

L&E Live

# New Developments in Discrimination Law

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*Bostock v. Clayton County, Georgia,*  
No. 17-1618 (June 15, 2020)

# “Sex” Under Title VII

Title VII prohibits employment discrimination “because of...race, color, religion, **sex**, or national origin...”

Historically, “**because of sex**” was based on the biological distinction between **male** and **female**.



# Expanded Definition of “Sex” Under Title VII

## **Sex Stereotyping**

*Price Waterhouse v. Hopkins*, 490  
U.S. 228 (1989)

## **Same-Sex Sexual Harassment**

*Oncale v. Sundowner Offshore*,  
523 U.S. 75 (1998)

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## **Associational Discrimination**

*Holcomb v. Iona College*, 521 F.3d 130  
(2d Cir. 2008)

# Majority Opinion (Justice Gorsuch)

Three cases before the  
Supreme Court

The importance of a  
textualist approach

“The answer is clear.”

“[I]t is **impossible** to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

# Dissents (Justices Alito and Kavanaugh)

The importance of an originalist approach

How can the majority say the answer is “clear”?

Leave it to Congress



# Legal Effects

“But-for” causation does not mean sole causation.

An employer cannot avoid liability just by citing some other factor that contributed to the challenged employment decision.

How does an employer now disprove cases?

**Now**, it does not matter if other factors besides an employee’s protected characteristic contributed to the decision.

# Legal Effects

- Weakened Defenses
  - Contributing Factors
  - Group Treatment
  - Equal Opportunity Harasser
- Is *McDonnell Douglas* on the ropes?

# Practical Impacts

Over half of all states, including Colorado, already prohibit sexual orientation and gender identity discrimination.

Expect a substantial increase in federal litigation alleging LGBTQ discrimination.

How the Court came to its conclusion also creates additional issues.

- Good time to revisit policies, practices, and benefit offerings.
- *Bostock* decision will likely have a complicated relationship with issues such as gendered bathroom usage and religion religious freedom.

# Hiring Process Considerations



Intentional and persistent refusal to use an employee's chosen name and gender pronoun can form the basis of a hostile work environment claim according to the Equal Employment Opportunity.

# Restrooms and Locker Rooms

- *Roberts v. Clark Cty. Sch. Dist.*, (D. Nev. 2016): Under Title VII and Nevada's Anti-Discrimination statute, transgender school police officer was treated differently than similarly situated employees by school district's requirement that officer use gender-neutral restroom, rather than men's or women's restroom.

## **Are sex-segregated bathrooms (i.e., a men's room and a women's room) now prohibited?**

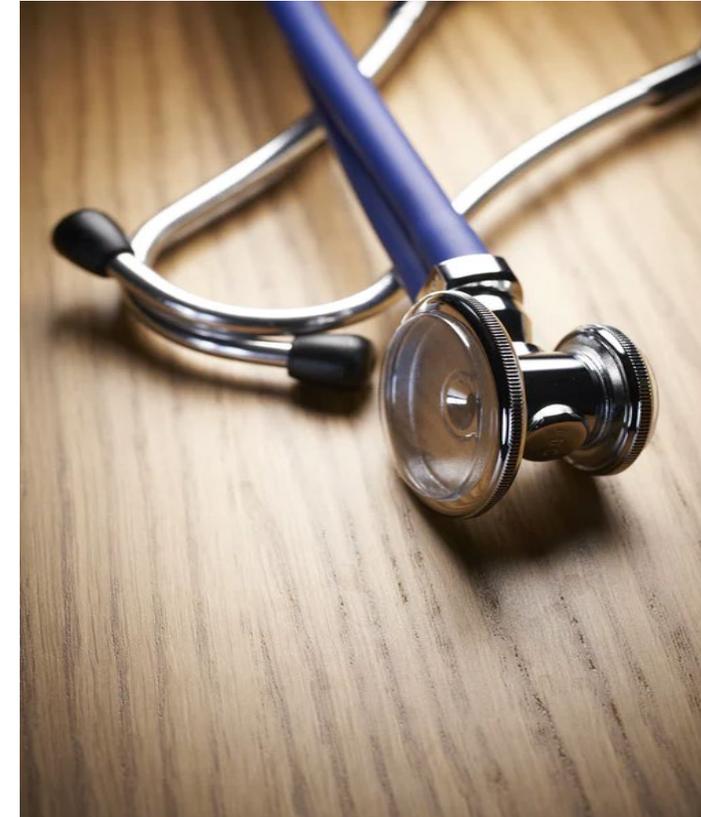
- The majority in *Zarda* (2<sup>d</sup> Cir.) explained that, under their view of Title VII, “employer policies regarding sex-segregated bathrooms” would indeed “discriminate[ ] because of sex,” but tried to avoid employer liability for separate bathrooms by suggesting that bathroom assignments are not significant enough to constitute terms and conditions of employment protected under Title VII.



# Health and Benefit Offerings

The Employee Retirement Income Security Act of 1974 (ERISA) explicitly exempts Title VII from its broad preemptive authority. This means that the protective authority of Title VII generally extends to employer-sponsored healthcare benefits.

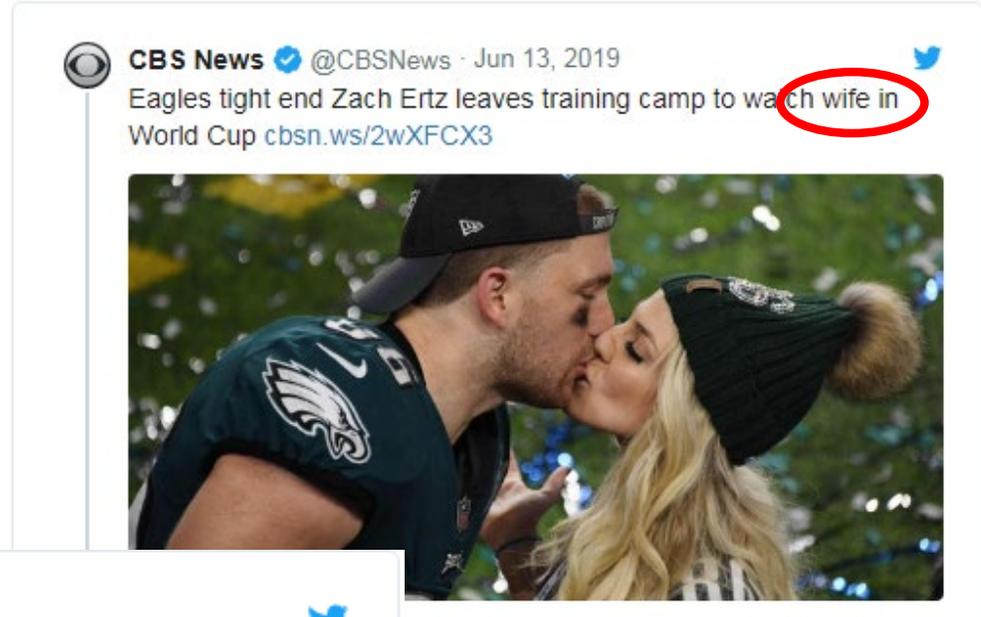
**We've seen this before:** In 1983, the Supreme Court held in *Newport News Shipbuilding Co. v. EEOC* that Title VII requires equally comprehensive coverage to both male and female employees, mandating that employer-provided health plans may not discriminate on sex-based characteristics (e.g., employer-provided health plans must cover pregnancy, childbirth, and related medical conditions).



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# Gender Sidelining

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# Gender Sidelining

Not giving full credit to a female colleague where it is deserved

“Joking” that female colleague’s constructive feedback is a result of

Not inviting female colleague to informal golfing with male colleagues

Bringing male colleague to client pitch because both are alumni of all-boys school

Promoting male employees’ successes more than female counterparts

Attributing colleague’s success to the efforts of another or outside factors

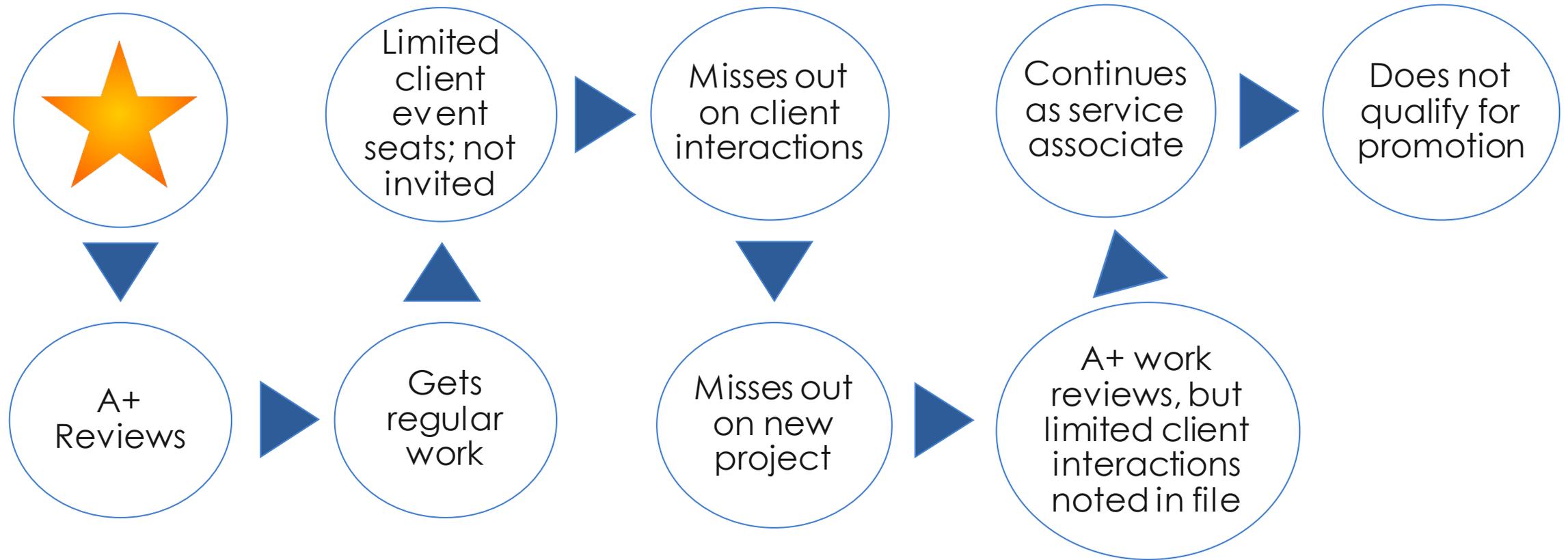
Assuming female employee (a mother) would not be available for late nights

Interrupting or silencing female employees more than male counterparts

# Gender Sidelining

- Hostile work environment?
  - ~~Severe~~ or pervasive conduct a reasonable person would consider ~~intimidating, hostile, or abusive~~.

# Sex Discrimination Repackaged



# Gender Sidelining



# Gender Sidelining

- Hostile work environment?
  - ~~Severe~~ or pervasive conduct a reasonable person would consider ~~intimidating, hostile, or abusive~~.
  - Subjective
  - Objective

# Times are Changing

*Minarsky v. Susquehanna County*, 895 F.3d 303 (3d Cir. 2018)

- “It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual’s employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred.
- While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee’s non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it.”

# Times are Changing

*Kortan v. Cal. Youth Auth.* (9th Cir. 2000)

- “Among other things, the chief of engineering (Nusbaum) told a pregnant maid ‘that’s what you get for sleeping without your underwear,’ asked her why she was pregnant by another man, and made comments about her ‘ass.’
- Nusbaum regularly offered to give another maid money and an apartment to live in if she would ‘give him [her] body’; he assured her she would never be fired if she would have sex with him; and he told another ‘You have such a fine ass.’
- The evidence also showed that the Executive Housekeeper merely laughed at such remarks and herself called one of the maids a ‘dog,’ ‘whore’ and ‘slut.’”

# Times are Changing

*Lewis v. U.S. Dep't of Treasury* (D.C. Cir. 2020)

- “[Plaintiff’s] more concerning argument rests on her contention that management provided only [male colleague] with career advancement opportunities that ‘played an integral part in [his] promotion.’”
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*Pringle v. Wheeler* (N.D. Cal. 2020)

- “While macroaggressions undoubtedly constitute a hostile work environment, pervasive microaggressions have the ability to diminish the workplace significantly as well.”

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# Recommendations

# Final Thoughts

- Audit/update policies and procedures
- Internal Trainings
- Consider who should be the decision-maker
- Hiring Process
- Health and Benefit Options

# Questions?

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