Welcome to the newly renamed LGBTQ+ Rights Committee!

With admiration and gratitude for the hard and effective work of Jerry Shoemaker during his years as the most recent chair, Martricia O’Donnell McLaughlin and Thomas Ude are now co-chairs of the committee. Our co-vice chairs are John Byrd and John M. Schaffranek. We look forward to an active and successful year, despite the challenges 2020 is presenting on many fronts.

Meet the New Co-Chairs and Co-Vice Chairs

Martricia O’Donnell McLaughlin. I am not only an attorney but also a mediator and have maintained an office in Easton since 1978. A partner in McLaughlin and Glazer, my practice has focused largely on family and criminal law. I have also handled sex and age discrimination cases and served as an assistant county prosecutor and assistant solicitor. Early in my career, I taught at Moravian College as an adjunct.

I have been a member of the LGBTQ+ Rights Committee almost since its founding and served as vice chair, with Leo Dunn and Jerry Shoemaker as chairs. I have also participated on several committee taskforces and subcommittees and edited and co-edited our newsletter, Open Court, for several years.

Equal justice under the law has always been my motivator. I have been active in community social justice organizations, including peace and women’s organizations. My participation in our committee represents my drive for social, racial, economic and gender fairness for all.

I have been married to my law partner, Robert Glazer, since 1978. Together we have raised three children and have one grandchild, and we all strive for a world where kindness, tolerance, acceptance, opportunity and justice are the norm for all, without regard for who we know, who we love, the color of our skin, the nature of our spirituality or our social class and wealth. mclandg@hushmail.com

Thomas W. Ude Jr. I am an attorney who, since 2014, has been Legal and Public Policy Director at Mazzoni Center, a Philadelphia nonprofit that offers LGBTQ+-oriented health and wellness services. I manage the center’s legal services program, which provides direct representation and advice to LGBTQ+ people, primarily low-income, on legal issues related to their sexual orientation or gender identity. Prior to joining Mazzoni Center, I worked for seven years in the northeast regional office of Lambda

Justice Ruth Bader Ginsburg

Associate Supreme Court Justice Ruth Bader Ginsburg passed on Sept. 18, after a long fight against cancer. As an advocate, she argued several key sex discrimination cases before the Supreme Court. Appointed by President Bill Clinton, she was sworn in as an Associate Justice on Aug. 10, 1993. She voted for LGBTQ+ rights in the several cases on these issues over the past 24 years: Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620 (1996); Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003); Windsor v. United States, 570 U.S. 744, 133 S.Ct. 2675 (2013); Hollingsworth v. Perry, 570 U.S. 693, 133 S.Ct. 2652 (2013); Obergefell v. Hodges, 576 U.S. 644, 135 S.Ct. 2584 (2015); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. ___.

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Co-Chair & Co-Vice Chair Chatter
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Legal, the national LGBTQ and HIV civil rights legal organization. I began my career in Connecticut where, after several years in private practice, I served as the City of New Haven's Corporation Counsel (akin to a city solicitor). After six years of a long-distance relationship with my now-husband, Michael Soileau, I moved to Philadelphia in 2014 to live with him and our dog, Colt.

I have presented at CLE programs organized by this committee, which I officially joined two years ago – much more recently than Martricia. I served on the previous Transgender Name-Change Task Force and serve on the current one. My advocacy for LGBTQ+ and HIV+ rights has lasted throughout my career, starting with volunteer work and advocacy and then, starting about 13 years ago, working on these issues full-time.

My passion for the rights of LGBTQ+ and HIV+ people, racial justice and anti-poverty advocacy has driven most of my career and my personal life. While some of that motivation comes from my own experiences and observations, it is strengthened and inspired by the work of activists across many social justice movements, including current and former leaders of this committee and the Pennsylvania Bar Association.

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John Alan Byrd. I am an attorney with North Penn Legal Services, in its Pittston office, and have been for the past four years. Mortgage foreclosures are my primary focus. I was president of OutLaw at Widener University in Harrisburg for all three years while in law school. jbyrd@northpennlegal.org

John M. Schaffranek. I am a senior associate attorney with Gilliland Vanasdale Sinatra Law Office LLC, in Cranberry Township. A 2012 graduate of the University of Pittsburgh School of Law, I was in the PBA Bar Leadership Institute, class of 2013-2014. My work has been primarily in family law, with forays into media and constitutional law, real estate, estate and trust work and municipal law. I am a member of the PBA, the Allegheny County Bar Association and the PBA Family Law Section and the Appellate Rules Committee. I was editor of Open Court in 2015. In addition, I served on the PBA Good Governance Task Force and as vice chair of the Law-Related Education Committee. John@gvlawoffice.com

2020-21 Events and Goals

First, we look forward to the October issue of the Pennsylvania Bar Quarterly, which will feature a symposium on LGBTQ+ issues, including analysis of the Bostock decision, LGBTQ+ rights and religion, the trans and gay panic defenses, common law marriage and parentage under Pennsylvania law.

Our committee is continuing the Transgender Name Change Task Force. The task force, chaired by Ellen Fischer, is drafting proposed court rules to make it easier and safer for transgender people to proceed through the name change process. We also have a new task force, chaired by Henry Sias, which is drafting a proposed resolution supporting action, such as legislation, to eliminate the so-called trans and gay panic defenses.

Mária Zulick Nucci will continue editing Open Court, which we plan to publish four times per year. We are seeking a co-editor.

For all these projects, and any others that you would like to see us take on, you are invited—and encouraged—to participate. Two goals of the committee are to increase active member involvement and to encourage diverse voices to be heard on all of our projects and all of the issues we address. In particular, we are seeking a volunteer to serve as the Young Lawyers Division liaison from our committee to the bar association.

We will meet monthly, via Zoom or telephone, at noon on the third Thursday of each month. We want your input and are sending a survey to committee members to identify your interests, priorities and needs.

As a committee, we have in the past accomplished much that has improved the lives of our community members. Let’s keep working together!
According to numerous studies, lesbian, gay, bisexual and transgender (LGBTQ+) people experience workplace discrimination at alarmingly high rates. See, e.g., https://williamsinstitute.law.ucla.edu/publications/lgb-discrimination-experiences/; https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. However, until June of this year, it was unclear whether federal law protected this vulnerable community from employment discrimination. Thus, Pennsylvania’s LGBTQ+ community breathed a collective sigh of relief when the United States Supreme Court issued its 6-3 decision in Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (2020), finding that federal anti-discrimination law does in fact prohibit sexual orientation and gender identity discrimination in employment. This article outlines the legal landscape for LGBTQ+ workers in Pennsylvania pre-Bostock, explains the decisions and suggests some likely effects on LGBTQ+ workers in the commonwealth.

Discrimination in employment is subject to prohibition under federal, state and often local law. Thus, if a class of persons is not explicitly protected under federal law, class members are often faced with a patchwork of spotty protections that vary state by state (and sometimes municipality by municipality within a state). Pennsylvania’s anti-discrimination statute, the Pennsylvania Human Relations Act (PHRA), covers discrimination in employment, housing and public accommodations. 43 Pa. Stat. Ann. §953. The Pennsylvania Human Relations Commission (PHRC), an executive-branch agency, enforces the PHRA. Id. at §956. For the purposes of employment discrimination, an “employer” must employ at least four people to come within the PHRA’s ambit. Id. at §954.

While the PHRA contains a number of protected classes not included in federal anti-discrimination law, it does not explicitly prohibit discrimination on the basis of either sexual orientation or gender identity. Id. at §953. Since 2001, Pennsylvania legislators have regularly introduced amendments the PHRA that would have specifically included sexual orientation and gender identity as protected classes under the law. https://www.pahouse.com/files/Documents/2020-06-16_034515_PA%Fairness%20Act.pdf. However, those attempts were repeatedly stonewalled by conservative legislators. See https://whyy.org/articles/is-2019-the-year-pa-gives-lgbtq-people-discrimination-protection/.

In recent years, Pennsylvania’s executive branch has attempted to expand protections to the LGBTQ+ community, even without explicit statutory coverage. In 2016, Pennsylvania’s Administrative Code was amended to prohibit employment discrimination on the basis of sexual orientation and gender identity in any “agency under the Governor’s jurisdiction.” 4 Pa. Code §1.861. On Aug. 6, 2018, Gov. Tom Wolf issued Executive Order 2018-06, creating the Commission on LGBTQ Affairs, the first in the nation, to address issues facing the community, including employment. https://www.governor.pa.gov/about/pennsylvania-commission-lgbtq-affairs/. And, also in August 2018, the PHRC issued guidance regarding the interpretation of the term “sex” in the Pennsylvania Human Relations Act. https://www.media.pa.gov/Pages/PA-Human-Relations-Commission-Details.aspx?newsid=74; New PHRC Sex Discrimination Guidelines, Open Court, December 2018, p. 4. That guidance interpreted “sex” broadly, to include: 1) sex assigned at birth; 2) sexual orientation; 3) gender identity; 4) gender expression; and 5) transgender status. https://www.phrc.pa.gov/
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About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf. Thus, the PHRC will accept complaints about sexual orientation or gender identity discrimination, but the Commonwealth’s law on this issue remains unsettled.

On the federal level, employment discrimination is prohibited under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. Title VII is enforceable against an employer with 15 or more employees; the federal Equal Employment Opportunity Commission (EEOC) is tasked with enforcing Title VII. §2000e(b); see generally <https://www.eeoc.gov/overview>. Title VII prohibits discrimination in employment based on race, color, religion, sex and national origin. 42 U.S.C. §2000e-2. Neither “sexual orientation” nor “gender identity” are explicitly included as protected classes under the statute. Therefore, Title VII litigation involving LGBTQ+ employees has historically revolved around whether “sex discrimination” can be read expansively enough to include discrimination based on sexual orientation and gender identity.

The earliest interpretations of “sex discrimination” under Title VII were quite narrow. “Sex discrimination” was understood by courts to be limited to plaintiffs who experienced adverse employment actions as a direct result of their biologically determined membership in one of the binary categories of male or female. See, e.g., Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (“[t]he manifest purpose of Title VII’s prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person’s sex”).

However, a watershed moment in the evolution of federal courts’ understanding of sex discrimination arrived in 1989 when the Supreme Court issued its plurality ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). In that case, which featured a female plaintiff who was passed up for promotion partly because her behavior and mannerisms were deemed insufficiently feminine, the court held that discrimination based on “sex” can mean discrimina-

In the years following *Price Waterhouse*, a line of cases reflected an evolution in the federal courts’ thinking, that, if discrimination against a cisgender woman for being insufficiently feminine is a form of sex discrimination, it logically follows that discrimination against a transgender person for failing to conform to the stereotypes associated with their sex assigned at birth would be sex discrimination as well. See, e.g., *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (transgender plaintiff, “[h]aving alleged that [her] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions ... has sufficiently pleaded claims of sex stereotyping and gender discrimination”). (“Cisgender” is defined as: “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” <https://www.merriam-webster.com/dictionary/cisgender>)

However, LBGTQ+ employees still could not convince courts that sexual orientation discrimination is sex discrimination, leaving gender-conforming LGBTQ+ people without recourse while permitting claims by LGBTQ+ people whose behavior and mannerisms did not conform to gender stereotypes. Compare *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (gender-conforming gay man unable to bring suit based on court’s finding that sexual orientation discrimination is not prohibited by Title VII) with *Prowel v. Wise Business Forms Inc.*, 579 F.3d 285 (3d Cir. 2009) (finding that, under facts similar to *Bibby*, gay man could sue under Title VII where he pled that workplace harassment was partially due to his effeminate behavior).

The United States Supreme Court finally clarified these issues in *Bostock*. *Bostock* consolidated two cases that presented a circuit split on the question whether sexual orientation discrimination is prohibited under Title VII and a third case that sought resolution whether gender identity discrimination is prohibited. *Bostock* was a 6-3 ruling that, to the surprise of many court-watchers, resulted in an unequivocal victory for LGBTQ+ workers.

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The question whether sexual orientation is covered under Title VII came to the court through the Eleventh and Second Circuits. Bostock, the Eleventh Circuit case, involved a gay county employee who was fired after he joined a gay softball league. He sued the county under Title VII. The district court ruled that Title VII’s sex discrimination prohibition did not include sexual orientation. On appeal, a panel of the Eleventh Circuit found itself bound by prior precedent, which held that Title VII does not protect against discrimination based on sexual orientation. 723 F. App’x 964 (11th Cir. 2018). En banc rehearing was denied.

The Second Circuit case, Zarda v. Altitude Express Inc., also involved a plaintiff who was allegedly terminated as a result of his sexual orientation. He, like the plaintiff in Bostock, also brought suit under Title VII, alleging sexual orientation discrimination as a form of sex discrimination. Like the Eleventh Circuit, a panel of the Second Circuit found that prior precedent prohibited a finding that Title VII covers sexual orientation discrimination. However, in an en banc rehearing, the entire Eleventh Circuit overruled prior precedent and found that Title VII covers sexual orientation discrimination. Zarda v. Altitude Express Inc., 883 F.3d 100, 108 (2d Cir. 2018).

The third case, R.G. & G.R. Harris Funeral Homes v. EEOC, was an appeal from the Sixth Circuit, which asked whether Title VII permits an employee to bring a cause of action for discrimination based on transgender status. Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes Inc., 884 F.3d 560 (6th Cir. 2018). The plaintiff presented as male during her employment, but struggled with distressing gender dysphoria. Id. at 568. When she presented her employer with a letter explaining that she finally intended to seek treatment and transition from male to female, she was terminated. Id. at 569. She filed a complaint with the EEOC, which took on the role of plaintiff against the funeral home. The EEOC lost in the district court, but prevailed at the Sixth Circuit, which found that “discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.” Id. at 600.

The Supreme Court’s 6-3 majority opinion was written by conservative justice Neil Gorsuch and relies on a textualist reading of Title VII to conclude that the concept of discrimination “because of sex” must include discrimination based on both sexual orientation and gender identity. The majority found that, logically, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” Bostock, 140 S.Ct. at 1741. As a consequence, the majority found that “[w]hen an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex. And that is all Title VII has ever demanded to establish liability.” Id. at 1744.

It is critical for practitioners in Pennsylvania not only to appreciate Bostock for what it accomplishes for LGBTQ+ workers, but also to understand its limitations. First, the most obvious news: post-Bostock, LGBTQ+ Pennsylvanians working for employers with 15 or more employees, and who are not otherwise exempt from Title VII, are assured that they can file a complaint with the EEOC if they feel that they have experienced discrimination in the workplace. In addition, the court’s reasoning in Bostock has wide-ranging ramifications for interpretation of other federal statutes that use “sex” as a protected category. For example, other federal civil rights laws include “sex” as a protected class and are also often interpreted in accordance with Title VII. See, e.g., Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project Inc., 135 S. Ct. 2507, 2525 (2015) (considering the court’s prior interpretation of similar language in Title VII when deciding that disparate impact claims are cognizable under the federal Fair Housing Act). Since “sex discrimination” now includes discrimination based on gender identity and sexual orientation for Title VII purposes, that concept should be equally inclusive across federal civil rights law.

Bostock’s reach may extend to Constitutional law as well. Equal protection doctrine affords heightened scrutiny to sex-based discrimination by state actors. Craig v. Boren, 429
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U.S. 190, 97 S.Ct. 451 (1976). Although this will certainly be resolved in separate litigation, it is hard to imagine that Bostock’s expansive understanding of “sex discrimination” will be able to co-exist peacefully with a more cramped definition in the Equal Protection context.

However, this does not mean that LGBTQ+ Pennsylvanians are reliably protected from discrimination as a result of Bostock, for a variety of reasons. First, and most obviously, there are structural features to Title VII that limit its reach. It only covers employers with 15 or more employees. However, about 200,000 Pennsylvanians work for employers with 20 or fewer employees. See https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-PA.pdf. Consequently, it is likely that many LGBTQ+ Pennsylvanians employed by small businesses must still rely on the PHRA for protection.

In addition, Title VII, unlike the PHRA, only covers discrimination in employment. Federal law prohibiting discrimination in public accommodations does not actually prohibit discrimination based on sex at all: the protected classes are race, color, religion and national origin. 42 U.S.C. §2000a. As a result, most victims of discrimination in public accommodations rely on their state anti-discrimination schemes. Again, this leaves Pennsylvanians to rely upon the PHRA for recourse in the absence of federal protection. Given that many litigants must still rely on the PHRA for protection, the Commonwealth should give priority to amend that statute so that it unequivocally prohibits discrimination based on sexual orientation and gender identity. Passage of the Fairness Act, which Gov. Wolf would doubtless promptly sign, would accomplish this.

In addition to the limitations of the PHRA, there are also unresolved issues with respect to religious liberty arguments that future Title VII defendants might use as defenses to discrimination claims. Justice Gorsuch’s majority opinion in Bostock seemed to invite such claims, and recent Supreme Court decisions have made it clear that this court will give broad latitude to religious defenses to Title VII claims. See Our Lady of Guadalupe School v. Morrissey-Berru, 140 S.Ct. 2049 (2020) (reading ministerial exception to Title VII broadly, to include teachers at Catholic schools).

To sum up, Bostock is clearly a very important decision that goes a long way toward leveling the playing field for LGBTQ+ workers. However, more work needs to be done to ensure fairness for LGBTQ+ Pennsylvanians working for small employers and those who face discrimination outside the employment context. Pennsylvania’s pending Fairness Act and two-year-old Commission on LGBTQ Affairs are a good start for The Keystone State.

Professor Leonore (Lee) Carpenter teaches Sexual Orientation, Gender Identity and the Law, Appellate Advocacy, and Introduction to Public Interest Law at Temple University Beasley School of Law. She served as Legal Director at Equality Advocates Pennsylvania, where she began as an Equal Justice Works Fellow, working with hate crime and domestic violence victims. She was adjunct instructor in an LGBT-rights clinical course at Temple that she designed. Professor Carpenter is a graduate of Temple Law, and may be reached at lee.carpenter@temple.edu.
The Ramifications of Bostock for Plaintiffs, Defendants and Their Counsel

By Nancy Conrad and Harold M. Goldner

The answer is clear. 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. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

So begins Supreme Court Justice Neil Gorsuch’s opinion of the Court in Bostock v. Clayton County, Georgia, 140 S.Ct. 1731, 1737 (2020), https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf, the landmark case which establishes that the proscription contained in Title VII of the Civil Rights Act of 1964 against discrimination “because of sex” extends to those who are homosexual or transgender. This article will suggest points for potential plaintiffs and defendants and their attorneys to consider when contemplating or bringing or defending against a claim under Bostock.

From the employer’s perspective, the court’s opinion dismisses the notion that Title VII’s drafters never contemplated such a broad application of the law. Of greatest importance is the rubric of Title VII, that all of its proscriptions involve a construction based upon the following root: “because of ... race, color, religion, sex or national origin.” These classifications are considered “protected classifications.” Another important variable is that employment discrimination cases may be for “disparate treatment” or “disparate impact.” The former involves discriminatory treatment, in the terms or conditions of employment, or in harassing or terminating the employee. The latter suggests that workplace conditions had the effect of discriminating against the employee based upon the protected classification.

For all of these “protected classifications,” a claimant can bring a “mixed motive” claim regardless of whether that claim is for disparate treatment or disparate impact. Under the “mixed motive” theory, even if the employer has multiple reasons for taking an adverse action against an employee, if membership in the protected class was “a motivating part” in the decision, it is prohibited. Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S.Ct. 1775, 1795 (1989). (By comparison, “mixed motive” theories for disparate impact claims cannot arise under the Age Discrimination in Employment Act, as it was enacted separately from and written differently than Title VII. Gross v. FBL Financial Services Inc., 557 U.S. 167, 180, 129 S.Ct. 2343, 2352 (2009).)

It remains to be seen whether mixed motive cases will extend to claims “because of sex,” which involve homosexual or transgender claimants. That is because so much of the reasoning of Justice Gorsuch’s opinion focuses on the “because of” part of the rubric and less the “sex” part. Several important decisions in discrimination jurisprudence already address the “because of” formula: one from this term and several from prior terms. Fundamentally,
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to call an employer racist, ageist, sexist or a practitioner of some other bias may have little or no difficulty faulting that employer for being retaliatory, as that violates a jury’s sense of fair play. (See David S. Sherwyn, Zev J. Eigen, Experimental Evidence that Retaliation Claims Are Unlike Other Employment Discrimination Claims, Cornell Hospitality Report, 16(19), 3-20 (2016), https://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?article=1228&context=chrpubs; Kimberly A. Pathman, Protecting Title VII’s Antiretaliation Provision in the Wake of University of Texas Southwestern Medical Center v. Nassar, 109 Nw. U. L. Rev. 474 (2015), https://scholarly-commons.law.northwestern.edu/nulr/vol109/iss2/6/.) Note, however, that “but-for” causation does not require a showing that such discrimination was the sole cause. Price Waterhouse, supra, 490 U.S. at 241 n. 7, 109 S.Ct. at 1785 n. 7 (noting Congress rejected putting “solely” before “because of”).

What remains to be decided is whether such claimants will be able to use the “mixed motive” approach. Will Bostock’s focus on “but-for causation” as a basis for expanding “sex” to include homosexual and transgender claimants ultimately result in precluding a “mixed motive” claim by such claimants in a disparate treatment case? Will the Supreme Court, the Third Circuit, a federal District Court sitting in Pennsylvania, or a Pennsylvania state court, extend Gross and hold that homosexual or transgender plaintiffs cannot bring “mixed motive” claims based on disparate impact? The Gross Court expressed dissatisfaction with Price Waterhouse’s analysis of “mixed motive” and, in any event, Price Waterhouse was a plurality opinion. It is entirely possible that courts will hold homosexual and transgender claimants to a strict “but for” standard of proof, eschewing any effort to use mixed motive to secure a recovery, regardless whether the claim is for disparate treatment or disparate impact.

Ultimately, of course, it is the advocate’s role to prove that the claimant was harmed by the employer’s discriminatory conduct, hence is entitled to recover. In the simplest sense, and as many employment counsel have experienced, mechanically the issue has always been that of “fault.” Will the trier find the employer at “fault” for treating the claimant differently, or was the employee at fault? In practice, straightforward “fault” analysis is mechanically indistinguishable from “but-for causation” analysis. Trial advocacy post-Gross and -Nassar has stressed that: (1) “but for” does not mean “sole”; (2) it is the jury’s role and right, not the court’s, to decide whether the tipping point was met; and (3) the best trial advocacy focuses on who is at fault. Plaintiff counsel thus needs to persuade the court and the jury that “if this person weren’t gay,” “if this person weren’t transgender,” “if this person weren’t Black” or “if this person weren’en” a member of another protected class, none of what happened would have happened. As such, the legal terms might take on less significance than the Supreme Court and other appellate opinions would suggest, as the real case, as it were, is that litigated before the EEOC or PHRC, or a trial court, on facts and evidence rather than precedent and legislative intent.

For this reason, plaintiffs and their counsel should consider the following, in evaluating a prospective claim:

1) did the employer provide postings and/or training about LGBTQ+ persons and workplace rights;
2) was the employee subjected to negative comments about his or her sexual orientation, gender affinity or gender identity;
3) were there comments, jokes and/or posted cartoons or other items in the workplace about LGBTQ+ persons, even if not directed to the plaintiff;
4) did any terms or conditions of employment differ from those of non-LGBTQ+ employees, other than normal differences based on job title and similar legitimate considerations;
5) if the employee had discipline or “counseling” about a workplace issue, were non-LGBTQ+ employees similarly treated for similar workplace issues; and
6) if the employee reported, to human resources or a supervisor, treatment or an incident which he or she believed was discriminatory, how was the report handled.

**The Defendant Dilemma.** Most importantly for employers, then, is the fact that where an LGBTQ+ claimant could previously never hope to bring a direct action and survive a motion to dismiss, or a dismissal by the EEOC before a right to trial, now the employer must prepare for the possibility of a lawsuit. The Ramifications of Bostock

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to sue letter was issued, now such claims are viable. They will most assuredly follow where employers discriminate against persons because of their sexual orientation, gender affinity or gender identity.

Accordingly, the Supreme Court’s ruling means that employers covered by Title VII can now face liability for taking an employment action on the basis of sexual orientation or transgender status or for allowing a hostile environment based on sexual orientation or transgender status. While laws in almost half of the states and many municipalities prohibit sexual-orientation and gender-identity discrimination, many states, including Pennsylvania, still do not prohibit this discrimination as a matter of state law. Employers in all states, if they are subject to Title VII, must now take action to ensure that their workplace policies and employment decisions comply with this new ruling under Title VII.

To assert a Title VII defense, employers will want to produce evidence of anti-discrimination policies that include sexual orientation and transgender status as protected categories and within the definition of discrimination based on sex. To this end, employers must be able to demonstrate:

1) EEO training programs that address Title VII’s protection of gay, lesbian and transgender employees, especially for supervisors and decision-makers;
2) a system that monitors employment decisions, including decisions to hire, fire, promote or discipline, to assure that they are based on legitimate, nondiscriminatory job qualification or performance reasons, and not because of an individual’s sexual orientation or transgender status; and
3) procedures that provide for prompt and remedial action to address and stop workplace conduct, including jokes, name-calling, remarks and messages, including electronic content, based on an individual’s sexual orientation, gender affinity or gender identity.

To successfully defend a Title VII case, an employer must ultimately convince a judge or jury that: its workplace is committed to equal opportunity employment without regard to sex, including sexual orientation, gender affinity and gender identity; its employment decisions are made without regard to an employee’s sexual orientation or transgender status; it does not tolerate workplace harassment based on sexual orientation and transgender status; and, upon notice of actions or conduct that negatively affects or treats an employee based on the employee’s sexual orientation or transgender status, the employer reacted promptly and in accordance with Title VII.

Bostock is clearly a very new, and significant, case. Employers, employees and employment attorneys are well advised to follow their applications in the PHRC, the EEOC and the trial courts, as new additions to the ever-growing body of employment law.

Nancy Conrad is a partner with White and Williams LLP, in its Center Valley office. She represents management in employment matters, including businesses, educational institutions and nonprofits, and workplace compliance investigations. She is chair of the PBA Diversity Team, serves as the Woman Governor on the PBA Board of Governors, and is a member of the National Association of College and University Attorneys. conradn@whiteandwilliams.com

Harold M. Goldner is of counsel to Kraut Harris PC, Blue Bell. He focuses on workplace issues, representing both employees and employers before the courts, the EEOC and the Pennsylvania Human Relations Commission, and including drafting employment policies and handbooks. He is chair of the Lower Merion Township Human Relations Commission. He plays oboe in the Lansdowne Symphony and is president of Delaware Valley Amateur Astronomers. www.krautharris.com; @HumanRacehorses.
Hear Ye! Hear Ye!

This feature provides up-to-date, brief bulletins addressing LGBTQ+ issues that might be relevant to readers’ lives or practices. Contributions from committee members and allies are welcome. Send the editor an item or an alert to the item.

- The Every Child Deserves A Family Act, S. 1791, introduced by Senator Kristen Hillebrand, on June 11, 2019, was read twice and referred to the Committee on Finance. The Act would “prohibit discrimination on the basis of religion, sex (including sexual orientation and gender identity) and marital status in the administration and provision of child welfare services, to improve safety, well-being and permanency for lesbian, gay, bisexual, transgender, and queer or questioning foster youth, and for other purposes.” https://www.congress.gov/bill/116th-congress/senate-bill/1791. The companion bill, H.R. 3114, was introduced by the late Rep. John Lewis on June 5, 2019; the next day, it was referred to the Subcommittee on Health. https://www.congress.gov/bill/116th-congress/house-bill/3114/all-actions?r=68&overview=closed&c=1#tabs.
Rainbeaux Arts and Culture

This section adds a touch of the humanities, because the humanities civilize and inspire! Members are welcome to share information on the arts and culture for the LGBTQ community. Items are provided for information and are not officially endorsed or promoted by the committee or the PBA.

Books


Film
“Good Joe Bell.” Directed by Reinaldo Marcus Green and written by Larry McMurtry and Diana Ossana, the writers behind “Brokeback Mountain”; McMurtry is also known for “Lonesome Dove” and other Western works. The film tells the true story of Joe Bell, a conservative father who faces his own homophobia when his teenage son, Jadin, comes out. Jadin kills himself after protracted bullying in high school, and Joe becomes a true walking campaign against bullying. The film premiered at the Toronto Film Festival. [https://www.indiewire.com/2020/09/good-joe-bell-review-mark-wahlberg-true-story-1234586187/](https://www.indiewire.com/2020/09/good-joe-bell-review-mark-wahlberg-true-story-1234586187/).
Getting to Know One of Our Members: Henry McGregor Sias

Just for the record, as they say, what is your full name?
My full name is Henry McGregor Sias.

Tell our readers about your background, education and employment as an attorney.
I am originally from Michigan. I lived in Detroit when I was elementary-aged and then moved to rural southern Michigan for junior high and high school. I went to college at Western Michigan University. (Go Broncos!) Terry Crews is probably our most famous alum. Then I took a few years off, heading to law school at Yale in my mid-20s. I graduated from YLS in 2005.

I spent a couple of years in New York City after law school, working at a big firm. A relationship brought me to Philadelphia, where a lucky set of circumstances led me into a clerkship for Justice James J. Fitzgerald III at the Supreme Court of Pennsylvania. Then I returned to private practice at Blank Rome in Philadelphia. I couldn’t pass up another opportunity to work at the Supreme Court, with Justice Jane Cutler Greenspan, and since then I have focused on Gideon work, especially under the Post Conviction Relief Act.

Where do you live and work?
I live in Philadelphia, not far from the Italian Market and the famous cheesesteak places. I work in Superior Court, near Independence Hall. Right now, I’m very grateful to have a job, as I see so many people facing layoffs and economic uncertainty. It’s nice to be able to walk to work.

What made you join the PBA LGBTQ+ Rights Committee? Does it dovetail with other professional or volunteer efforts or ventures?
It dovetails with my work as a commissioner on the Pennsylvania Commission for LGBTQ+ Affairs. I have been involved in civil rights work for our community since my first semester at law school, and I enjoy the fellowship the committee provides. Our community differs from other historically disadvantaged groups in that we are not “automatically” connected to one another through our families or neighborhoods; we have to seek out the company of other LGBTQ+ people. For that reason, I try to seek out opportunities to reconnect, and our committee’s work is a good one.

Can you give me an example?
Yes. Right now, we have formed a subcommittee to look at the gay/trans “panic” defenses; this is also a committee priority. I see it as an opportunity for the bar association to take the lead on an ethical question and exercise our ability to be a self-governing profession.

On a lighter note, what’s your favorite vacation spot?
I love the Traverse City/Sleeping Bear Dunes area of Michigan. We used to spend a week there in early October, when the trees were showing all their autumn colors. It’s really lovely. I also enjoy Squam Lake in New Hampshire, where my wife’s family has been vacationing in late summer for many years.

Do you have a favorite book and why do you love it?
I have several! Before law school, I was in an MFA program for writing. I dropped out after surveying job prospects and took the LSAT shortly thereafter, but I’m glad I had the extra time and exposure to so much good writing. In fiction, I like Fred Exley (A Fan’s Notes), Jaimy Gordon (Lord of Misrule), and Thomas Ligotti. I like the poetry of Amy Clampitt, Frank Stanford and Frank O’Hara. Two books have changed the way I approach legal thinking: Atul Gawande’s Checklist Manifesto and Thinking, Fast and Slow.
Getting to Know Henry McGregor Sias
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by Daniel Kahnemann (with lots of influence by his former research partner, Amos Tversky). I also love John McPhee, one of the best New Yorker staff writers of all time. His book, *Draft No. 4*, is some of the best nonfiction writing instruction I’ve encountered.

Do you have a favorite TV show?
Lately, my wife Carey and I have been re-watching “Black Mirror.” It’s definitely one of my favorites of recent years. We also really enjoyed “The Midnight Gospel,” which turned out to have a lot more resonance than we anticipated.

What about a favorite movie?
Probably “Shoot the Piano Player.”

What’s one thing that we don’t know about you?
I was born on a Saturday, which means (according to some traditions) I can hunt vampires.

Do you have a favorite band or type of music?
I listen to a lot of different music. Lately, I’ve been into a Detroit post-punk band called Tyvek. They are sometimes described as “the Talking Heads of Detroit.” I’ve also been listening to a lot of solo guitar music, some Jack Rose and Kaki King.

Do you have any pet peeves?
Cutting in line. It’s the worst.

Is there anything special you do after a particularly challenging day?
I like to make myself a fancy cup of tea, and if I can talk anyone into going out to dinner with me, that’s also a favorite coping mechanism.

Do you have any interesting objects on your desk?
I have a bunch of rubber donuts to use for hand-strengthening exercises, because I broke my left hand last year.

Is there any special photo or artwork on your office wall or in your office?
I have a framed reproduction of a piece by Nari Ward called “Homeland Sweet Homeland” that contains an assertion of a person’s rights against searches and seizures. I also have a nautical map of Lake Michigan.

Do you have any pets?
We have two cats: a sweet gray tabby who has many names but is often called Kitty, who is sort of an ur-cat, as she reminds us of every companionable cat of our youths, and a young wild-man named Frankie, who has one eye and a serious snaggletooth that gives him a permanent goofy sort of sneer. He’s a mutt from the streets of Olney, but looks like a fancy Russian Blue until you see his goofy mug.

If you were not a lawyer, you would be a _____.
Lately I’ve been thinking it would be interesting to work in music production.
Justice Ruth Bader Ginsburg
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For Justice Ginsburg’s Supreme Court biography, see https://www.oyez.org/justices/ruth_bader_ginsburg

LGBTQ+ Rights Committee

The LGBTQ+ Rights Committee shall study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (LGBTQ+) community. The committee will monitor and make recommendations on issues and developments in the law impacting LGBTQ+ people in the public and the legal profession.

The committee is open to LGBTQ+ lawyers and allies. The committee welcomes all members who are interested in promoting equal rights for the LGBTQ+ lawyers and the LGBTQ+ community at large.

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