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# HHS Rule Block Shows Vast Reach Of Justices' LGBTQ Ruling

By Alan Kabat (August 19, 2020)

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When the U.S. Supreme Court issued its landmark Bostock v. Clayton County decision on June 15, some readers assumed that its impact would be limited to the holding that Title VII prohibits discrimination on the basis of sexual orientation or gender identity.[1]

However, the courts are now recognizing that Bostock is of much broader impact, as recently set forth in a series of pathbreaking decisions that enjoined proposed federal regulations.

The challenged regulations had the improper effect of (1) excluding transgender individuals seeking health care from the anti-discrimination laws; (2) prohibiting college students who are not citizens from receiving emergency financial aid; and (3) making employees ineligible for paid sick leave if their employer did not have work for them.

Most recently, on Aug. 17 in Walker v. Azar, U.S. District Judge Frederic Block of the U.S. District Court for the Eastern District of New York applied Bostock in issuing an injunction against a proposed regulation of the U.S. Department of Health and Human Services, which excluded gender identity from coverage under the anti-discrimination provision of the Affordable Care Act.[2] That provision prohibited discrimination by health care providers on any of the grounds prohibited under Title VI, Title IX or the Age Discrimination Act of 1975.[3]

The Obama administration's regulation in 2016 stated that gender identity was expressly covered by this statute.[4] However, after the Trump administration took over in January 2017, HHS took steps to repeal this regulatory provision and replace it with a new regulation that did not include gender identity.

Although HHS recognized in 2019 that litigation before the Supreme Court would decide whether Title VII protected gender identity or sexual orientation, HHS forged ahead with its rule to bar transgender patients from invoking the anti-discrimination provision of the Affordable Care Act. And even after the Supreme Court's Bostock decision came out this year on June 15, HHS allowed the regulations to be published on June 19, with an effective date of Aug. 18 — two months after Bostock.[5]

Judge Block readily recognized that Bostock applied to this HHS regulation, when two transgender women challenged the regulation and sought a preliminary injunction against its enforcement. After setting out the four factors for a preliminary injunction, and finding that the second through fourth factors were readily satisfied, Judge Block held that the likelihood of success on the merits (the first factor) was also satisfied, because the Administrative Procedure Act allows a court to set aside an agency action that is contrary to law.

Here, Bostock made clear that the proposed regulation was no longer consistent with the law as to gender identity. Judge Block explained the basis for his decision: "HHS took a position ... [that] was effectively rejected by the Supreme Court."[6]

Even though HHS had the opportunity for a do-over, "it continued on that same path, even after Bostock was decided," and the "timing might even suggest to a cynic that the agency pushed ahead specifically to avoid having to address an adverse decision."[7]

**Bostock and Regulations Interpreting Other Protective Statutes**

The impact of Bostock has not been limited to extending its gender identity holding to other statutes or their implementing regulations. Bostock was also a call for judges to look more closely at the plain language of statutes. This allows judges to decide whether a regulation implementing a statute had impermissibly narrowed the statutory protections.

Recently, Bostock led judges in the U.S. District Court for the Northern District of California and U.S. District Court for the District of Massachusetts to reject the attempt by the U.S. Department of Education to issue regulations that limited emergency financial aid under coronavirus legislation to college students who are either citizens or have specific legal authorization to be in the country.

The Coronavirus Aid, Relief and Economic Security, or CARES, Act authorized the Department of Education to provide emergency coronavirus-related funding to colleges and universities through the Higher Education Emergency Relief Fund.[8] The Department of Education decided that colleges and universities could not provide this financial aid to students who were not citizens or did not have green cards.

In June, U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California, in Oakley v. DeVos,[9] held that the Department of Education's prohibition on providing this emergency financial aid to students who were not citizens or green card holders was contrary to the plain language of the statute, which had no such restriction.

Quoting Bostock, the court held: "When the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[10] Since the statute had no citizenship-based limitation on students who were eligible for the emergency funding, the court enjoined the regulation.[11]

Similarly, in July, U.S. District Judge Leo Sorokin of the District of Massachusetts, in Noerand v. DeVos,[12] cited Bostock in enjoining this same Department of Education regulation: "In interpreting a statute, courts first look to 'the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President.'"[13]

Judge Sorokin thus found that the CARES Act did not limit students to those who were citizens or green card holders, and, therefore, the rule was invalid.[14]

Another holding of Bostock that's just as important is that "but for" causation does not mean "sole" causation.[15] Earlier this month in New York v. U.S. Department of Labor, U.S. District Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York, used this holding to issue an injunction against several key components of a regulation proposed by the Department of Labor to implement the Emergency Paid Sick Leave Act.[16]

The Department of Labor had proposed excluding employees whose employers did not have any work from eligibility for the Emergency Paid Sick Leave Act. The purported justification was that the statute covered those who were unable to work due to any of six qualifying

conditions, and that a lack of work was not among those six conditions.[17]

However, under Bostock, Judge Oetken found that this statutory provision did not exclude employees whose employers lacked work from the paid sick leave protection. Quoting Bostock, the court stated that "Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that the actions taken 'because of' the confluence of multiple factors do not violate the law. ... But none of this is the law we have."[18]

**Conclusion**

Whether or not the Supreme Court intended it, the Bostock decision has critically supported courts in sustaining a broad interpretation of protective statutes, in opposition to the scaling back of protections by the Trump administration. The courts have protected noncitizen college students and employees seeking paid sick leave, as well as transgender patients under the most recent decision.

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[1] Bostock v. Clayton County, Georgia, 590 U.S. ___, 140 S. Ct. 1731 (2020).

[2] Walker v. Azar, No. 1:20-cv-02834-FB-SMG, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020).

[3] 42 U.S.C. § 18116.

[4] 45 C.F.R. Part 92.

[5] HHS, "Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority," 85 Fed. Reg. 37,160 (June 19, 2020).

[6] Walker v. Azar, 2020 WL 4749859, at *9.

[7] Id.

[8] Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020).

[9] Oakley v. DeVos, No. 20-cv-03215-YGR, 2020 WL 3268661 (N.D. Cal. June 17, 2020), appeal docketed, No. 20-16564 (9th Cir. Aug. 14, 2020).

[10] Id., 2020 WL 3268661, at *7 (quoting Bostock, 140 S. Ct. at 1749).

[11] Id. at *14.

[12] Noerand v. DeVos, No. 20-11271-LTS, 2020 WL 4274559 (D. Mass. July 24, 2020).

[13] Id., 2020 WL 4274559, at *2 (quoting Bostock, 140 S. Ct. at 1738).

[14] Id. at *8.

[15] Alan Kabat, "High Court's Title VII Ruling Reaches Beyond LGBTQ Rights," Law360 (June 17, 2020).

[16] New York v. U.S. Department of Labor, No. 20-cv-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020). The Emergency Paid Sick Leave Act is part of the Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178, 195-201 (Mar. 18, 2020).

[17] New York, 2020 WL 4462260, at *7.

[18] Id. at *7 (quoting Bostock, 140 S. Ct. at 1739).