individuals to serve and disrupts cohesion within military units.[62] As then-Defense Secretary Mattis wrote in his 2018 Memorandum to the President on Military Service by Transgender Individuals:

> I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations.[63] [The inclusion of transgender individuals] could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.[64]

Those opposed to banning transgender individuals from military service argue that gender dysphoria does not create a bar to service, that healthcare costs for treating transgender individuals are manageable, and that no existing empirical evidence shows that transgender individuals disrupt unit cohesion. A bipartisan letter from fifty senators sent on April 26, 2018 to Secretary Mattis outlined these arguments.[65] First, the senators cited statements from the American Medical Association, American Psychological Association, and two former U.S. Surgeons General explaining that gender dysphoria is a treatable condition and should not be used as a pretext to ban transgender individuals from military service.[66] The Surgeons General, quoted by the senators, argued that "transgender troops are as medically fit as their non-transgender peers and there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from

59. Tennessee v. U.S. Dep't of Educ., No. 3:21-CV-308, 2022 WL 2791450, at *4 (E.D. Tenn. July 15, 2022).
60. *Id.* at *16.
61. *Id.* at *67.
62. Dep't of Def., Memorandum to the President (Feb. 22, 2018), https://perma.cc/B3XU-ZFXD.
63. *Id.*
64. *Id.*
65. Letter from Kirsten Gillibrand, Sen. N.Y., to James Mattis, Sec'y of Def., (Apr. 26, 2018), https://perma.cc/M29A-BDN3.
66. *Id.*

military service."[67] Many legislators have gone beyond just criticizing the transgender military ban, taking active steps to end it; however, all attempts to introduce or amend legislation failed.[68]

Also in July 2020, over one hundred House Democrats wrote a letter to then-Defense Secretary Esper and then-Attorney General Barr calling for an end to the transgender military ban in light of the landmark Supreme Court decision in *Bostock*.[69] According to the letter, the *Bostock* decision "unambiguously clarified that Title VII's prohibition against discrimination on the basis of sex includes protections for LGBTQ workers."[70] The House Democrats also urged the government to negotiate an end to the four outstanding lawsuits challenging the ban given the likelihood that the litigation would be defeated by the new Supreme Court precedent.[71]

Doe v. Esper, filed in March 2020 by GLBTQ Legal Advocates & Defenders (GLAD), was the first lawsuit to challenge the transgender military ban when it went into effect in April 2019.[72] Lieutenant Doe was a committed member of the U.S. Navy who came out as a trans woman after the ban went into effect.[73] Upon being diagnosed with gender dysphoria by a military physician in June 2019, Lieutenant Doe, following protocol, informed her commanding officer of the diagnosis.[74] Doe, who risked involuntary discharge from the Navy by coming out, sought to undergo a gender transition, which was impermissible under the policy in place.[75] In May 2020, Doe received a special, irrevocable waiver from the Navy exempting her from the ban: she could now serve openly as a woman and continue receiving medical care to aid her transition.[76]

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67. *Id.*

68. *Human Rights Campaign Slams Marco Rubio, Jim Banks Effort to Reinstate Trump-Era Ban on Military Service by Transgender People*, HUM. RTS. CAMPAIGN, https://perma.cc/4YXJ-AUHL (last updated Feb. 16, 2023); Connor O'Brien, *House Votes to Stymie Trump's Transgender Troop Ban*, POLITICO (July 30, 2020, 2:28 PM), https://perma.cc/3G72-VBV5; Letter from House Democrats to Mark Esper, Sec'y of Def., & William Barr, Att'y Gen. (July 8, 2020), https://perma.cc/6GTT-5PUF; Rebecca Kheel, *Overnight Defense: Pentagon to Get $696B in Year-end Funding Deal: House Preps for Dec. 28 Veto Override on Defense Bill if Necessary*, THE HILL (Dec. 21, 2020, 6:21 PM), https://perma.cc/Y3ZN-FM25; Cole Blum, *Defense Policy Negotiations Near Completion in Congress, With Human Rights Provisions in Play*, JUST SEC. (Nov. 25, 2020), https://perma.cc/XW3L-4DGJ.

69. Harm Venhuizen, *House Democrats Call on Military to End Ban on Transgender Service*, MIL. TIMES (July 8, 2020), https://perma.cc/4GG3-SMNX.

70. Letter from House Democrats to Mark Esper, Sec'y of Def., & William Barr, Att'y Gen., *supra* note 68.

71. Dawn Ennis, *House Votes to End Trump's Transgender Military Ban*, FORBES (July 30, 2020, 4:39 PM), https://perma.cc/59MQ-CHHH.

72. *Doe v. Esper*, GAY & LESBIAN ADVOCS. & DEFS., https://perma.cc/JC3G-X6DF (last visited Feb 25, 2023).

73. Complaint for Declaratory and Injunctive Relief at 1, Doe v. Esper, No. 1:20-cv-10530-FDS (D. Mass. 2020).

74. *Id.* at 2.

75. *Id.*

76. Notice of Voluntary Dismissal Without Prejudice for Plaintiff, Doe v. Esper, No. 1:20-cv-10530-FDS, at *2 (D. Mass. 2020).

In one of his first actions as President, Biden repealed the Trump Administration's transgender military ban.[77] As of February 2023, any qualified transgender person who wishes to serve in the military may do so.[78] Some congressional Republicans have responded to this development by introducing legislation to reimpose a general ban on transgender persons serving in the military.[79]

D. STATE LAWS ON EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER PEOPLE

In June 2020, the Supreme Court issued a landmark decision in *Bostock*, declaring that the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity.[80] However, Title VII is not as protective of transgender employees as some state laws. For example, Title VII only applies if an employer has fifteen or more employees.[81] But states may—and some do—extend anti-discrimination protections to workplaces with fewer than fifteen employees.[82] California's employment discrimination law applies to workplaces with at least five employees, while Colorado's applies to workplaces with just one employee.[83] Thus, while *Bostock* affords unprecedented protection to transgender employees who live in states that previously extended no safeguards against employment discrimination,[84] trans individuals living in stricter states will be better protected under state than federal law.[85]

Before *Bostock*, twenty-two states and the D.C. explicitly prohibited employment discrimination based on gender identity.[86] The laws in these states protected against both sexual orientation and gender identity discrimination in the workplace.[87] In 2020, Virginia became the first state in over ten years to add sexual orientation and gender identity to its existing employment discrimination laws.[88] Minnesota was the first state to extend protection to transgender individuals with the passage of the Minnesota Human Rights Act in

77. Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform (Jan. 25, 2021), https://perma.cc/4NX3-KSU3.

78. *See id.*; *see also* Brad Dress, *Rubio, Banks introduce measure to ban some transgender people from military service*, THE HILL (Feb. 16, 2023), https://perma.cc/X8VZ-N6G2.

79. *See* Dress, *supra* note 78.

80. Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020, 9:01 AM), https://perma.cc/3SGJ-YTXD.

81. Cathryn Oakley, *What the Supreme Court Ruling in Bostock Means for State Legislative Efforts*, HUM. RTS. CAMPAIGN (July 15, 2020), https://perma.cc/8TGN-D3ZD.

82. *Id.*

83. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS (June 2012), https://perma.cc/6Y39-6D2T.

84. *See id.*

85. *Id.*

86. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/9HKZ-8YKW (last visited Feb. 25, 2023).

87. *2019 State Equality Index: A Review of State Legislation Affecting the Lesbian, Gay, Bisexual, Transgender and Queer Community and a Look Ahead in 2020*, HUM. RTS. CAMPAIGN FOUND. (2019), https://perma.cc/QEC9-RJBC.

88. *Id.* at 12.

1993.[89] The Act bans employment discrimination on the basis of "sexual orientation,"[90] broadly defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[91] The Act's drafters were intentionally vague so that it would "[cover] everyone" while "[steering] the debate away from any one group" in the months leading up to its passage.[92]

Other states, like Massachusetts, extend protections to transgender people by explicitly naming gender identity as a protected category in employment discrimination law. In November 2011, then-Governor Deval Patrick signed "An Act Relative to Gender Identity."[93] The law added gender identity as a protected characteristic in Massachusetts's employment laws, amending previous law and making it unlawful for "an employer . . . because of the . . . gender identity . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."[94] Massachusetts defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."[95]

Connecticut passed a similar law in 2011 protecting transgender individuals in the workplace by adding "gender identity or expression" as a protected category to Connecticut's anti-discrimination laws.[96] Connecticut's definition of "gender identity" is the same as that of Massachusetts, but it also includes ways in which employees can demonstrate their gender identity, such as "providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity."[97] The definition makes it clear that a transgender person is protected against discrimination because of both their "gender identity" and "gender expression," which includes appearance and behavior.[98]

Some states do not explicitly protect transgender individuals from employment discrimination, but apply and expand existing state law protections against sex

89. Joshua Preston, *Senator Allan Spear and the Minnesota Human Rights Act*, 65 MINN. HIST. 76 (2016).

90. MINN. STAT. ANN. § 363A.08 (West, Westlaw through Mar. 21, 2023 from the 2023 Reg. Sess.).

91. MINN. STAT. ANN. § 363A.03 (West, Westlaw through Mar. 21, 2023 from the 2023 Reg. Sess.).

92. Preston, *supra* note 89, at 81–82.

93. Jamie Reese, *Massachusetts Passes Gender Anti-Discrimination Bill*, JURIST (Nov. 16, 2011), https://perma.cc/FHB6-HDLB; *see also* Dana L. Fleming, *Massachusetts Passes Transgender Rights Bill*, MASS. BAR ASS'N (Jan. 2012), https://perma.cc/ZR4X-Y3SL.

94. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West, Westlaw through the 2022 2nd Annual Sess.).

95. *Id.*

96. *Connecticut: Legal Protections for Transgender People*, GAY & LESBIAN ADVOCS. & DEFS. (Oct. 2012), https://perma.cc/EN87-L5UV.

97. CONN. GEN. STAT. § 46a-51 (West, Westlaw through all enactments of the 2023 Reg. Sess.).

98. *Connecticut: Legal Protections for Transgender People*, *supra* note 96.

discrimination to prohibit discrimination based on gender identity.[99] For example, Pennsylvania does not explicitly protect transgender individuals from employment discrimination, but the Pennsylvania Human Relations Commission has indicated that existing provisions against sex discrimination in the Pennsylvania Human Relations Act (PHRA) can be used to protect transgender individuals:

> The term "sex" under the PHRA may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case. The prohibitions contained in the PHRA and related case law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected class, prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression. The Commission will accept for filing sex discrimination complaints arising out of the complainant's sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression using any and all legal theories available depending on the facts of the individual case.[100]

In 2020, the North Dakota Department of Labor and Human Rights, citing the persuasive authority of *Bostock*, similarly announced that it would now interpret "sex discrimination" to include discrimination on the basis of gender identity when enforcing the North Dakota Human Rights Act and the state's Housing Discrimination Act.[101]

IV. EMPLOYMENT DISCRIMINATION IN HIRING AND TERMINATION

Claims for discrimination in employment actions often involve different burdens of proof and evaluative standards courts must apply, making it easier or more difficult for certain plaintiffs to prevail in certain actions. Section A will discuss the varying levels of protection LGBT persons have against discrimination as a result of their particular employment sector. Section B discusses the varying degrees of difficulty plaintiffs face in bringing failure to hire and wrongful termination suits given differing burden-shifting frameworks.

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99. These states include Alaska, Arizona, Florida, Kansas, Kentucky, North Dakota, Nebraska, Ohio, Pennsylvania, and Texas. *See Equality Map: Employment Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/YE6S-4BME (last visited Feb. 26, 2023).

100. *Pennsylvania Human Relations Commission Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUM. RELS. COMM'N (July 30, 2018), https://perma.cc/MT3E-ZJAP.

101. *NDDOLHR Now Accepting And Investigating Charges of Discrimination Based on Sexual Orientation and Gender Identity*, N.D. DEP'T OF LAB. & HUM. RTS. (June 18, 2020), https://perma.cc/8RHJ-Q9Q9.

A. DISPARATE LEVELS OF PROTECTION BASED ON EMPLOYMENT SECTOR

An employer's protection against discrimination suits under the sovereign immunity doctrine varies depending on whether the employer is a public, quasi-public, or private entity.[102] Some courts examine the functions of the employer's business to determine whether it is public or private. For example, in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, the California Supreme Court determined that the highly regulated nature of the employer's business made it "more akin to a governmental entity than to a purely private employer."[103] While the court relied on the state constitution's equal protection clause to rule against the employer,[104] California later amended its discrimination statute to incorporate this holding, protecting both public and private employees through legislation.[105]

Additionally, in a 2003 sovereign immunity case, a Washington court allowed a patient at a municipal public health authority to sue her doctor under an argument based on *Gay Law Students Association*.[106] The court held that a public health authority established by a municipality for the purpose of providing healthcare for the general welfare was a quasi-municipal corporation that qualified as a local government entity for purposes of a statute waiving sovereign immunity.[107] This holding suggests that protection of sexual orientation statutes could be extended to employers that can be categorized as "quasi-public" corporations or state-protected monopolies, although this application has yet to be seen. Thus, the equal protection doctrine and state statutes that explicitly protect against sexual orientation discrimination may be a source of relief for LGBT plaintiffs, at least with respect to employees of the government or industries subject to the same regulations as government employees.

Conversely, certain state employers advocate for heightened levels of deference when faced with sexual orientation discrimination suits. For instance, school districts have argued that homosexuality presents a "moral issue," and that they therefore have a right and an obligation to look out for the "best interests" of their

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102. *See, e.g.*, *Municipal Liability and Qualified Immunity Explored in Discrimination Case*, 26 No. 6 McQuillin Mun. L. Rep. 4 (2008).

103. Gay L. Students Ass'n v. Pac. Tel. & Tel. Co., 595 P.2d 592, 599 (Cal. 1979).

104. *Id.* ("[A]rbitrary exclusion of qualified individuals from employment opportunities by a state-protected public utility does, indeed, violate the state constitutional rights of the victims of such discrimination.").

105. The holdings of *Gay Law Students Ass'n* and *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 89 (Cal. Ct. App. 1991) effectively amended California employment statutes to prohibit discrimination on the basis of sexual orientation. The holdings were later codified in CAL. GOV'T CODE § 12920 (West, Westlaw through Ch. 651 of the 2022 Reg. Sess.). For a discussion of the legislative history, *see* Murray v. Oceanside Unified Sch. Dist., 95 Cal. Rptr. 2d 28, 36 (Cal. Ct. App. 2000).

106. *See* Woods v. Bailet, 67 P.3d 511, 515 (Wash. Ct. App. 2003).

107. *Id.* (holding that plaintiff's allegation that doctors performed surgery on her without informed consent required her to file a claim with the corporation's governing body prior to filing suit, in accordance with the sovereign immunity statute).

students.[108] However, many courts have struck down school policies as vague for including general provisions to terminate, refuse to hire, or refuse to promote on moral deficiency grounds.[109] The most common rationale for these rulings is that a citation to a general requirement of morality, without specific reference to an articulated standard, exposes the moral judgment to the vagaries of a particular school board's notion of morality.[110] In *Weaver v. Nebo School District*, a federal court held that a school principal's decision not to assign a teacher as a volleyball coach because of a negative reaction in the community to her sexual orientation violated the Equal Protection Clause of the Fourteenth Amendment.[111] The court noted that the equal protection guarantee, if it is to mean anything, stands for the proposition that the "private antipathy of some members of a community cannot validate state discrimination."[112]

B. BRINGING CLAIMS OF HIRING AND TERMINATION DISCRIMINATION

Generally, LGBT persons have only been protected from discrimination under statutes that expressly prohibit discrimination on the basis of gender identity or sexual orientation.[113] These laws usually protect certain classes of employees from adverse employment decisions,[114] including termination, failure to hire or promote, providing lower salaries or benefits, and offering inferior work terms.[115]

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108. *See, e.g.*, Gish v. Bd. of Educ., 366 A.2d 1337, 1342 (N.J. Super. Ct. App. Div. 1976) ("[T]he school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted." (quoting Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952))).

109. *See, e.g.*, Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254, 255 (D. Or. 1973) (interpreting Oregon law to hold that "immorality" is unconstitutionally vague as grounds for dismissal; regulation must define immorality and cannot depend on the idiosyncrasies of the individual school board members, or of the community as a whole).

110. *Id.*

111. *See* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998).

112. *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985)).

113. *See, e.g.*, Flynn v. Hillard, 707 N.E.2d 716, 720 (Ill. App. Ct. 1999) (stating that the claim should have been brought under the city statute that prohibited sexual orientation discrimination instead of state anti-discrimination statute, which did not expressly protect against sexual orientation discrimination); Barbour v. Dep't of Soc. Servs., 497 N.W.2d 216, 217-18 (Mich. Ct. App. 1993) (demonstrating that no claim is available where protections of civil rights statute were aimed at gender discrimination, not sexual orientation discrimination); Nacinovich v. Tullet & Tokyo Forex, Inc., 685 N.Y.S.2d 17 (N.Y. App. Div. 1999) (noting that civil rights statute did not prohibit sexual orientation discrimination, but claim could survive under New York City Human Rights Law, codified at N.Y. ADMIN. CODE § 8-107). *But see* Hubert v. Williams, 184 Cal. Rptr. 161, 162-63 (Cal. App. Dep't Super. Ct. 1982) (providing that LGBT persons are protected under state civil rights act, although not explicitly stated, where statute had been interpreted to prohibit all forms of arbitrary discrimination by business establishments).

114. *See, e.g., Gay L. Students Ass'n.*, 595 P.2d at 599 (holding that, even though the state statute did not protect against sexual orientation discrimination, arbitrary employment decisions against a class of persons by a public utility company violated state due process rights under the state constitution). Protection for sexual orientation has since been codified in California under CAL. GOV'T CODE §12920 (West, Westlaw through 2022 Reg. Sess).

115. *See, e.g.*, CONN. GEN. STAT. § 46a-60 (West, Westlaw through 2022 Jan. Reg. Sess. & Nov. Spec. Sess.).

To prevail on a discrimination claim, plaintiffs must prove that a discriminatory reason more likely than not motivated the employer's adverse action.[116] They may do so by offering direct proof of discriminatory intent, or they may offer indirect proof using the method elucidated by *McDonnell Douglas Corporation v. Green*.[117] Under the *McDonnell Douglas* method, an employee has the initial burden of making a prima facie showing of discrimination. Then, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[118] Finally, the burden shifts back to the plaintiff to show that the employer's reason was "pretext" for discrimination.[119]

1. Failure to Hire

The burden-shifting framework for a claim of discriminatory failure to hire creates a relatively high standard for potential plaintiffs.[120] To establish a prima facie case of discrimination under the *McDonnell Douglas* method, a plaintiff must show (l) membership of a protected class; (2) qualification for the position sought; (3) subjection to an adverse employment action; and (4) either that the position remained open or that their replacement had similar qualifications.[121] If the plaintiff succeeds, a presumption of discrimination arises.[122] The employer must then state a "legitimate, nondiscriminatory reason" for not hiring the plaintiff.[123] If successful, the burden returns to the plaintiff, who must present evidence demonstrating that the reason articulated by the employer was a pretext for unlawful discrimination.[124] At this stage, the plaintiff must do more than refute or question the employer's nondiscriminatory reason for the action;[125] they must also provide evidence of the employer's discriminatory animus.[126] Because the *McDonnell Douglas* standard often causes confusion for plaintiffs and is not used

116. *See, e.g.*, Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 690 (9th Cir. 2017).

117. 3 Lab. & Emp. Law § 54.01 (2023); *see also* McDonnell Douglas Corp. v. Green., 411 U.S. 792 (1973).

118. *McDonnell Douglas Corp.*, 411 U.S. at 802.

119. *Id.*

120. *See, e.g.*, Robin Cheryl Miller, *Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination*, 82 A.L.R. 5TH 1, § 7 (2000) (discussing cases where plaintiff job applicants failed to establish prima facie cases of employment discrimination due to lack of sufficient evidence); Sondheimer v. Georgetown Univ., No. Civ. A.87-1052-LFO, 1987 WL 14618, at *3 (D.D.C. Oct. 20, 1987) (applicant unable to establish a prima facie case of employment discrimination). *But see* R.I. GEN. LAWS ANN. § 28-5-7.3 (West, Westlaw through Ch. 442 of the 2022 Reg. Sess.) (establishing that discrimination only has to be one motivating factor in termination to constitute an unlawful employment practice).

121. This test is widely accepted among circuits. *See, e.g.*, Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008) (citation omitted); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 110 (2d Cir. 2018), *cert. granted sub nom*; Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

122. Cook v. PC Connection, Inc., No. 08-cv-496-SM, 2010 WL 148369, at *4 (D.N.H. Jan. 13, 2010).

123. *Id.* (quoting Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 54 (1st Cir. 2000)).

124. *Id.* (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993)).

125. *Id.*

126. *Id.*

for jury instructions, several legal scholars have criticized this burden-shifting framework as giving judges an unfairly outsized ability to dismiss discrimination claims before they even get to trial.[127]

2. Wrongful Termination

Wrongful termination claims may be easier to establish than discriminatory failure to hire. The burden of proof in wrongful termination cases is less forgiving to the employer: the employee need only show an increased likelihood that the termination was based on the employee's sexual orientation or gender identity.[128] Additionally, employees have more tools available to prove wrongful termination. For example, plaintiffs may utilize circumstantial evidence to claim constructive termination based on a hostile work environment.[129] Many states apply an objective standard when determining constructive termination.[130] Specifically, an employee must prove by preponderance of the evidence "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign."[131]

In *Kovatch v. California Casualty Management Co.*, evidence of ostracization, decreased job responsibilities, and threatened termination constituted a showing of constructive termination.[132] The employee was tormented about his sexual orientation at work to the point that he required psychiatric counseling.[133] After exhausting his disability leave, which he had taken under his psychiatrist's advice, Kovatch refused to return to work or take an alternate position that he found less desirable.[134] In overturning a summary judgment ruling against the employee, the court held that the evidence created triable issues of fact as to whether Kovatch had been constructively terminated as a result of harassment, and whether he had been discriminated against on the basis of his sexual orientation through his employer's failure to provide an adequate remedy for the harassment.[135]

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127. *See* Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 BERKELEY J. EMP. & LAB. L. 257, 259–60 (2013).

128. *See, e.g.*, Leibert v. Transworld Sys., Inc., 39 Cal. Rptr. 2d 65, 70 (Cal. Ct. App. 1995) (holding that employee's subjection to a heightened degree of job performance scrutiny and threats of firing were sufficient to constitute discrimination).

129. Constructive termination occurs when the employer's behavior effectively compels an employee to resign. *See* Kovatch v. Cal. Casualty Mgmt. Co., 77 Cal. Rptr. 2d 217, 225–26 (Cal. Ct. App. 1998).

130. *See, e.g.*, Baker v. Tremco Inc., 890 N.E.2d 73, 80 (Ind. Ct. App. 2008); Kosa v. Dallas Lite & Barricade, Inc., 228 S.W.3d 428 (Tex. Ct. App. 2007); Darrow v. Dillingham & Murphy, LLP, 902 A.2d 135, 138 (D.C. 2006); Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1027 (Cal. 1994), *overruled on other grounds by* Romano v. Rockwell Int'l, Inc., 926 P.2d 1114 (Cal. 1996).

131. *Turner*, 876 P.2d at 1029.

132. *Kovatch*, 77 Cal. Rptr. 2d at 226.

133. *Id.*

134. *Id.* at 222.

135. *Id.* at 228–29.

Circumstantial evidence is an accepted and often necessary method for demonstrating the requisite causal link between an employee's sexual orientation and subsequent termination.[136] In turn, courts do not always require direct evidence to show that disclosure of sexuality caused termination.[137] In many cases, the admissibility of circumstantial evidence will mean the difference between summary judgment for or against the plaintiff.[138]

3. Intentional Infliction of Emotional Distress

In addition to an employment discrimination claim, an employee can bring an intentional infliction of emotional distress claim if an employer purposely causes severe emotional distress through extreme and outrageous conduct; winning such a case, however, is extremely difficult.[139] Many courts recognize intentional infliction of emotional distress as a cause of action separate from a discrimination claim.[140] In order to establish such a claim, plaintiffs must include the traditional elements of this tort in their *prima facie* case.[141] However, in the absence of a bright-line standard for what level of harassment an employer must intentionally or negligently inflict on an employee, it is extremely difficult for LGBT plaintiffs

136. *See, e.g.*, Hollander v. Am. Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) (finding that because employers rarely leave a trail of concrete evidence, circumstantial evidence is an appropriate way to build a case against an employer charged with discrimination); Sussman v. N.Y.C. Health & Hosps. Corp., No. 94 CIV. 8461 (DBS), 1997 WL 334964, at *15 (S.D.N.Y. June 16, 1997) (finding circumstantial evidence that employer's hostility towards employee increased after disclosure of employee's sexual orientation was sufficient to survive employer's motion for summary judgment).

137. *See, e.g.*, Goins v. W. Grp., 635 N.W.2d 717, 724 (Minn. 2001) ("Disparate treatment claims based on circumstantial evidence are governed by the burden-shifting framework established under the *McDonnell Douglas* scheme. This scheme allocates the burden of producing evidence between the parties and establishes the order of presentation of proof. A plaintiff must first establish a prima facie case of discriminatory motive. If the plaintiff makes this showing, the burden of production then shifts to the employer to articulate a legitimate nondiscriminatory reason for its adverse employment action. If the employer articulates such a reason, the plaintiff must then put forward sufficient evidence to demonstrate that the employer's proffered explanation was a pretext for discrimination. The burden of persuasion, however, remains with the plaintiff at all stages.").

138. *See Hollander*, 895 F.2d at 84; Husman v. Toyota Motor Credit Corp., 220 Cal. Rptr. 3d 42, 61–62 (Cal. App. 2d Dist. 2017), *rev. denied* (Sept. 27, 2017).

139. *See, e.g.*, Kofoid v. Woodard Hotels, 716 P.2d 771, 775 (Or. Ct. App. 1986) (holding that lower court erred in finding that a statutory violation preempted the independent claim of intentional infliction of emotional distress); Holien v. Sears, Roebuck & Co., 677 P.2d 704, 705 (Or. Ct. App. 1984) (establishing intentional infliction of emotional distress as a separate claim in the jury verdicts). *But see* Steven Aptheker & Russell Penzer, *Rethinking Tort Claims in Employment Discrimination Cases*, 248 N.Y.L.J. 55 (2012) (observing that tacking IIED onto employment discrimination claims in New York is routinely dismissed).

140. *See* Alex B. Long, *Using IIED Tort to Address Discrimination and Retaliation in the Workplace*, 2022 U. ILL. L. REV. 1325, 1328 (2022).

141. *See* Ellison v. Stant, 136 P.3d 1242, 1249 n.5 (Utah Ct. App. 2006) (stating that the traditional elements to establish intentional infliction of emotional distress are: (1) the defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends generally accepted standards of decency and morality; (2) the defendant engaged in such conduct either with the purpose of inflicting emotional distress or where a reasonable person would have known that such would result; and (3) the defendant's conduct directly resulted in severe emotional distress).

to survive a summary judgment motion.[142] Courts have generally been unwilling to find a defendant liable for intentional or negligent infliction of emotional distress when the only conduct complained of is harassment due to the employee's actual or presumed sexual orientation.[143] For example, the District Court for the Southern District of New York in *Moye v. Gary* rejected the plaintiff's claim that her employer had engaged in intentional infliction of emotional distress when a supervisor called her a "fag" and suggested that she was a lesbian.[144] The court held that the comments were not sufficiently outrageous to state a claim and implied that further "outrageous" actions beyond name-calling were necessary to constitute intentional infliction of emotional distress.[145] Comparably, the District of Connecticut expressly stated:

> The standard of outrageousness for cases of intentional infliction of emotional distress is high: Liability . . . has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous![146]

Until courts adopt a more workable standard for such harassment, the intentional infliction of emotional distress claim is an ineffective alternative to the explicit right to relief under a state anti-discrimination statute.

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142. *See* Forgione v. Skybox Lounge, LLC, No. NNHCV146050777S, 2015 WL 7941111, at *7 (Conn. Super. Ct. Nov. 10, 2015) (granting partial summary judgment for employer because his statements and conduct while terminating employee were not extreme or outrageous enough to support intentional infliction of emotional distress); Riscili v. Gibson Guitar Corp., No. 06 CIV 7596 RJH, 2007 WL 2005555, at *5 (S.D.N.Y. July 10, 2007) (granting partial summary judgment for employer because the conduct alleged did not meet the strict standard for intentional infliction of emotional distress); Rubalcaba v. Albertson's LLC, No. B278626, 2019 WL 1417158, at *22 (Cal. App. 2d Dist. Mar. 29, 2019) (reversing a jury finding of intentional infliction of emotional distress).

143. *See generally* Camille L. Herbert, Employee Privacy Law §§ 9:3–9:4 (West Dec. 2022). Many cases illustrate the types of conduct that are insufficient to rise to the level of outrageousness needed to recover under the tort. *See, e.g.*, Dawson v. Entek Intern, 630 F.3d 928, 941 (9th Cir. 2011) (finding that an employer's indifference to derogatory comments made by its employees about the plaintiff was not sufficiently outrageous to give rise to such a claim); De La Campa v. Grifols Am., Inc., 819 So. 2d 940, 943–44 (Fla. Dist. Ct. App. 2002) (finding that employer's expression of displeasure about employee's sexual orientation and statement that he would be terminated, while offensive, were not outrageous enough to support a claim of intentional infliction of emotional distress); *see also* Spencer v. Bedford, No.6:18-CV-31, 2018 WL 5983572, at *1 (W.D. Va. Nov. 2, 2018) (openly gay police officer did not plead enough facts to survive motion to dismiss for IIED but survived other claims for retaliation).

144. Moye v. Gary, 595 F. Supp. 738, 739 (S.D.N.Y. 1984).

145. *Id.* at 740.

146. Byra-Grzegorczyk v. Bristol-Myers Squibb Co., 572 F. Supp. 2d 233, 256 (D. Conn. 2008) (quoting Morrissey v. Yale Univ., 844 A.2d 853, 854 (Conn. 2004)) (quotation marks omitted).

V. EMPLOYMENT BENEFITS FOR LGBT PERSONS

As discussed in Part IV, LGBT individuals may face significant discrimination in the workplace and may have difficulty challenging adverse employment actions. An important and connected issue facing LGBT persons in the workplace is access to benefits such as healthcare and paid sick and family leave, each of which also raises important issues of equality. This Part will discuss access to employer-provided spousal benefits for same-sex couples, insurers' limits on access to gender affirmation surgery, and the problem of paid leave.

Many LGBT individuals gained access to employer-based benefits previously only available to opposite-sex spouses after the Supreme Court's decision in *Obergefell v. Hodges*, which extended marriage rights to same-sex couples.[147] Post-*Obergefell*, employers who refuse to provide equal access to benefits risk discrimination lawsuits.[148] Despite gaining access to spousal benefits, however, transgender individuals seeking gender affirmation surgery still face difficulties in gaining access to care.[149] Insurers may deny coverage for surgery for a variety of reasons discussed below, and transgender individuals have had little success in challenging insurance determinations in court. Because local, state and federal policies persist in defining "family" in ways that exclude the living arrangements and social networks of many LGBT individuals, these individuals still struggle to access benefits such as sick leave and paid family leave.[150]

A. THE CURRENT STATE OF EMPLOYMENT BENEFITS FOR FAMILIES HEADED BY SAME-SEX COUPLES

Following the Supreme Court's ruling in *Obergefell v. Hodges* in June 2015, all states must now perform and recognize same-sex marriages.[151] Because same-sex couples can now enter into marriages across the country, LGB workers face fewer obstacles when trying to extend employer-provided health insurance to their spouses and families: the logical conclusion of the Court's decision in *Obergefell* is that any benefits provided by employers to opposite-sex married couples must be provided to same-sex married couples.[152] If employers only offer plans to opposite-sex couples, the employers could face state and federal discrimination lawsuits.[153] For example, in *Schuett v. FedEx Corp.*, the U.S. District Court for the Northern District of California held that FedEx

147. 576 U.S. 644, 680–81 (2015).

148. *Id.*

149. *See Accessing Coverage for Transition-Related Health Care*, LAMBDA LEGAL, https://perma.cc/CJY4-86XA (last visited Feb. 25, 2023).

150. Moira Bowman, Laura E. Durso, Sharita Gruberg, Marcella Kocolatos, Kapana Krishnamurthy, Jared Make, Ashe McGovern, & Katherine Gallagher Robbins, *Making Paid Family Leave Work for Every Family*, CTR. FOR AM. PROGRESS (Dec. 1, 2016), https://perma.cc/ZQB3-KS3V.

151. *Obergefell*, 576 U.S. at 680–81.

152. Todd A. Solomon, Brian J. Tiemann, & Jacob M. Mattinson, *Employee Benefits Implications of Supreme Court Decision on Same-Sex Marriage*, MCDERMOTT, WILL & EMERY, LLP (June 30, 2015), https://perma.cc/2UCN-PYYH.

153. *Id.*

violated its duty to administer its benefit plan in accordance with applicable law when it denied the plaintiff's claim for qualified pre-retirement survivor annuity benefits.[154] The court ruled that California law recognized the plaintiff as her deceased wife's spouse for the purposes of her wife's pension plan even though the pension plan language still defined "spouse" according to the Defense of Marriage Act.[155] At the federal level, Section 1557 of the Affordable Care Act (ACA) also expressly prohibits insurers from discriminating on the basis of sexual orientation or gender identity.[156] In fact, under the ACA, the rate of uninsured LGBT persons fell from 19% to 10% from 2016 to 2019.[157] However, only sixteen states and the D.C. had implemented state laws or policies prohibiting private insurance companies from discriminating on the basis of sexual orientation as of June 2022.[158]

B. MEDICAL SERVICES FOR GENDER AFFIRMATION TREATMENTS

Transgender persons wishing to access gender-affirming care, including surgery, frequently face health insurance policies that label such treatments as cosmetic[159] or medically unnecessary, and therefore outside coverage parameters.[160] In *Mario v. P & C Food Markets, Inc*., an employee who was denied coverage filed suit under the Federal Employee Retirement Income Security Act (ERISA)[161] and Title VII.[162] The court rejected the ERISA claim, finding that the plaintiff's mastectomy and hormone therapy were not "medically necessary."[163] The court's ruling was based upon controversy within the medical community regarding the efficacy of that particular treatment plan;[164] however, the American Medical Association (AMA) has subsequently declared the denial of coverage based solely on the patient's gender identity to be discrimination.[165] In subsequent cases, courts have ruled in favor of transgender patients seeking coverage, and Section 1557 of the ACA prohibits most insurers from discriminating on the basis of gender identity, giving transgender patients an avenue for enforcing their

154. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1165 (N.D. Cal. 2016).

155. *Id*.

156. Lindsey Dawson, Jennifer Kates, & Anthony Damico, *The Affordable Care Act and Insurance Coverage Changes by Sexual Orientation*, KAISER FAM. FOUND. (Jan. 18, 2018), https://perma.cc/F267-9BX8.

157. *Id*.

158. *Healthcare Laws and Policies: Nondiscrimination in Private Insurance*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/7ATP-P73P (last updated June 22, 2022).

159. *See* Davidson v. Aetna Life & Cas. Ins. Co., 420 N.Y.S.2d 450 (N.Y. Sup. Ct. 1979).

160. Mario v. P & C Food Mkts. Inc., 313 F.3d 758, 765–66 (2d Cir. 2002).

161. *Id*. at 763.

162. *Id*. at 764.

163. *Id*. at 764–66.

164. *Id*. at 766.

165. *Removing Financial Barriers to Care for Transgender Patients*, AM. MED. ASS'N, https://perma.cc/43RU-UW5P (last visited Mar. 4, 2023) (resolving that the AMA "support[s] public and private health insurance coverage for treatment of gender identity disorder" as recommended by the patient's physician).

right to health insurance coverage for confirmation treatments.[166] In addition, twenty-three states and the D.C. have enacted laws prohibiting blanket exclusions for gender affirming services as of August 2022.[167] Nevertheless, individual insurers continue to deny or delay confirmation treatments for transgender patients on a case-by-case basis.[168]

The lack of clear anti-discrimination protections for people in the U.S. seeking gender-affirming care through private insurance has left many uncertain of their rights.[169] It is within individual companies' purview whether to include gender affirmation surgery in their health insurance plans, and many large companies do include it.[170] However, this is likely to change in light of *Bostock*: in June 2022, a federal court in Georgia held that employers who refuse to cover gender affirming care violate Title VII, relying on *Bostock*'s holding that transgender people are protected from discrimination under Title VII of the Civil Rights Act of 1964.[171] As of 2014, there is no national Medicare exclusion of gender-affirming care.[172] Additionally, although Medicaid coverage for gender-affirming care is prohibited or uncertain in over twenty states, state courts in Alaska, Georgia, Iowa, West Virginia, and Wisconsin have all struck down Medicaid exclusions of this coverage since 2019.[173]

C. PAID FAMILY AND SICK LEAVE

LGBT workers are particularly at risk of discrimination in the areas of paid sick leave and paid family leave. Overall, in 2018, two-thirds of workers without fully paid leave reported difficulty making ends meet.[174] Furthermore, LGBT persons are generally more vulnerable to poverty than heterosexual persons.[175]

166. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, 260 (2010).

167. *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/8243-BJR6 (last visited Apr. 5, 2023).

168. *See Accessing Coverage for Transition-Related Health Care*, LAMBDA LEGAL, https://perma.cc/QCN4-QBVY (last visited Feb. 26, 2023).

169. Erin Mulvaney, *"Not Completely Me:" Transgender Workers Fight for Health Care*, BLOOMBERG LAW (Oct. 20, 2021), https://perma.cc/GCN7-VYT2.

170. *See Transgender-Inclusive Benefits for Employees and Dependents*, HUM. RTS. CAMPAIGN, https://perma.cc/PX8R-8DLN (last visited Feb. 26, 2023).

171. Lange v. Houston Cnty., No. 5:19-CV-392 (MTT), 2022 WL 1812306, at *30-31 (M.D. Ga. Jun. 2, 2022).

172. Ariana Eunjung Cha, *Ban Lifted on Medicare Coverage for Sex Change Surgery*, WASH. POST (May 30, 2014), https://perma.cc/J239-YNTE.

173. *Healthcare Law and Policies: Medicaid Coverage for Transgender-Related Care*, MOVEMENT ADVANCEMENT PROJECT (Feb. 16, 2023), https://perma.cc/8E58-YBK8.

174. Scott Brown, Jane Herr, Radha Roy, & Jacob Alex Klerman, *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, ABT ASSOC. (July 2020), https://perma.cc/A865-6B6G.

175. *See Lesbian, Gay, Bisexual, and Transgender Persons & Socioeconomic Status*, AM. PSYCH. ASS'N, https://perma.cc/GFN7-5HF7 (last visited Feb. 25, 2023).

Millions of women are low-wage workers who lack access to paid leave;[176] and 69% of workers in the lowest 10% wage category do not have access to paid sick leave.[177] As a result, people at the intersection of these identities—namely, lesbian, bisexual, and trans women of color—have extreme difficulty providing for themselves and their families.[178] Black women in same-sex couples are three times more likely to be poor than white women in same-sex couples, while Latina women in same-sex couples are twice as likely to be poor as their white counterparts.[179]

No federal legislation guarantees paid sick or family leave. However, a patchwork of state and local laws provides for these kinds of leave. Currently, over three dozen states and municipalities have laws that provide paid sick leave.[180]

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176. Alex Baptiste, *Paid Sick Days Promote Women's Health*, PAID SICK DAYS (May 16, 2018) https://perma.cc/GN4S-NTPP.

177. *Employee Benefits in the United States – March 2019*, BUREAU OF LAB. STAT. (Sept. 19, 2019), https://perma.cc/C5HG-BY6D.

178. Sharon J. Lettman-Hicks, *The State of Black LGBT People and Their Families*, HUFFPOST (May 13, 2014), https://perma.cc/6NCC-564F. *See also* M. V. Lee Badgett, Soon Kyu Choi, & Bianca D.M. Wilson, *LGBT Poverty in the United States: A Study of Differences Between Sexual Orientation and Gender Identity Groups,* WILLIAMS INST. (Oct. 2019), https://perma.cc/8NUA-35L6.

179. Dayana Yochim, *Pride Month: 12 key numbers highlighting the economic status, challenges that LBGTQ people fac*e, MSNBC (June 22, 2020), https://perma.cc/MK38-BRED.

180. *See* S.F., Cal., Admin. Code ch. 12W.1-.16 (2006) https://perma.cc/T7NS-M5L6 (last visited Feb. 25, 2023); D.C. CODE § 32-131.01-.17 (2022); CONN. GEN. STAT. § 31-57r-w (2023); Seattle, Wash., Ordinance 123698 (2011) https://perma.cc/7RTH-XZSB (last visited Feb. 25, 2023); Portland, Or. Code § 9.01.010-140 (2013) https://perma.cc/5LVR-DRU3 (last visited Feb. 25, 2023); N.Y.C. Admin. Code tit. 20, ch. 8, § 20-911-924 (2013) https://perma.cc/ZX6M-AGXD (last visited Feb. 25, 2023); Jersey City, N.J., Ordinance 13.097 (2013) https://perma.cc/ZP4K-U2JM (last visited Feb. 25, 2023); Newark, N.J., Ord. 6 PSF-A(S) (2022); Irvington, N.J., Ordinance MC 3513 (2014) https://perma.cc/QY6H-KP6K (last visited Feb. 25, 2023); Passaic, N.J., Ordinance 1998-14 (2014) https://perma.cc/5GW4-9RCN (last visited Feb. 25, 2023); East Orange, N.J., Ordinance 21 ch. 140-1-140-15 (2014) https://perma.cc/K3K2-6L2X (last visited Feb. 25, 2023); Paterson, N.J. Code § 412-1-13 (2014) https://perma.cc/L8FM-P67V (last visited Feb. 25, 2023); Trenton, N.J. Ordinance ch. 230-1-230-13 (2014) https://perma.cc/ASU2-QLUV (last visited Feb. 25, 2023); Montclair, N.J. Paid Sick Leave Ordinance ch. 131-1-132-13 (2014) https://perma.cc/ET2X-MU2U (last visited Feb. 25, 2023); Milwaukee, Wis., Ordinance ch. 350 (2014) https://perma.cc/6KV8-V346 (last visited Feb. 25, 2023); Bloomfield, N.J., Ordinance ch. 160-1-160-16 (2015) https://perma.cc/A6M5-2UPA (last visited Feb. 25, 2023); Cal. Lab. Code § 245-249 (West, 2022); Eugene, Or., Ordinance 20537 (2014) https://perma.cc/VWM4-ZRSB (last visited Feb. 25, 2023); Mass. Gen. Laws ch. 149, § 148c-d (2015) https://perma.cc/Z8GD-3KML (last visited Feb. 25, 2023); Oakland, Cal. Mun. Code ch. 5.92 (2014) https://perma.cc/3PX4-X877 (last visited Feb. 25, 2023); Tacoma, Wash., Ordinance 28275 (2015) https://perma.cc/YGH7-UAPP (last visited Feb. 25, 2023); Phila., Pa., Ordinance 141026 (2015) https://perma.cc/XP63-YTWT (last visited Feb. 25, 2023); S.B. 454, 78th Ore. Leg. Assemb., Reg. Sess. (Ore. 2015) https://perma.cc/H2NN-8SET (last visited Feb. 25, 2023); Emeryville, Cal., Ordinance 15-004 (2015) https://perma.cc/YRT2-5U6P (last visited Feb. 25, 2023); Montgomery Cnty., Code ch. 27, art. XIII (2015) https://perma.cc/B89V-WQGC (last visited Feb. 25, 2023); Pittsburgh, Pa. File 2015-1825 (2015) https://perma.cc/2E94-MW44 (last visited Feb. 25, 2023); New Brunswick, N.J., Title 8, ch. 56 (2015) https://perma.cc/A95A-UT84 (last visited Feb. 25, 2023); Spokane, Wash., ch. 09.01 (2016) https://perma.cc/A95A-UT84 (last visited Feb. 25, 2023); Plainfield, N.J. Ordinance ch. 8 (2016) https://perma.cc/L6K7-2NBF (last visited Feb. 26, 2023); Santa Monica Mun. Code 4.62.025 https://perma.cc/7WM9-TJG9 (last visited Feb. 26, 2023); Minneapolis, Minn., Ordinance 2016-040 (2016) https://perma.cc/HS6X-CGT7 (last visited Feb. 26, 2023); L.A., Cal., Ordinance 184320 (2016) https://perma.cc/7PHN-DA5J (last visited Feb. 26, 2023); San Diego, Cal., Ordinance 20390 (2014) https://perma.cc/SB4S-

While the characteristics of these laws vary by jurisdiction, many of them include one hour of sick leave accrual for a specific amount of hours worked (usually between thirty and fifty hours); however, almost all jurisdictions exclude some classes of workers.[181] For example, unmarried and low-wage earners, who are disproportionately likely to identify as LGBT, are less likely to have access to paid leave.[182] The relative dearth of paid leave laws for childcare disproportionately impacts LGBT workers, who are also less likely to have supportive extended family networks to provide free or emergency childcare.[183]

The federal Family and Medical Leave Act (FMLA) gives employees of public agencies and some private entities the right to take sick leave for themselves or family members for twelve or twenty-six weeks in a twelve-month period, depending on the reasons for the leave.[184] However, the Act only provides for unpaid leave for civilian workers, meaning enlisted workers may need to rely on the protections of their state of residence.[185] Furthermore, leave for employees caring for a sick minor child only covers those who have a biological or legal relationship to the child or day-to-day childcare responsibilities.[186] LGBT parents are more likely to be excluded from FMLA protections because they are less likely to have a biological or legal relationship to their children and employers are free to interpret "day-to-day responsibilities" so narrowly as to exclude adoptive parents.[187]

VI. CONCLUSION

The *Bostock* decision has had a major impact on the ability of LGBT persons to seek redress for employment discrimination, at both the federal and state levels. Many states, state courts, and state administrative agencies have reinterpreted

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7HN9 (last visited Feb. 26, 2023); Chi., Il., Ordinance 02016-2678 ch. 1-24 (2016) https://perma.cc/ZZ6B-WWQ6 (last visited Feb. 26, 2023); Berkeley, Cal., Mun. Code ch. 13.100 (2016) https://perma.cc/J8AC-PHLX (last visited Feb. 26, 2023); Saint Paul, Minn., Ordinance ch. 233 (2016) https://perma.cc/Q65Y-MYLX (last visited Feb. 26, 2023); Cook Cnty., Il., Ordinance 42 art. 1, div. 1 (2016) https://perma.cc/XG6Y-GB3R (last visited Feb. 26, 2023); COLO. REV. STAT. ANN. § 8-13.3-401 *et seq*. (2020) https://perma.cc/L7NC-X8GD (last visited Feb. 26, 2023); *see also Paid Sick Leave*, NAT'L CONF. OF STATE LEGISLATURES. (May 29, 2018), https://perma.cc/7QL4-LGK4; *Paid Sick Time Legislative Success*, A BETTER BALANCE (Jun. 22, 2022), https://perma.cc/5U9B-6DWM.

181. *Id*.

182. *See* Sabia Prescott, *Queer Families Still Struggle to Access Leave*, SLATE (Feb. 7, 2018), https://perma.cc/F4DF-RSF2; *see also* Aurelia Glass, Sharita Gruberg, Caroline Medina, & Karla Walter, *New Opportunities for the Biden-Harris Administration to Create Good Jobs for LGBTQI+ Workers*, CTR. FOR AM. PROGRESS (Apr. 8, 2022), https://perma.cc/5M99-YQ3R.

183. *Id*.

184. A primary criterion for determining if a private employer is covered by the Act is size: entities that employ fifty or more employees for at least twenty workweeks a year must abide by its provisions. Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2023).

185. The National Defense Authorization Act for Fiscal Year 2020 included the "Federal Employee Paid Leave Act," which provides for twelve weeks of paid leave for certain caregivers. *See* 133 Stat. 1198 § 7601 *et seq*. (2019).

186. *See* Prescott, *supra* note 182.

187. *See id*.

their laws to ensure consistency with the reasoning articulated in *Bostock*.[188] However, challenges remain for LGBT employees. When the *Bostock* reasoning was extended to expand protections in the context of employee pronouns, locker and bathroom use, and dress codes through the EEOC guidance, states successfully challenged it.[189] Moreover, there are disparate levels of protection based on the employment sector an LGBT person works in as well as relatively difficult burdens of proof to meet depending on whether the claim is for failure to hire or wrongful termination. Finally, while spousal employment benefits have expanded for the LGBT community as a result of *Obergefell*, many still face difficulty in seeking medical services for gender-affirming care and are disproportionately affected by the lack of a federal legislation guaranteeing paid sick leave. Nevertheless, the community and its supporters continue to make strides toward protecting the unique issues faced by the LGBT population in the employment context.

188. *See State Sex Discrimination Laws Covering SOGI Discrimination*, AM. C.L. UNION (Apr. 15, 2022), https://perma.cc/J2PM-8XB2.

189. *See* Tennessee v. U.S. Dep't of Educ., No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).