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Justice for All: Examining Bostock v. Clayton County's Impact on Louisiana Employment Discrimination Law

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INTRODUCTION

Title VII of the Civil Rights Act states that no employer shall discriminate against an employee on the basis of their "race, color, religion, sex, or national origin."[1] In June of 2020, the United States Supreme Court held that protections for "sex" under Title VII include protection from discrimination based on sexual orientation and gender identity in the case of *Bostock v. Clayton County*.[2] While this marks an important step in realizing rights and protections for the LGBTQ+ community, *Bostock*'s ruling is only applicable to Title VII employment discrimination claims. Louisiana has its own set of employment discrimination laws which are not bound by the Court's ruling in *Bostock*.

In Louisiana, there are no state-level employment protections for LGBTQ+ employees. Louisiana's lack of discrimination protection for these employees may not seem problematic given the recent *Bostock* decision. After all, these employees can seek protection under federal law. Bringing a Title VII claim, however, can be a long and arduous process. Claimants must file a formal charge with the proper agency and wait as their claim is investigated. This process can cost time and money that a person, who recently lost their job, may not have. These claims can also bring unwanted public attention to extremely personal matters of one's sexual orientation or gender identity. Under Louisiana law, filing a state claim means you can forego the federal charge filing process and file a private civil suit. This alternative creates a more streamlined process that is potentially more attractive than the Title VII process. Because Louisiana provides no state level protection for LGBTQ+ employees, this class of employees can only file Title VII claims, meaning that, unlike other classes of employees, they do not have the luxury of choosing between a federal or state claim.

The degree to which *Bostock* will affect a positive change in the protections afforded to LGBTQ+ workers in Louisiana at the state level is uncertain since *Bostock* is not binding on Louisiana law. However,

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∗ LSU Law Center J.D. 2021. This article is dedicated to all those who have committed their voices and their lives to the betterment of the LGBTQ+ community, specifically Marsha P. Johnson, Harvey Milk, James Baldwin and Larry Kramer to name a few. This is my small contribution to that rich legacy of activism. This work is also dedicated to my family and friends, who have supported me throughout not just law school, but my through own journey to accepting who I am. Without them, this article could not exist.

1. 42 U.S.C.A. § 2000e-2(a) (West 1991).
2. Bostock v. Clayton Cnty., 140 S.Ct. 1731 (2020).

Bostock can act as an extremely persuasive guiding principle in interpreting Louisiana's own employment discrimination law, should the Louisiana Supreme Court choose to do so. There is also the possibility of the Louisiana legislature amending their employment discrimination laws to reflect the *Bostock* ruling. However, as discussed further below, previous attempts to provide employment discrimination protections for LGBTQ+ workers has not gained much traction in the Louisiana legislature.

Regardless of whether or not Louisiana courts or legislators view providing these protections as necessary, the people of Louisiana have begun to express more support for protecting LGBTQ+ individuals from employment discrimination.[3] Local parishes have even started taking their own initiative in providing such protection.[4] These changing attitudes suggest that Louisiana citizens, as a whole, would like to see their state take a stronger initiative in providing basic anti-discrimination protections at the state level, just as the United States Supreme Court has now done at the federal level. Although *Bostock v. Clayton County* may not be binding on Louisiana's employment discrimination law, it should be understood as a sign that 'times are a changin'', and Louisiana would do well to change with it.

I. *BOSTOCK* AND FEDERAL EMPLOYMENT DISCRIMINATION LAW

A. Title VII of the Civil Rights Act of 1964

The passage of the Civil Rights Act of 1964 represents a landmark moment in the United States' recognition of civil rights pertaining to its minority citizens. Preceded by an intense period of political and social upheaval that included the shocking assassination of John F. Kennedy and important demonstrations such as the Greenboro sit-ins, the Act's passage was the light at the end of the tunnel that many desperately needed to see after such a turbulent period. Marking the end of the "Jim Crow" era, the Act prohibited unequal voter registration requirements, racial segregation in both schooling and public accommodations, as well as protection for employees from discrimination.[5] While the 1964 Act would go on to be

3. Christy Mallory & Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Louisiana*, THE WILLIAMS INST. (Nov. 2015), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Employment-Discrimination-LA-Nov-2015.pdf [https://perma.cc/8PW5-Q7R3].

4. *Id.*

5. 42 U.S.C.A. § 2000e.

revised in later years, many of the civil rights protections that United States citizens enjoy now are directly traced back to the original legislation.

Title VII of the 1964 Civil Rights Act expressly pertains to protections from discrimination in the workplace. According to the provisions of this Title, employers are prohibited from discriminating against an employee because of their "race, color, religion, sex or national origin."[6] Employers of fifteen or more employees that are found to engage in discrimination based on one of these characteristics are liable under Title VII.[7] How Title VII claims are made and what remedies are available is discussed in more detail in a later section.

B. Bostock v. Clayton County *Decision*

Bostock v. Clayton County is a consolidation of three separate suits that each follow a similar fact pattern. In each suit, an employee was fired shortly after disclosing their sexual orientation or gender identity. Gerald Bostock worked for the child welfare program in Clayton County, Georgia, until he was fired after participating in a gay recreational softball league.[8] Donald Zarda, a skydiving instructor, was fired shortly after casually mentioning he was gay.[9] Aimee Stephens was fired from her job at a funeral home shortly after informing her employers that she would begin transitioning.[10] All three filed Title VII actions claiming they were discriminated against on the basis of "sex" due to their sexual orientation or gender identity.

The central question the Supreme Court was asked to decide was whether Title VII's employment discrimination protection based on "sex" included protection from discrimination on the basis of sexual orientation and gender identity.[11] After careful analysis, the Court found that to discriminate against someone because of their sexual orientation or gender identity is to necessarily discriminate against someone based on their "sex" as it is understood in Title VII.[12] According to the Court, this was the correct result because an individual employee's "sex" should not be

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6. 42 U.S.C.A. § 2000e-2(a).
7. 42 U.S.C.A. § 2000e-2(b).
8. Bostock v. Clayton County Bd. of Comm'rs, 723 Fed.App'x. 964 (11th Cir. 2018).
9. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. 2018).
10. EEOC v. R.G & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).
11. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737.
12. *Id.* at 1740-1741.

"relevant to the selection, evaluation or compensation of employees."[13] Thus, if changing an employee's "sex" would change an employer's ultimate decision or action in a given scenario, then Title VII discrimination has occurred on the basis of "sex." The Court provided two examples to help illustrate their reasoning.

In the first example, a male employee is attracted to men and a female employee is also attracted to men. If an employer fires the man simply because he is attracted to men but does not fire the woman for that same reason, then the employer has discriminated on the basis of the male employee's sex. Thus, to discriminate against someone because of their sexual orientation is to discriminate based on sex.[14] The second example involves a transgender employee who identifies as a woman, though she was originally assigned the male gender at birth. There is also a cis-gender employee who is assigned the female gender at birth and continues to identify as such. If an employer fires the transgender woman but not the cis-gender woman, the transgender woman is being penalized for traits or actions the employer would otherwise tolerate in a cis-gender woman, namely that both women identify as women. Thus, this scenario also features discrimination based on sex, and Title VII protects against it.[15]

This ruling is a significant victory in the years-long battle for the recognition of LGBTQ+ individual's rights and serves as another landmark Supreme Court decision, following only five years after their decision in *Obergefell v. Hodges*. While this decision is certainly cause for celebration, it is important to understand that *Bostock*'s ruling offers LGBTQ+ workers protection from discrimination only under federal law. Some states have created their own employment discrimination laws, which operate separately from Title VII. Because the *Bostock* decision was based on Title VII, it is binding on all cases arising under the federal statute only, not cases arising under a state's employment discrimination law. Louisiana has its own set of employment discrimination laws upon which the *Bostock* decision is not binding.

II. COMPARING FEDERAL AND LOUISIANA EMPLOYMENT DISCRIMINATION LAW

In 1997, Louisiana passed its employment discrimination laws which provide statewide protection for employees from discrimination in the public and private sectors, commonly referred to as the Louisiana

13. *Id.* at 1741.
14. *Id.* at 1741-1742.
15. *Id.* at 1742.

Employment Discrimination Law (LEDL).[16] In order to properly analyze *Bostock*'s impact on the LEDL, we must first understand some important similarities and differences between Title VII and the LEDL, as well as how the two interact with each other.

A. Title VII Procedures and Remedies

Before a Title VII claim can be filed in a federal district court, all administrative remedies must be exhausted. In other words, a timely charge must be filed with the Equal Employment Opportunity Commission (EEOC) and an investigation must ensue.[17] The EEOC will first try to get the parties to mediate. This is in line with the primary purpose of Title VII, which is to achieve a non-judicial resolution to employment discrimination claims.[18] If the parties do not agree to mediate, then the EEOC undertakes an investigation. Once that investigation is complete, the EEOC has a few options depending on their findings.

If the investigation does not result in a finding of a viable claim of discrimination, then the EEOC will dismiss the action and send the claimant a Right to Sue Letter. This letter informs the claimant that after investigating the charges, the EEOC has no "reasonable cause to believe that the charges are true" and that they will not pursue the claim any further.[19] The claimant will then have 90 days from the receipt of this letter to bring their own civil action against the employer if they choose to do so.[20] If the EEOC finds a viable claim of employment discrimination, they will invite both parties to settle the claim outside of a court.[21] If the parties can agree to settle the claim, then the agreement is signed and the matter is deemed to be closed.[22] If settlement negotiations fail, then the EEOC issues a Right to Sue letter to the claimant.[23]

If the EEOC determines that settlement is futile, then they can file their own suit against the employer.[24] The claimant then loses their right to sue in a private civil action, but they do have the right to intervene in those proceedings.[25] The EEOC can also decide against further pursuing the

16. La. R.S. 23:301 *et seq* (West 1997).
17. 42 U.S.C.A. § 2000e-5(e).
18. Davis v. Fort Bend Cnty., 893 F.3d 300 (5th Cir. 2018).
19. 42 U.S.C.A. § 2000e-5(b).
20. 42 U.S.C.A. § 2000e-5(f).
21. 42 U.S.C.A. § 2000e-5(b).
22. 42 U.S.C.A. § 2000e-5(f).
23. *Id.*
24. *Id.*
25. *Id.*

matter and send the claimant a Right to Sue letter. There is no real limit on how long the EEOC's investigation can last, which can result in frustration for some claimants. If 180 days pass after filing a charge and the EEOC still has not taken any action, the claimant can request a Notice of Right to Sue, which means the claimant can receive a Right to Sue letter and bring their own civil suit.[26]

If a claimant manages to make it through the investigation process with a Right to Sue letter, the remedies potentially available to them are rather extensive. Overall, Title VII offers equitable relief, rather than legal relief. In that vein, the claimant can receive back pay, front pay, rehiring, affirmative action, or injunctive relief to prevent the employer from engaging in similar discriminatory acts in the future.[27] In certain instances, claimants can receive compensatory and punitive damages, however these damages are capped depending on the size of the employer.[28]

B. LEDL Procedures and Remedies

Just like Title VII, the LEDL protects employees from intentional discrimination based on a person's "race, color, religion, sex, or national origin."[29] Unlike Title VII however, the LEDL does not require that all administrative remedies be exhausted before a private civil action can be filed, nor is a Right to Sue letter required. A claimant bringing an employment discrimination charge under the LEDL can simply file suit in the district court for the parish where the discrimination is alleged to have occurred.[30] The only requirement for this direct civil action is that the claimant give the employer at least thirty days prior written notice before filing suit.[31] This notice must detail the alleged discrimination that the employer engaged in.[32] Additionally, both parties are required to make a "good faith effort" to resolve their dispute before the employee can bring their private action.[33]

If a claimant does not want to bring their own private civil action, they can go through a process similar to that of a Title VII claim. A claim can be filed with the Louisiana Commission on Human Rights (LCHR), which

26. *Id.*
27. 42 U.S.C.A. § 2000e-5(e).
28. 42 U.S.C.A. § 1981a(b)(3).
29. La. R.S. 23:332 (2014).
30. Washington v. Entergy Corp., 729 So.2d 127 (La. Ct. App. 4th Cir. 1999), writ denied 740 So.2d 1283 (La. 1999).
31. La. R.S. 23:303(C) (2008).
32. *Id.*
33. *Id.*

is Louisiana's agency that investigates state and federal discrimination claims.[34] Just like with an EEOC investigation, the LCHR investigates the claimant's charge and based upon their findings, they decide whether to dismiss the claim, or pursue it further. Unlike the EEOC, the LCHR must investigate and make their determination within 30 days of the claimant initially filing their charge.[35] If the LCHR does not dismiss the claim and the parties successfully enter into settlement negotiations, the terms of that settlement are binding on the parties.[36] Furthermore, the LCHR can investigate to make sure those terms are being complied with after a year has passed.[37] If settlement negotiations fail, the LCHR then holds a hearing in which they decide on whether or not they will dismiss the claim or award the claimant the desired relief in the form of an affirmative action.

If the LCHR's hearing decides that the employer is liable, they can issue an order containing their findings to the employer, along with a cease and desist order that tells the employer to stop engaging in the unlawful practice. Relief that can be awarded includes reinstatement, with or without back pay, and uncapped compensatory damages.[38] If a complainant decides to forgo the LCHR process altogether and file a private civil action, they can receive general or special compensatory damages, back pay, front pay, reinstatement, benefits, reasonable attorney's fees, and court costs.[39]

C. How do State and Federal Employment Discrimination Law Interact?

The exact contours of how state and federal employment discrimination law interact with each other can be rather convoluted. In sum, state-level employment discrimination claims can be investigated and enforced by either state or federal entities. The same goes for federal Title VII claims. Regardless of the forum in which a Title VII claim is brought, before a claimant can bring a private civil action, they must exhaust all administrative remedies and obtain a Right to Sue letter. Thus, bringing a Title VII claim to the LCHR does not entitle the claimant to a direct private civil action, as they must still go through the investigation process.

As stated previously, *Bostock*'s interpretation of "sex" is only applicable to Title VII claims. Therefore, even though both Title VII and

34. La. R.S. 51:2231 (2014).
35. La. R.S. 51:2257(B) (West 1997).
36. La. R.S. 51:2257(D) (West 1997).
37. La. R.S. 51:2257(E) (West 1997).
38. La. R.S. 51:2261(C) (West 1995).
39. La. R.S. 23:303 (West 2008).

the LEDL feature protections based on "sex", only Title VII expressly includes LGBTQ+ workers in their understanding of "sex." This means that these workers can only bring a Title VII claim for discrimination, not a claim under the LEDL as it is currently interpreted by Louisiana courts. Thanks to *Bostock*, LGBTQ+ workers can now bring Title VII claims in either a federal or state forum. Because they are not protected by the LEDL, however, they do not have the option to bring a private civil action against their employers without exhausting all administrative remedies, as required by Title VII.

Filing under Title VII means time and money is spent while the EEOC investigates the charge, and if the parties are invited to settle the matter, additional time and money are required. These are resources an aggrieved claimant might not have, especially if they were fired by their employer and lack a stable source of income. Due to the potentially significant time and money costs endured by the time conciliation efforts begin, the charging party may not be in the best bargaining position. This imbalance in bargaining power could lead to a situation where the claimant is settling for less than they should because they simply do not have the ability to continue settlement negotiations. From 2009 to 2017, seventy-eight percent (78%) of employment discrimination claims filed with the EEOC were dismissed, likely due to settlements.[40] The data scientist who conducted the study speculated that one reason for the high dismissal rate was that litigation costs were higher than actual damages, such that any damages a claimant did recover would mostly go to paying their legal fees.[41]

Furthermore, if the case actually goes to trial, the aggrieved employee is not likely to find much success. During the same period from 2009 to 2017, of the employment discrimination cases that went to trial, the charging party was victorious in only one percent (1%) of those cases.[42] Thus, only one percent of these plaintiffs likely recovered damages, and these damages would be capped under Title VII, likely lessening the actual amount awarded to plaintiffs after paying legal fees. While reinstatement or hiring is possible, depending on the severity of the discrimination, a plaintiff may not want to work for that employer again, making this a less desirable form of compensation than collecting damages. Injunctive relief may seem like a significant advantage for bringing a claim under Title VII,

40. Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY (Jul. 31, 2017), https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits [https://perma.cc/E9HQ-UFM4].

41. *Id.*

42. *Id.*

however, this relief is only available if a plaintiff has the means to even take the case to an actual trial.

By filing a private civil suit under the LEDL, most of the concerns around time and money costs are dissipated. Due to the requirement that "good faith efforts" be made by both parties to settle the matter before a civil suit commences, settlement negotiations can begin almost immediately after the discriminatory incident occurs.[43] This would cut down on the different ways that Title VII makes an employment discrimination claim a potentially extensive resource-draining endeavor before settlement negotiations even begin. Furthermore, if the civil action still proceeds to trial, the potential damages recoverable are not subject to any kind of limit, which is a useful bargaining chip for plaintiffs who can use the increased potential damages to negotiate for a more fitting settlement. Of course, filing a private civil action under the LEDL is not guaranteed to end in a better result than that of a Title VII claim. However, without the procedural obstacles available in a Title VII action, a claim made under the LEDL looks more attractive as it can yield a more immediate and lucrative result in favor of the aggrieved claimant.

In addition to time and money, privacy is a concern that is particularly salient for LGBTQ+ workers. For some of these workers, sexuality and/or gender identity could be extremely sensitive topics. Moreover, some may not want to potentially out themselves in such a public forum. The idea of having a prolonged investigation that could potentially probe into these sensitive areas through a Title VII claim could be too much of an invasion for some of these workers to handle. Furthermore, potentially taking matters into a federal or even state civil trial where those personal matters could be used against them may not be a price that some LGBTQ+ workers are willing to pay. The ability to immediately enter settlement negotiations means things are likely to stay quieter and avoid further personal turmoil to people who have already been humiliated through the discrimination they endured. While this will not be a concern for all LGBTQ+ workers, the truth is that some are more private when it comes to matters of sexuality and gender identity. Potentially exposing them to further trauma and discomfort should be avoided if it is possible.

Bringing a direct LEDL civil action against their employers is not necessarily more effective or preferable to bringing a Title VII claim in every case. If the previously referenced study is anything to go by, many employment discrimination cases are the subject of private settlements, the details of which are not required to be disclosed to the public and are

43. La. R.S. 23:303 (West 2008).

often kept private between the parties.[44] Thus, it is difficult to determine whether or not these claimants would actually prefer the more streamlined process that the LEDL offers. Nevertheless, LGBTQ+ workers in Louisiana do not have the option of bringing a direct civil suit against their employers.

Louisiana workers who face discrimination in employment based on any other enumerated category in the LEDL are not limited in the same way. Employees who have discrimination claims based on other protected characteristics have the choice of different venues and procedures, which allows them the freedom to decide which option is best for them. It also increases their bargaining power against employers by expanding the employee's access to different remedies. Under current Louisiana law, LGBTQ+ workers do not have this freedom of choice, putting them in a weaker bargaining position via-à-vis employers and offering them fewer protections than other classes of employees.

III. A HISTORICAL OVERVIEW OF EMPLOYMENT DISCRIMINATION PROTECTION FOR LGBTQ+ EMPLOYEES IN LOUISIANA.

To understand the impact of the *Bostock* decision on Louisiana employment discrimination law, we must look to Louisiana's history of providing LGBTQ+ workers with protection from employment discrimination. In the absence of extensive case law surrounding the issue, the two areas where Louisiana has had the most active conversations about protecting LGBTQ+ workers from discrimination is in the executive and legislative branches.

A. The Battle of the Executive Orders

Arguably, the most active battleground for LGBTQ+ discrimination law has been dueling Executive Orders from various Louisiana governors. In 1992, then-governor Edwin Edwards signed an Order that prohibited employment discrimination based on sexual orientation for state employees.[45] This protection remained in place until 1996 when Louisiana elected Mike Foster as its governor, who allowed the Order to expire. Foster's first Executive Order as governor abolished "preferential treatment programs" and reverted the list of protected characteristics for state employees to include "sex" but did not specify that term to include

44. Captain, *supra* note 40.

45. La. Exec. Ord. No. EWE 92-7, available at http://www.qrd.org/qrd/usa/louisiana/louisiana.executive.order [https://perma.cc/N2LH-G2Z9] (last visited Feb. 4, 2022).

sexual orientation.[46] Foster's Order remained law until 2004, when Kathleen Blanco, as Louisiana's newly elected governor allowed it to expire. Blanco signed her own Order that, once again, provided protection for state employees from discrimination based on, among other things, sexual orientation.[47] This Order was allowed to expire in 2008, when Blanco was replaced by Bobby Jindal.

In 2016, John Bel Edwards became the governor of Louisiana and swiftly signed an Executive Order providing employment discrimination protection for LGBTQ+ employees that applied to state contracts for the purchase of services.[48] These contracts would be required to include a provision stating that the contractor could not discriminate on the basis of, among other things, "sexual orientation" or "gender identity" when it came to matters concerning employment.[49] This was the first time gender identity had been included for protection by an Executive Order. The Order was challenged by Louisiana Attorney General Jeff Landry, who filed for declaratory judgment to have the order declared invalid and also filed for injunctive relief to enjoin any attempt by Governor Edwards to implement his Order.[50]

According to the Louisiana First Circuit Court, although the Governor has the power to issue Executive Orders, that power doesn't "inherently constitute authority to exercise" the functions of a legislature, which is to make laws.[51] In that vein, they found that the Order was more than a "mere policy statement or directive to fulfill law" and was thus, invalid for two reasons.[52] First, at the time this case was decided, there was no binding "federal law or jurisprudence banning discrimination on the basis of sexual orientation or gender identity."[53] Second, the First Circuit did not find that the Order was an accurate representation of Louisiana citizens as "the Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the state Constitution to specifically add

46. La. Exec. Ord. No. MJF 96-1, available at https://www.doa.la.gov/media/marpakyr/february.pdf [https://perma.cc/JD7H-5PY3] (last visited April 5, 2022).

47. La. Exec. Ord. No. KBB 4-54, available at https://www.doa.la.gov/media/hiadriyu/0412.pdf [https://perma.cc/3A55-SW6Y] (last visited April 5, 2022).

48. La. Dep't. of Just. v. Edwards, 233 So.3d 76, 78 (La.App. 1 Cir. 2017).

49. *Id.*

50. *Id.* at 78-79.

51. *Id.* at 81.

52. *Id.*

53. *Id.*

'sexual orientation' or 'gender identity' to the list of protected persons relating to discrimination."[54]

Governor Edwards filed a writ of cert with the Louisiana Supreme Court (LASC) to appeal the decision, but his writ was denied, leaving the Appellate Court's decision as the standing opinion on the matter.[55] The LASC's denial of the writ was not unanimous, however. Chief Justice Johnson voiced her disappointment "that Louisiana finds itself, yet again, on the wrong side of history in a matter of civil rights and social justice."[56] Since this decision, Governor Edwards has not attempted to pass another Order providing such protections.

B. Battles in the Louisiana Legislature

On the legislative side, Louisiana has been reticent to pass legislation that would provide protection for LGBTQ+ employees from employment discrimination. During the 2008 Regular Session, former House Representative Juan A. LaFonta introduced two groundbreaking bills into the Louisiana Legislature that could have provided much needed protection in this area. House Bill No. 443 sought to prohibit employment discrimination based on someone's "real or perceived" sexual orientation, gender identity, or gender expression.[57] Unfortunately, this bill died in the House Committee, where Representative LaFonta seemingly pulled the bill from consideration.[58] House Bill No. 981 was later introduced and would have prohibited employment discrimination for state employees based only on their sexual orientation.[59] This bill also suffered the same fate as Bill No. 443.[60] In 2016, hopes were once again revived that the state legislature would pass employment discrimination laws protecting LGBTQ+ individuals when former Senator Jean-Paul J. Morrell introduced Senate Bill No. 332 during the 2016 Regular Session. This bill would have provided comprehensive statewide protection from employment discrimination based on sexual orientation and gender

54. *Id.*

55. La. Dep't. of Just. v. Edwards, 239 So.3d 824 (La. 2018).

56. *Id.*

57. 2008 La. Acts 48, available at http://www.legis.la.gov/Legis/BillInfo.aspx?s=08RS&b=HB443&sbi=y [https://perma.cc/KX36-Z3D3] (last visited Feb. 4, 2022).

58. *Id.*

59. 2008 La. Acts 105, available at http://www.legis.la.gov/Legis/BillInfo.aspx?s=08RS&b=HB981&sbi=y [https://perma.cc/B39P-TFTG] (last visited Feb. 4, 2022).

60. *Id.*

identity in private employment settings.[61] This bill actually reached the Senate Floor, where it has remained, and as of this writing, has still not been passed.[62]

In looking through both the dueling Executive Orders of past governors and the lack of legislation regarding protections for LGBTQ+ employees, it is clear that Louisiana lawmakers have not wholly embraced the idea of protecting this group of people from discrimination in the workplace. As we will discuss further below, there are no current indications that the Louisiana legislature is interested in amending the LEDL to include sexual orientation or gender identity in its protected characteristics.

IV. BOSTOCK'S RULING AND THE LEDL'S INTERPRETATION OF "SEX"

Even though the decision in *Bostock* does not require the LEDL to include sexual orientation and gender identity as protected characteristics, there are two ways in which *Bostock's* ruling could impact future interpretations of the LEDL's protection against discrimination on the basis of "sex." Because *Bostock* is a United States Supreme Court decision regarding employment discrimination, it acts as a piece of federal jurisprudence that could be extremely persuasive to the LASC. Additionally, while the possibility is rather remote, *Bostock* could provide an incentive for the Louisiana legislature to amend the LEDL to include protection based on sexual orientation and gender identity.

A. Louisiana Courts Can Look to Bostock v. Clayton *as Guiding Federal Jurisprudence in Interpreting 'Sex' Under the LEDL.*

Louisiana state courts have a tradition of looking to federal law to guide their interpretation of the LEDL. In *LaBove v. Raferty*, the LASC noted that "[b]ecause Louisiana's prohibition against age discrimination is identical to the federal statute…, Louisiana courts have traditionally looked to federal case law for guidance."[63] The Court in *LaBove* used tests developed by the United States Supreme Court to determine whether there was employment discrimination,[64] and in discussing the burdens of proof

61. 2016 La. Acts 32, available at http://www.legis.la.gov/Legis/BillInfo.aspx?s=16RS&b=SB332&sbi=y [https://perma.cc/CX55-8Y7Q] (last visited Feb. 4, 2022).

62. *Id.*

63. LaBove v. Raferty, 802 So.2d 566, 573 (La. 2001).

64. *Id.*

imposed on both parties.[65] In 2017, the Louisiana Supreme Court once again used this same method of analysis in another age discrimination case, *Robinson v. Board of Supervisors.*[66] While these may be age discrimination suits, and thus not raised under Title VII, the LASC's reasoning could be extended to Title VII.

The LEDL bans intentional discrimination based on "race, color, religion, sex or national origin"[67], which is virtually the same language found in Title VII.[68] Thus, one could easily point to the decision in *Bostock* as support for their argument that the LEDL's protection based on "sex" includes sexual orientation and gender identity, since the LASC would be interpreting the same language as the United States Supreme Court in *Bostock*. Furthermore, the First Circuit for Louisiana has recently stated that state courts deciding cases based on racial discrimination "may appropriately consider a federal court's interpretation of federal statutes to resolve similar questions concerning Louisiana" law since Title VII and the LEDL feature similar language.[69] This only strengthens the idea that *Bostock*'s interpretation of "sex" could apply to the LEDL because both protect against discrimination based on "sex".

It is important to keep in mind, however, that both the First Circuit and the LASC do not *require* state courts to consult federal court jurisprudence on employment discrimination cases. The First Circuit only noted that a state court "may" consider interpretations of federal statutes[70], while the LASC only stated that consulting federal court jurisprudence was "traditional."[71] In other words, Louisiana state courts have complete discretion to decide whether or not they should consider federal court jurisprudence in matters of employment discrimination. Thus, the LASC or any other state court can decline to extend *Bostock* to the LEDL, even though it protects "sex" just as Title VII does.

This is not to say that Louisiana courts will simply ignore *Bostock*, as they will likely need substantive reasoning to depart from their traditional standard. The principles outlined in those First Circuit and LASC cases, however, do not guarantee that *Bostock* will be a determining factor in future challenges to the LEDL's interpretation of "sex." These cases do

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65. *Id.* at 574.

66. 225 So.3d 424, 431 (La. 2017).

67. LSA-R.S. 23:332 (1997).

68. 42 U.S.C. § 2000e-2(a) (Title VII protects against discrimination based on "race, color, religion, sex, or national origin.").

69. Baldwin v. Board of Supervisors For the University of Louisiana System, 299 So.3d 105,108 (La. App. 1 Cir. 2020).

70. *Baldwin*, 299 So.3d at 108.

71. *LaBove*, 802 So.2d at 573.

support the idea that *Bostock* is potentially an extremely persuasive piece of guiding jurisprudence should Louisiana courts choose to consider it as such.

B. Bostock*'s Interpretation of 'Sex' is Unlikely to Convince the Louisiana Legislature to Amend the LEDL.*

There would be no need for the LASC to make any kind of ruling on the LEDL if the Louisiana legislature were to amend the law to include express protections for sexual orientation and gender identity. If this amendment were to occur, Louisiana would join other states such as California[72] and Massachusetts.[73] In total, twenty-two out of the fifty United States have employment discrimination laws providing protection based on sexual orientation and gender identity.[74] For these states, *Bostock* is simply a federal reflection of what they have already been doing at the state level.

Regardless of how many states have provided these protections, the Louisiana legislature is unlikely to make this much needed change any time soon. One only has to look at their response to the Supreme Court's decision in *Obergefell v. Hodges*, where the Supreme Court held that same-sex marriages were protected under both the Due Process Clause and the Equal Protections Clause. [75] Five years since that decision, Louisiana's legislature has still not amended their marriage statutes to reflect the gender-neutral status of marriage that *Obergefell* expressly approved.[76]

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72. CAL. GOV'T CODE § 12940 (2016).

73. MASS. GEN. LAWS ANN. CH. 151B, § 4 (West 2018).

74. *See* COLO. REV. STAT. § 24-34-402 (2016); CONN. GEN. STAT. § 46a-81c (2012) (sexual orientation) & CONN. GEN. STAT. § 46a-60 (2005) (gender identity); 19 DEL. CODE § 711 (2018); HAW. REV. STAT. § 378-2 (2013); 775 ILL. COMP. STAT. ANN. 5/2-101-102; IOWA CODE ANN. § 216.6 (2018) & IOWA CODE ANN. § 2016.6A (2018); ME. REV. STAT. tit. 5, § 4572 (2018); MD. CODE ANN., STATE GOV'T § 20-606 (2010); NEV. REV. STAT. ANN. § 613.330 (2013); N.H. REV. STAT. ANN. § 354-A:7 (2015); N.J. STAT. ANN. § 10:5-12 (2009); N.M. STAT. ANN. § 28-1-7 (2011); N.Y. EXEC. LAW § 296 (2015); OR. REV. STAT. ANN. § 659A.030 (2015); 28 R.I. GEN. LAWS ANN. § 28-5-7 (2012); UTAH CODE ANN. § 34A-5-106 (2006); VT. STAT. ANN. tit. 21, § 495 (2012); WASH. REV. CODE § 49.60.180 (2016).

75. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

76. La. Civ. Code art. 86 ("Marriage is a legal relationship between a *man* and a *woman* that is created by civil contract")(emphasis added).

The Louisiana state legislature has also refused to repeal the state's ban on same-sex marriage, despite its status as an unconstitutional provision.[77]

Louisiana's lack of legislative response to the *Obergefell* ruling does not bode well for those hoping that *Bostock* will positively impact the LEDL. *Obergefell* is binding federal law on Louisiana, meaning whether or not the Louisiana legislature agrees with the decision, they must issue same-sex couples the marriage licenses they are guaranteed under the Constitution. In contrast, *Bostock* is not *binding* federal law for Louisiana, it is merely guiding legislation. As far as the LEDL is concerned, *Bostock*'s ruling does not render any of its language unconstitutional. If Louisiana is unwilling to amend and repeal their statutes to reflect a Supreme Court decision that blatantly renders the state's statutory language unconstitutional, then it is even less likely that they would amend the LEDL to reflect a Supreme Court decision that does *not* render its statutory language unconstitutional. Louisiana's legislative history on employment discrimination illustrates that past attempts to provide protection for LGBTQ+ employees failed to gain significant traction in the House or the Senate. Thus, we have yet to see much indication from the Louisiana legislature that any change to the LEDL's interpretation of "sex" is forthcoming.

This does not mean that the Louisiana legislature will never amend the LEDL to reflect the ruling in *Bostock*, but the legislature's response to *Obergefell* and unsuccessful past attempts by legislators to pass such amendments, indicate that such a change is not likely to occur. There is hope to be found in the possible changing opinions of Louisiana citizens that could result in future legislators being encouraged to provide these protections— a possibility which is discussed in the next section.

V. LOUISIANA'S CHANGING WORKFORCE AND ATTITUDES TOWARDS LGBTQ+ EMPLOYMENT DISCRIMINATION NECESSITATE A CHANGE IN THE LEDL.

Recall that the First Circuit in the *Edwards* case found that an Executive Order providing discrimination protections for sexual orientation and gender identity was unconstitutional because, among other things, the laws and the people of Louisiana had not indicated a desire to provide such protections. The court cited the lack of such protections in the law as evidence of the will of the people.[78] This idea seems to be

77. La. Civ. Code art. 89 ("Persons of the same sex may not contract to marriage with each other.").

78. La. Dep't. of Just. v. Edwards, 233 So.3d 76, at 81(La. App. 1 Cir. 2017).

premised around the assumption that lawmakers and the law itself are an accurate reflection of Louisiana and its citizens. After all, the Louisiana legislature is a democratically elected body, so it must be representative of how citizens feel to some crucial degree. But a closer look at data compiled in recent years might suggest otherwise.

A study conducted in 2015 by the Williams Institute at the UCLA School of Law made a bevy of interesting discoveries regarding Louisiana's attitude towards employment discrimination protection for LGBTQ+ individuals.[79] In total, they found that approximately 117,000 adults living in Louisiana identified as either gay, lesbian, bisexual or transgender.[80] Of this 117,000, over 88,000 were a part of Louisiana's workforce.[81] Although the LEDL does not protect these 88,000 from being discriminated against by an employer because of their sexual orientation or gender identity, some protections do exist at the local level for these employees.

Both New Orleans[82] and Shreveport[83] protect employees from employment discrimination based on sexual orientation and gender identity in both the public and private sectors. In Jefferson Parish, no taxi drivers can be discriminated against based on gender identity or sexual orientation.[84] Bossier City protects local government employees from discrimination based on sexual orientation[85], as well as similar protections for taxi drivers.[86] While these ordinances may seem few and far between, it does at least indicate that there are places within Louisiana that do believe protections for LGBTQ+ workers should be put in place to keep them from experiencing discrimination.

In addition to municipal laws, some of the flagship universities for Louisiana also feature policies protecting employees from discrimination based on their sexual orientation and gender identity. These universities

79. Christy Mallory and Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Louisiana*, THE WILLIAMS INST., available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Employment-Discrimination-LA-Nov-2015.pdf [https://perma.cc/ZB8V-4FVV] (last visited Feb. 4, 2022).

80. *Id.* at 1.

81. *Id.*

82. New Orleans, La. Code of Ordinances § 86-22 (1999).

83. Shreveport, La. Code of Ordinances § 39-2(2) (2013).

84. Jefferson, La. Code of Ordinances § 38-26 (2016).

85. Bossier City, La. Code of Ordinances § 15.03 (2020).

86. Bossier City, La. Code of Ordinances § 118-15(b) (2020).

include Louisiana State University[87] and the University of Louisiana at Lafayette.[88] The Human Rights Campaign also found that at least eight large private sector employers that have their headquarters in Louisiana, also have internal non-discrimination policies that include protections based on sexual orientation, while three of these companies also protect against discrimination based on gender identity.[89]

As far as public opinion goes, there is data to suggest that more Louisiana citizens are in support of providing employment discrimination protection for LGBTQ+ workers. In 2011, a nationally conducted poll found that seventy four percent (74%) of Louisiana participants supported the idea that Congress should pass federal legislation protecting LGBTQ+ employees from discrimination in the workplace.[90] Furthermore, the Williams Institute found that by aggregating data taken from two large public opinion polls, eighty-one percent (81%) of Louisiana citizens believe that LGBTQ+ individuals experience some kind of discrimination.[91]

When we look at all of this data, it becomes clear that the LEDL's lack of protections for LGBTQ+ employees do not wholly represent the mindset of Louisiana citizens. It would be difficult to argue that the 88,000 LGBTQ+ workers living in Louisiana feel represented by this lack of employment discrimination protection at the state level. Moreover, if over half of the state's population believes that LGBTQ+ workers are discriminated against and deserve federal protection from employment discrimination, does the state legislature's failure to provide those protections accurately reflect the desires of its citizens? That's not to mention the fact that some localities have embraced protections for LGBTQ+ workers, including one of the state's most prominent cities, New Orleans.

Thanks to *Schoolhouse Rock!*, we all know that a bill faces a long road ahead of it before it can become a law. It takes a perfect confluence of factors for a law to be passed that goes far beyond a simple vote for a candidate. This is why operating off of the simple premise that a

87. La. State Univ., PS-01: Equal Employment Policy (Feb. 5, 2013), https://www.lsu.edu/hrm/about_hr/staff_handbook/general_employment_policies/ [https://perma.cc/S5HR-SRGJ].

88. Univ. La. Sys., M-(11)a: Prohibiting Workplace Harassment, and Discrimination (Dec. 3, 2010), https://ulsystem.edu/assets/docs/searchable/boards/M-%20%2811%29%20%20Prohibiting%20Workplace%20Harassment%20and%20Discrimination%2012_3_2010.pdf [https://perma.cc/97WS-BGGG].

89. Mallory & Sears, *supra* note 79.

90. *Id.*

91. *Id.*

legislature's makeup accurately reflects the will of its citizens is merely hopeful at best, and woefully naïve at worst. The hope is that in the future, as more and more people of different races, ethnicities, sexual orientations and gender identities run for state and local offices, the Louisiana legislature will eventually become a direct reflection of its diverse population. In looking at the data presented in this section, there is evidence that a possible shift in the social mores of Louisiana citizens in the future will bring forth a legislature that is ready and willing to provide employment discrimination protection to people who should have been provided those protections long ago.

CONCLUSION

Bostock v. Clayton County is a watershed moment in the recognition of civil rights for LGBTQ+ citizens. In recognizing that Title VII protects employees from being discriminated against based on their sexual orientation or gender identity, the Supreme Court has once again affirmed that LGBTQ+ individuals are citizens that deserve all the rights and protections that are supposed to come with being an American citizen. And while *Bostock* is a major victory on the federal level, Louisiana's employment discrimination laws are a reminder that there is still much work to be done at the local level to ensure that these employees are protected from unjustified discrimination.

The LEDL, in its current form, blocks employment discrimination suits based on sexual orientation or gender identity from being litigated in a private civil action at the state level. This is potentially more attractive than making a federal Title VII claim because it does not require commission investigations before having the matter put in front of a trial court or even beginning settlement negotiations. By forgoing this process, and instead filing a private civil action, an aggrieved employee can potentially save time and money that would otherwise be spent trying to litigate or negotiate a Title VII claim. Until the LEDL is amended or the Louisiana Supreme Court interprets the LEDL the same way Title VII was interpreted in *Bostock*, LGBTQ+ employees who are discriminated against can only file a Title VII claim, which is more than was previously offered, but does not afford the same potential ease and cost benefits of simply filing a private civil action under the LEDL.

There is hope that one day Louisiana's employment discrimination law could be changed or interpreted to reflect *Bostock*, whether it be through the LASC or the Louisiana legislature. In deciding LEDL claims, the LASC traditionally looks to federal cases interpreting Title VII since both the federal and state employment discrimination laws feature similar

protections based on "sex." This offers the possibility that *Bostock*'s interpretation of "sex" in Title VII could be adopted to the LEDL, as well. However, adherence to this tradition is discretionary, meaning the LASC could decline to extend *Bostock*'s ruling to the LEDL if they choose to do so. As far as amending the LEDL to reflect *Bostock* is concerned, the Louisiana legislature does not seem to be in any rush to do so given their refusal to amend Louisiana's law to reflect past Supreme Court decisions like that of *Obergefell v. Hodges*.

Lastly, Louisiana's workforce continues to increase in LGBTQ+ workers and citizen's attitudes towards providing protections for those workers have trended positively in the past few years. Thus, as a matter of general policy, it only seems just that the legislature do right by its citizens and amend the LEDL to protect against discrimination based on sexual orientation and gender identity. We cannot say that there is 'justice for all', when the laws do not provide the same rights and protections to all of its citizens.