



U.S. Department of Justice

Civil Rights Division

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MEMORANDUM

March 10, 2022

TO: Department of Justice Office of Justice Programs, Office of Community Oriented Policing Services, Office on Violence Against Women, and Money Laundering and Asset Recovery Section

FROM: Assistant Attorney General Kristen Clarke *KC*
Civil Rights Division

SUBJECT: Interpretation of *Bostock v. Clayton County* regarding the nondiscrimination provisions of the Safe Streets Act, the Juvenile Justice and Delinquency Prevention Act, the Victims of Crime Act, and the Violence Against Women Act

The Department of Justice is charged with coordinating the implementation and enforcement of statutes that prohibit discrimination by recipients of federal financial assistance on a number of bases, including sex. Exec. Order No. 12250, §§ 1-2, 45 Fed. Reg. 72,995 (Nov. 4, 1980). Under the Executive Order 12250 authority delegated to the Civil Rights Division, 28 C.F.R. §§ 0.51(a), 42.412(a), I write to share the Division's view that the holding in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), as to the meaning of the word "sex" in Title VII of the Civil Rights Act of 1964 extends to the use of "sex" in nondiscrimination provisions of the following statutes: (1) the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act"), as amended, 34 U.S.C. § 10101, *et seq.*; (2) the Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDP A"), 34 U.S.C. § 11101, *et seq.*;¹ (3) the Victims of Crime Act of 1984 ("VOCA"), 34 U.S.C. § 20101, *et seq.*; and (4) the Violence Against Women Reauthorization Act of 2013 ("VAWA"), Pub. L. No. 113-4, § 3, 127 Stat. 54, 61 (2013) (nondiscrimination provision codified at 34 U.S.C. § 12291(b)(13)).

We conducted this evaluation in connection with our work under Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 25, 2021). Executive Order 13988 sets out the Administration's policy that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation." *Id.* Citing the Supreme Court's holding in *Bostock*, the Executive Order explains that *Bostock*'s reasoning applies with equal force to other laws that prohibit sex discrimination "so long as the laws do not contain sufficient indications to the contrary." *Id.*

In *Bostock*, the U.S. Supreme Court held that the prohibition on discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII),

¹ The JJDP A incorporates the nondiscrimination provision of the Safe Streets Act, 34 U.S.C. § 10228(c).

covers discrimination on the basis of gender identity and sexual orientation. *Bostock* explains that when an employer fires an employee for being gay or transgender, the employer fires that person “for traits or actions [the employer] would not have questioned in members of a different sex.” 140 S. Ct. at 1737. This means that “[s]ex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids.” *Id.* In other words, being gay or transgender is “inextricably bound up with sex.” *Id.* at 1742.

The *Bostock* holding applies with equal force to discrimination on the ground of intersex traits – *i.e.*, variations in physical sex characteristics that do not fit typical definitions of male or female bodies. See Dep’t of Just. Title IX Legal Manual, Title IX Cover Addendum post-*Bostock*, Editor’s Note.² Such discrimination is based on variations in biological sex traits and is motivated by perceived differences between an individual’s specific sex characteristics and their sex category (either as identified at birth or some subsequent time). *Id.*; *cf. Bostock*, 140 S. Ct. at 1746 (“By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today”). An intersex individual does not conform to “the sex-based stereotypes of the sex that [they were] assigned at birth,” or indeed to either binary sex category. *Cf. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (discussing transgender individuals). Intersex traits, like gender identity and sexual orientation, are “inextricably bound up with” sex. *Bostock*, 140 S. Ct. at 1742); see also *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (“[T]here are . . . youth born intersex who do or do not identify with their sex assigned-at-birth,” and this is one reason why some youth “do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity.”).

The Division concludes that the sex discrimination prohibitions in the Safe Streets Act, JJDPa, VOCA, and VAWA prohibit discrimination on the basis of sexual orientation, gender identity, and intersex traits. The prohibitions against sex discrimination in the Safe Streets Act, JJDPa, VOCA, and VAWA are sufficiently similar to the prohibition in Title VII to make *Bostock*’s analysis applicable there too. In particular, each of the statutes explicitly prohibit sex discrimination and protect individuals from discrimination.

Analysis of the Safe Streets Act, JJDPa, VOCA, and VAWA

The nondiscrimination provision of the Safe Streets Act, which is also incorporated into JJDPa, provides that “[n]o person in any State shall on the ground of . . . sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title.” 34 U.S.C. § 10228(c)(1). Similarly, VOCA states that “[n]o person shall on the ground of . . . sex be excluded from participation in, denied the benefits of, subjected to discrimination under, or denied employment in connection with, any undertaking funded in whole or in part with sums made available under this chapter.” 34 U.S.C. § 20110(e).

² This interpretation is provided under the Division’s delegated authority to promote the “consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance.” 45 Fed. Reg. 72,995 (Nov. 4, 1980); see also 28 C.F.R. §§ 0.51(a), 42.412(a) (delegation to Civil Rights Division).

Finally, VAWA states “[n]o person in the United States shall, on the basis of . . . sex . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under” VAWA and related programs funded by the Department’s Office on Violence Against Women. 34 U.S.C. § 12291(b)(13)(a).³

Title VII, the Safe Streets Act, JDDPA, VOCA, and VAWA all use comparable language when articulating the prohibition on sex discrimination.⁴ Title VII prohibits discrimination “because of” sex; the Safe Streets Act, JDDPA, and VOCA bar discrimination “on the ground of” sex; and VAWA prohibits discrimination “on the basis of sex.” Courts have often used these similar phrases interchangeably. *See, e.g., Bostock*, 140 S. Ct. at 1737 (“[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.”) (emphasis added); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]hen a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”); *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) (evaluating Title VI of the Civil Rights Act of 1964 which prohibits discrimination “on the ground of” protected classes, and analogizing it to Title VII’s prohibitions “because of” membership in a protected class); *FCS Advisors, LLC v. Missouri*, 929 F.3d 618, 622 (8th Cir. 2019) (discussing Title VI claim and using “on the ground of” and “because of” interchangeably); *Dunnet Bay Const. Co. v. Borggren*, 799 F.3d 676, 697 (7th Cir. 2015) (same). We conclude that the phrases “on the ground of” and “on the basis of” sex, as used in these statutes, are sufficiently similar to “because of” sex under Title VII, and therefore *Bostock*’s analysis applies to the Safe Streets Act, JDDPA, VOCA, and VAWA.

The second relevant similarity among Title VII, the Safe Streets Act, JDDPA, VOCA, and VAWA is the statutes’ focus on protecting individuals from discrimination. Title VII expressly protects “any individual” from discrimination, while the Safe Streets Act, JDDPA, VOCA, and VAWA state “no person” shall be discriminated against. As the *Bostock* Court observed, this focus is significant because it is not a “defense for the employer to note that, while

³ Although VAWA’s nondiscrimination provision explicitly references sexual orientation and gender identity, *see* 34 U.S.C. § 12291(b)(13), this Memorandum addresses VAWA’s prohibition on sex discrimination as a separate ground for protection against discrimination based on sexual orientation and gender identity. VAWA’s nondiscrimination provision was drafted and enacted several years prior to the *Bostock* decision. Before *Bostock*, federal courts were inconsistent on whether various statutory sex discrimination provisions covered discrimination on the basis of sexual orientation and gender identity. *See, e.g., Bostock*, 140 S. Ct. at 1738 (noting that the Court granted certiorari “to resolve at last the disagreement among the courts of appeals over the scope of Title VII’s protections” regarding sexual orientation and gender identity). Furthermore, the usage of “sex,” “sexual orientation,” and “gender identity” in the same statutory provision does not necessarily make these terms mutually exclusive. *See, e.g., S. Rep. No. 112-153*, at 7 (2012) (“Although the new [VAWA] civil rights grant provision lists ‘gender identity’ as a separate protected class, nothing in this bill is intended to undermine protections that transgender victims of discrimination already enjoy under existing guarantees against discrimination on the basis of sex.”). Rather, such a delineation can reflect a purposeful approach to drafting and enacting legislation. *See, e.g., Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (statutory language may appear to “all mean the same thing”, but such redundancy is a “not uncommon sort of lawyerly iteration”).

⁴ To the extent employment discrimination is also prohibited by these statutes, the statutes’ implementing regulations direct the Department to analyze complaints of employment discrimination consistently with Title VII. *See, e.g., 28 C.F.R. 42.203(c)*.

he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall.” *Bostock*, 140 S. Ct. at 1741. This logic compels the conclusion that the Safe Streets Act, JDDPA, VOCA, and VAWA also protect any “person” from sex discrimination, including discrimination based on that person’s sexual orientation, gender identity, and intersex traits.

Based on the analysis outlined in this memo, the Division concludes that the reasoning of Supreme Court’s decision in *Bostock* applies equally to the nondiscrimination provisions of the Safe Streets Act, JDDPA, VOCA, and VAWA, respectively. The Safe Streets Act, JDDPA, and VOCA’s prohibitions on discrimination “on the ground of” sex and VAWA’s prohibition on discrimination “on the basis of sex” include a prohibition on discrimination based on sexual orientation, gender identity, and intersex traits. Before reaching this conclusion, the Division considered whether these statutes “contain sufficient indications” that would merit a contrary conclusion. The Division carefully considered, among other things, the concerns raised in the dissents in *Bostock*. For the reasons discussed above, however, the Division finds that these statutes’ text, legislative history, and caselaw do not justify a departure from the *Bostock* majority’s textual analysis and the Supreme Court’s longstanding directive to interpret civil rights statutes broadly.

Conclusion

Whether allegations of sex discrimination might constitute a violation of the Safe Streets Act, JDDPA, VOCA, or VAWA in any given instance will necessarily turn on specific facts and require an individualized, case-specific analysis. Therefore, this memorandum does not prescribe any particular outcome in any given matter, and does not create rights, responsibilities, or obligations for the Department or any individual or entity. Any action taken by the Department in a specific case will take account of all relevant facts and legal requirements, including, where applicable, the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, and any other applicable exemptions.⁵

I hope this memorandum provides a starting point for your offices to ensure the consistent and robust enforcement of the Safe Streets Act, JDDPA, VOCA, and VAWA. The Civil Rights Division is available to answer any questions you may have.

⁵ This Memorandum does not address the application of these statutes in sex segregated settings or the application of any specific statutory exemptions.