

EEOC Guidance on Transgender Workers in Flux in Wake of District Court Opinion, While EEOC Continues to Lack Quorum

by Nisha Verma and Alex Super

On May 15, 2025, a District Court struck portions of the Equal Employment Opportunity Commission's ("EEOC") 2024 guidance pertaining to sexual orientation and gender identity under Title VII. Although this decision was issued by a Texas court, the decision operates nationwide to prevent the use of those vacated portions of the 2024 guidance across the country. This drastic change in guidance from the EEOC, compounded by the new administration's policy changes, has left employers wondering how to proceed in their compliance efforts under Title VII, specifically regarding sexual orientation and gender identity.

***Bostock* Affirms That Employment Discrimination Based on an Employee's Sexual Orientation or Gender Identity is Prohibited Under Title VII.**

In 2020, the Supreme Court held in a landmark decision, *Bostock v. Clayton County*, that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating based on an employee's sexual orientation or gender identity. The Court reasoned that firing an employee based on either of those statuses required differential treatment on the basis of "sex" which is expressly prohibited under Title VII.

The 2024 EEOC Guidance Incorporated the *Bostock* Opinion and Explained That Harassment Under Title VII Included Intentional Misgendering, Forced Dress Codes, and Prevention of Bathroom Use.

The EEOC expressly relied on *Bostock* to issue technical assistance and update its guidance on issues pertaining to sexual orientation and gender identity. On April 29, 2024, the EEOC updated its Enforcement Guidance on Harassment in the Workplace ("2024 EEOC Guidance") to define "sex" under Title VII to include sexual orientation and gender identity, and to assert that "sex-based harassment [under Title VII] includes

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harassment based on sexual orientation or gender identity, including how that identity is expressed,” such as the “repeated and intentional use of a name or pronoun inconsistent with the individual’s known gender identity (misgendering),” and “the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.” The guidance also included hypothetical situations, such as a supervisor interrogating an employee regarding their gender identity, ordering that employee to dress in a way that is inconsistent with their gender identity, and purposefully and maliciously misgendering the employee. In another example, an employee is intentionally misgendered by her supervisors, coworkers, and customers despite repeated requests by the employee to use her preferred pronouns and questioned regarding her anatomy and subjected to other offensive comments. Examples from the guidance are reproduced below:

Example 15: “Chloe, a purchase order coordinator at a retail store warehouse, is approached by her supervisor, Alton, who asks whether she was “born a man” because he had heard a rumor that “there was a transvestite in the department.” Chloe disclosed to Alton that she is transgender and asked him to keep this information confidential. After this conversation, Alton instructed Chloe to wear pants to work because a dress would be “inappropriate,” despite other purchase order coordinators being permitted to wear dresses and skirts. Alton also asks inappropriate questions about Chloe’s anatomy and sexual relationships. Further, whenever Alton is frustrated with Chloe, he misgenders her by using, with emphasis, “he/him” pronouns, sometimes in front of Chloe’s coworkers. Based on these facts, Alton’s harassing conduct toward Chloe is based on her gender identity.”	Example 46: “Jennifer, a female cashier who is transgender and works at a fast-food restaurant, is regularly and intentionally misgendered by supervisors, coworkers, and customers over a period of several weeks. One of her supervisors, Allison, intentionally and frequently uses Jennifer’s prior male name, male pronouns, and “dude” when referring to Jennifer, despite Jennifer’s requests for Allison to use her correct name and pronouns. Other managers also intentionally refer to Jennifer as “he” whenever they work together. In the presence of customers, coworkers ask Jennifer questions about her sexual orientation and anatomy and assert that she is not female. After hearing these remarks by employees, customers also intentionally misgender Jennifer and make offensive comments about her transgender status. Based on these facts, which must be viewed in the context of Jennifer’s perspective as a transgender individual, Jennifer has been subjected to an objectively hostile work environment based on her gender identity that includes repeated and intentional misgendering.”
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Legal Backlash to the EEOC Guidance Arises Shortly Following its Publication.

The plaintiffs in the Texas district court action challenged these new portions of the 2024 EEOC Guidance shortly following its publication. The parties were in pending litigation when the new administration issued an Executive Order (“EO”) in January 2025 that declared the policy of the United States is to recognize two sexes, male and female, and explicitly rejected the notion of gender ideology. In furtherance of that policy, the EO required the EEOC, among other federal agencies, to rescind all guidance inconsistent with the EO, such as the 2024 EEOC Guidance. In response, EEOC Acting Chair Andrea Lucas vocally asserted her aim to defend the administration’s viewpoints on gender identity and has made clear her displeasure with the portions of the 2024 EEOC Guidance inconsistent with the administration’s EO.

Following the EEOC’s Inability to Rescind the 2024 EEOC Guidance, the Texas District Court Proceeded to Rule Despite the EO.

However, Lucas was unable to modify or rescind portions of the 2024 EEOC Guidance because the EEOC requires a majority to take such action and it lacked the necessary three-person quorum. Meanwhile, the litigation proceeded and the district court issued its opinion. First, the district court, in contravention to the language in the holding of *Bostock*, determined that the EEOC impermissibly exceeded its authority by defining “sex” under Title VII to include sexual orientation and gender identity, which the court deemed both “beyond the biological binary” of male and female. Second, the district court found that the 2024 EEOC Guidance’s inclusion of gender identity issues relating to “bathrooms, pronouns and dress preferences” as constituting sex-based harassment again went beyond the scope of Title VII and *Bostock*, where the Supreme Court expressly declined to answer those issues. Based on the above, the district court ordered the specific portions of the 2024 EEOC Guidance at issue be vacated and struck while permitting the remainder of the guidance to remain in effect.

The EEOC Modified the 2024 EEOC Guidance Based on the District Court’s Opinion.

On May 20, 2025, the EEOC issued a press release regarding the Texas district court’s opinion. The press release explains that the EEOC still lacks quorum to modify or rescind any portion of the 2024 EEOC Guidance, regardless of the district court’s orders. However, the EEOC has “labeled and shaded the vacated portions of the guidance on the agency’s website,” including the hypotheticals reproduced above, which can be found at: [Enforcement Guidance on Harassment in the Workplace | U.S. Equal Employment Opportunity Commission](#). The guidance now provides that the shaded portions, which include notations that any sections defining “sex” to include sexual orientation and gender identity, or defining harassment under Title VII to include gender identity issues pertaining to bathrooms, pronouns and dress codes as well as any corresponding examples, were determined to be unlawful by a federal court.

Considerations for Employers in the Aftermath of the District Court's Decision.

Remain Vigilant.

Despite the Texas district court's ruling on the 2024 EEOC Guidance, the nationwide effect only pertains to the provisions discussed above, and not the district court's interpretation of Title VII. There are significant arguments available to litigants that the district court misapplied *Bostock*, and further litigation is likely. Furthermore, many state and local anti-discrimination laws include sexual orientation and gender identity as protected categories. Employers should work with counsel to review all developments before implementing any changes.

An Appeal of the Texas District Court Decision is Unlikely and EEOC Enforcement of This Issue May Decline.

An appeal of the decision is unlikely based on EEOC Acting Chair Lucas' vocal support for the administration's promotion of the "biological binary" and rejection of gender identity, and considering reports that the agency has stopped pursuing cases involving transgender issues. Furthermore, a new EEOC commissioner was nominated by the administration and if confirmed, the EEOC would gain the necessary three-person quorum to take action as directed by President Trump's EO including rescinding or modifying the 2024 EEOC Guidance. However, if this remains a contentious issue in the federal courts, the Supreme Court, may eventually weigh in on the district court's interpretation of *Bostock* and Title VII's definition of "sex."

The Remainder of the 2024 EEOC Guidance Remains Effective.

This decision only touches on portions of the 2024 EEOC Guidance regarding sexual orientation and gender identity and does not take aim at the remainder of the guidance which provides an in-depth overview of the law on Title VII. Employers are encouraged to review the guidance and enforce their anti-discrimination policies.

Support Your Employees.

Many employees are looking to their employers for support following the district court's opinion and as the EEOC's enforcement on these issues declines. Particularly, transgender employees who have already faced challenges in the past, as distinct from the general population, may be deeply affected by these policy changes. It is important to not only consider the law but the values and morale of the company and its personnel as a whole when modifying and enforcing anti-discrimination policies in the workplace.