Joseph Benincasa

Title VII after *Bostock v. Clayton County*- How this Decision may be Catastrophic to Women's Professional Athletics

Introduction

The Supreme Court recently decided, in *Bostock v. Clayton County*, that an employer cannot discriminate against an individual based on their LGBTQ+ status. While this decision may be satisfying on its face, its broad ruling may have an adverse impact on certain sectors of employment, more specifically, women's professional athletics. For example, allowing biological males to compete in the women's category based on their transgender status may ultimately be the downfall of women's athletics. A solution to this issue would be to allow women's professional athletics to include gender-assigned-at-birth (or hormone thresholds) as a bona fide occupational qualification (BFOQ) for employment of women by professional athletic associations, without running afoul with Title VII after the recent *Bostock* opinion. This note does not dispute the decision in *Bostock*, nor does it suggest that the BFOQ exception should be broadened. The argument here is, in light of Bostock's recent decision, the court should recognize application of the BFOQ exception in women's professional athletics.

Section I of this note will discuss the meaning of Title VII. Section II will then review the *Bostock* opinion. Lastly, Section III addresses how the BFOQ operates and analyzes if it would be an acceptable defense for women's professional sports leagues to discriminate against transgender athletes.

I. What is Title VII

Title VII of the Civil Rights Act of 1964, amended by the Equal Opportunity Act of 1972, and then again amended by the Civil Rights Act of 1991 ("Title VII") states, in relevant part, it shall be unlawful for an employer to discriminate on the basis of sex against an employee,

or potential employee, with respect to any term or condition of employment.[1] There are four theories of discrimination a plaintiff may allege under Title VII: disparate treatment, disparate impact, mixed motives, and pattern and practice.[2] This note will focus specifically on sex discrimination under the theory of disparate treatment. "Disparate treatment sex discrimination involves overt or intentional discrimination and occurs when an employer treats one individual (or group) differently from another because of that individual's (or group's) sex."[3] Where there is no direct evidence of discrimination, disparate treatment cases under Title VII are analyzed under the 'McDonnell-Douglas' three-part burden shifting test.[4]

II. *Bostock v. Clayton County*

On June 15, 2020, The Supreme Court of the United States answered the question of whether an individual's sexuality, homosexual or transgender, falls within the scope of protection afforded under Title VII.[5] When the Supreme Court granted certiorari, they consolidated three cases stemming from the Eleventh Circuit, the Second Circuit, and the Sixth Circuit.[6] In all of these cases, an employer had allegedly fired an employee due to their homosexual or transgender status, and in turn, each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex.[7] Ultimately, the court held that an employer violates Title VII when they discriminate against an employee on the basis on their homosexuality or transgender status.[8]

---

[1] The Civil Rights Act of 1964, 42 U.S.C.S §2000e-2 (a)(1), (2) (1991).
[2] Thomas Fusco, J.D., *What constitutes sex discrimination in termination of employee so as to violate Title VII of Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.),* 115 A.L.R. Fed. 1, 2a.
[3] Thomas Fusco, J.D., supra, at 2a.
[4] *McDonnell Douglas Corp v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973).
[5] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 230 (2020).
[6] *Id*. at 226.
[7] *Id*.
[8] *Id*. at 236.

The Court stated "[i]f the employer intentionally relies in part on an individual's sex when deciding to discharge the employee - put differently, if changing the employee's sex would have yielded a different choice by the employer- a statutory violation has occurred."[9] Thus, when applying this straight forward rule the court found that an employer violates Title VII when they discriminate against an individual based on their sexuality or transgender status.[10] The court's rationale was that it is impossible for an employer to discriminate against an individual based on their homosexuality or transgender status without discriminating against that individual based on their sex.[11] The Court concluded with recognizing that Title VII's reach has gone much further than what Congress expected at the time of its enactment.[12] *Bostock v. Clayton County* is responsible for determining that an employer who discriminates against an individual simply for being gay or transgender, defies Title VII's prohibition against discrimination on the basis of sex.[13]

A. Affirmative defenses under Title VII – Post *Bostock*

The court recognizing that they were broadening Title VII's scope of protection, acknowledged that their holding may be subject to certain exceptions under Title VII, specifically where an employer may discriminate against an individual on the basis of their religion.[14] The court made clear that their decision did not intend to run afoul with any of these pre-existing exceptions, however, they stated that the way these exceptions operate under the statute should be determined in subsequent case law.[15] Although the court recognized potential issues with their holding, these exceptions have only been applied in extremely narrow

[9] *Id*. at 234. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S. Ct. 1775 (1989).
[10] *Id*.
[11] *Id*.
[12] *Id*. at 249.
[13] *Id*.
[14] *Id*. at 248-249.
[15] *Id.*

circumstances, meaning they won't be of much assistance to most employers.[16] Therefore, since *Bostock's* ruling is so broad and these exceptions are only applied in narrow circumstances, experts suspect this decision will have an adverse impact against unique sectors of employment that rely on employing women only.[17] For example, John Bursch, an attorney who represented one of the defendants in *Bostock,* stated, "Monday's opinion will create chaos and enormous unfairness for women and girls in athletics, women's shelters, and many other contexts."[18]

Despite Bursch's comments, there are other exceptions under Title VII which may allow women's professional sports leagues to discriminate against an individual's sexuality or transgender status. Although the court didn't mention all of Title VII's exceptions, the fact that they mentioned some may have opened the door to other affirmative defenses which women's sports leagues may claim, specifically, the Bona Fide Occupational Qualification (BFOQ) exception.

III. Analyzing The Bona Fide Occupational Qualification (BFOQ) exception

The BFOQ exception is an affirmative defense under Title VII, which justifies discrimination where an individual's sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business.[19] In sex discrimination cases, the exception is only applied where an employer can demonstrate: (1) the essence of the job requires the employee to be of a particular sex, and (2) the sex-based requirement relates to the central mission of the employer's business.[20] When proving that the job requires the employee to be of a particular sex, the employer must demonstrate all, or substantially all, employees (men or

[16] Braden Campbell, *Blockbuster LGBTQ Ruling Tees Up Religious Defenses*, LAW360, Jun. 16, 2020.
[17] Braden Campbell, *High Court Says Title VII Protects Gay, Trans Workers,* LAW360, Jun. 15, 2020.
[18] *Id*.
[19] Melissa K. Stull, *Permissible sex discrimination in employment based on Bona Fide Occupational Qualifications (BFOQ) under § 703 (e)(1) of Title VII of Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-2(e)(1))*, 110 A.L.R. Fed 28, 2. (citing 42 U.S.C.S §2000e-2 (e)(1)).
[20] Reid Coploff, *Article: Exploring Gender Discrimination in Coaching*, 17 Sports Law. J. 195, 215.

women, whichever the employer is attempting to discriminate against) cannot perform their job related duties because of their gender.[21] When establishing this requirement an employer may not rely on arbitrary stereotypes regarding the physical capabilities of a specific gender.[22] Furthermore, when proving the requirement relates to the central mission of the business, the plaintiff must demonstrate the sex-based requirement is reasonably necessary to the normal operation of the business.[23] Thus, the BFOQ exception has only been applied in extremely narrow circumstances.[24]

The Eighth Circuit has already found sex as a BFOQ for professional sports teams.[25] In a footnote, the court stated that Title VII does not mandate the admission of men as competitors in women's professional sports because being female would constitute as an acceptable BFOQ to participate in women's professional sports.[26]

A. The BFOQ exception as it pertains to professional athletics

1. The essence of women's athletics

According to Judge Richard Allen Posner, the central mission, or "normal operation," of women's professional athletics is to "highlight, isolate, and display one or more of the hierarchies of height, strength… agility, physical coordination, beauty, and brilliance… and to invite our admiration for the women who occupy the highest rung."[27] The essence of female

---

[21] *Int'l Union v. Johnson Controls*, 499 U.S. 187, 201, 111 S. Ct. 1196 (1991).
[22] Melissa K. Stull, *supra*, at 2. (citing *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977)).
[23] *Johnson Controls*, 499 U.S. at 203.
[24] Reid Coploff, *supra,* at 215; *see, e.g.*, *Johnson Controls*, 499 U.S. at 203. (rejecting the BFOQ defense because extra incremental costs, such as protecting females from lead exposure at a battery manufacturer, is not a legitimate reason). *But see Dothard*, 433 U.S. at 340. (finding sex as a BFOQ for employment at an all-male state penitentiary because employing female security officers could have undermined the central mission of maintaining a safe and secure prison facility).
[25] *Graves v. Women's Professional Rodeo Ass'n, Inc*., 907 F.2d 71 (8th Cir. 1990).
[26] *Graves,* 907 F.2d at fn.3. The case was not decided on the merits because the employer was not found subject to Title VII. *Id*.
[27] Doriane Lambelet Coleman, *ARTICLE: SEX IN SPORT*, 80 Law & Contemp. Prob. 63, 85. (citing Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping*, 57 Duke L.J. 1725,1729 (2008).

athletics requires that athletes be segregated on the basis of their biological gender because genetic males and genetic females have different athletic capabilities. Male competitors, in comparison to female competitors are inherently more *athletic*, specifically with respect to power, speed, and endurance.[28] This note does not suggest that males have greater hand-eye-coordination, reflex-speed, judgement, *in-game acumen*, or other intangible characteristics that have been included when discussing the term athletic.

Consequently, male athletes are deemed to be more athletic because biological males produce elevated levels of testosterone.[29] Higher testosterone levels allow males to use and store carbohydrates and Type 2 muscle fibers (which are used to generate speed and power) more efficiently; cause the male heart and lungs to grow larger, allowing for more oxygen intake (ultimately increasing aerobic performance); and have varying effects on hemoglobin levels and body fat content.[30] There is no scientific doubt that testosterone is a driving force behind why male athletes physically outperform female athletes in sporting events which heavily rely on the athletes' power, speed, and endurance.[31]

It is, therefore, impossible for males (and transgender women) to equitably perform the task of female athletes since their biological make up, or "sex," makes them unfit to participate. Consequently, if men (and transgender women) were allowed to participate, it would severely undermine the integrity of the business, since these individuals would have an inherent unfair advantage. Thus, the argument is circular, *all* men (and transgender women) cannot participate in women's athletics simply because they are not biological females.

---

[28] Doriane Lambelet Coleman, *supra*, at 87. When referencing the term *athletic* this note interprets the meaning as an individual's speed, power and endurance.
[29] *Id*.at 74.
[30] *Id*. at 74-75.
[31] *Id*. at 75.

2. Reasonably necessary to the normal operation of the business

Furthermore, allowing men (or transgender women) to participate in female athletics would be in direct conflict with the central mission of highlighting, isolating, and showcasing elite *female* athletes. Since male athletes have an athletic advantage, the only way to showcase female athletes is to segregate individuals on the basis of their biological sex.[32] "Any other option that has males and females competing together works mainly to highlight, isolate and display male bodies."[33] For example, in the 2016 Rio Olympics, the three medalists for the women's 800-meter race were all individuals who did not identify as biological females.[34] Experts also suspect that gold medalist Caster Semenya, would have also won the other two races she had qualified for, had she decided to race in them.[35] This demonstrates that athletes who are not biologically female may dominate the outcome in athletic events when competing against female athletes, essentially disrupting the hierarchical ordering of gender-based physical attributes of the event. In sum, in order for women's professional sports leagues to highlight, isolate, and display elite female athletes, it is reasonably necessary to segregate individuals by their biological gender.

In *Bostock*, Justice Gorsuch employed a textual analysis to define the term "sex" to mean the reproductive biological distinction between males and females.[36] When employing this textual analysis, the court should hold the BFOQ exception should apply when the reproductive biological distinction between males and females, or "sex," requires the employer to only hire employees of a particular sex, and when that sex-based requirement relates to the central mission

[32] *Id*. at 86.
[33] *Id*.
[34] *Id*. at 108
[35] *Id*. at 75.
[36] *Bostock*, 140 S. Ct. at 231.

of the business. Women's professional sports leagues that heavily rely on their athletes' power, speed, and endurance would likely fall within that scope, since all biological men (and transgender women) cannot effectively complete the task of a female athlete with respect to these athletic attributes.[37] Thus, it is reasonably necessary to the essence of their business to exclude male (and transgender) athletes. Women's professional sports leagues that don't heavily rely on these characteristics, such as dog sledding, horseback riding, bowling, and others would not be subject to the rule. This is because the essence of these leagues do not rely on the athlete's speed, power, and endurance, and therefore, would not be reasonably necessary.

3. Hormone thresholds as a BFOQ

There is an argument that all transgender women do not disrupt the integrity of women's professional athletics. Science and technology now afford individuals the option to alter their chemical make-up and essentially become a biological female.[38] Through this process, transgender women decrease the amount of testosterone their body produces, while increasing the amount of estrogen they produce.[39] This theory would ultimately negate the athletic advantage that once existed when the individual was a biological male.[40] Therefore, if the individual posed no threat to the integrity of the sport, that may disprove the fact that women's professional sports requires their participants to be biologically female.

Although this is a valid point, there is a simple solution to combat this assertion. Instead of women's professional sports leagues excluding all transgender women, they can impose a

[37] The following is a non-exhaustive list of women's professional athletic associations that may be subject to the BFOQ Exception: 1) The big five American team sports (football, baseball, basketball, hockey and soccer); 2) All combat sports; 3) professional/Olympic track and field.
[38] Katherine Kornei, *This scientist is racing to discover how gender transitions alter athletic performance-including her own*, ScienceMag (last visited 7/18/2020) https://www.sciencemag.org/news/2018/07/scientist-racing-discover-how-gender-transitions-alter-athletic-performance-including.
[39] *Id.*
[40] *Id.*

hormone threshold for all competitors as a BFOQ exception. Meaning, all women seeking to compete would be subject to a hormone test to determine if their chemical make-up is in the range of a "biological female." This rule would likely fit neatly within the BFOQ's exception because, for the reasons stated above, individuals who have hormone levels different than that of a biological female pose a threat to the integrity of the sport. Furthermore, it is reasonably necessary to the normal operation of women's professional sports to exclude those individuals who undermine the integrity of their business. This rule would ultimately sustain the integrity of women's professional athletics, while including those who conform to the essence of the sport.

4. What would the repercussions be if "sex" was a legal BFOQ exception for women's professional athletics?

The court does not need to alter the ruling in *Bostock*, nor broaden the BFOQ exception under Title VII, to allow women's professional sports leagues to discriminate against transgender athletes. Congress had professional sports in mind as one of these unique employment situations which would qualify as an acceptable BFOQ exception under the statute. For example, "[t]he legislative history offers an example of legitimate discrimination under the BFOQ exception to the proscriptions of Title VII, 'a professional baseball team for male players.'"[41] This argument does not propose to amend any of the court's prior precedent, nor expand the BFOQ exception. The argument is simple, read Title VII as it was enacted. While accepting Title VII's prohibition against discrimination on the basis of an individual's sexuality, women's sports leagues should have a legal claim under the BFOQ exception to discriminate against transgender athletes who pose a risk to the integrity of their sport.

[41] *Graves,* 907 F.2d at fn.3. (citing 110 Cong. Rec. 7213 (1964)).

5. Is including "sex" as a BFOQ exception for women's professional athletics a viable solution?

After *Bostock*, women's professional sports leagues would not be able to use the BFOQ exception to exclude homosexual athletes from competing because being heterosexual does not go towards the essence of being a women's professional athlete. However, as explained above there is a viable argument for women's professional sports leagues to claim they are subject to the BFOQ exception and can, therefore, discriminate against transgender individuals. That said, it is a risky argument to make. If a court finds that women's sports leagues are not subject to the BFOQ exception they will most likely be found liable for sex discrimination under Title VII (due to *Bostock*).

There isn't much litigation regarding the issue of whether sports leagues are subject to the BFOQ exception. Therefore, we will have to wait to see how the court interprets the statute to determine which way the argument will swing.

Conclusion

Sexual orientation and transgender status have taken many steps to reach protection under Title VII. The ruling in *Bostock* certainly altered the landscape of employment discrimination law forever. Their broad ruling may have been satisfactory for most sectors of employment, however, it may have adversely affected other unique sectors of employment, such as women's professional sports leagues.