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## Impact of SCOTUS Decision on LGBTQ Rights at the State and Local Level

Prior to the *Bostock* decision, the Pennsylvania Human Relations Commission (PHRC) decided to get out in front of the debate over whether discrimination on the basis of sex also included protection for being homosexual or transgender.

By **Jeffrey Campolongo** | June 18, 2020



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"Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them." When Justice Neil Gorsuch wrote those words as the lede to the landmark decision in *Bostock v. Clayton County, Georgia*, the legal world knew that what was to come would be fairly significant. But it was the following sentence of the opinion that will forever change the landscape for members of the LGBTQ community: "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."

Gorsuch was indeed right when he declared that few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. Title VII was created to enforce constitutional rights, to confer jurisdiction upon the district courts to provide relief against discrimination in public accommodations and to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education.

Similarly, the Pennsylvania Human Relations Act (PHRA) was enacted by the commonwealth of Pennsylvania because the denial of equal employment (because of discrimination) results in individuals not being utilized to their fullest potential, deprives individuals the ability to maintain decent standards of living and necessitates their resort to public relief, thereby resulting in grave injury to the public health and welfare. The commonwealth created this statute as an exercise of police power for the "protection of the public welfare, prosperity, health and peace of the people of the commonwealth of Pennsylvania," see 42 P.S. Section 952(c). Pennsylvania courts have consistently held that the PHRA is to be interpreted consistently with federal anti-discrimination law. See *Chmill v. City of Pittsburgh*, 412 A.2d 860 (Pa. 1980), *Imler v. Hollidaysburg American Legion Ambulance Services*, 731 A.2d 173 (Pa. Super. Ct. 1999), *Fogelman v. Mercy Hospital*, 283 F.3d 561 (3d Cir. 2002) and *Taylor v. Phoenixville School District*, 184 F3d 296 (3d Cir. 1999).

Prior to the *Bostock* decision, the Pennsylvania Human Relations Commission (PHRC) decided to get out in front of the debate over whether discrimination on the basis of sex also included protection for being homosexual or transgender. In fact, the PHRC issued a "Guidance on Discrimination on the Basis of Sex" on Aug. 2, 2018, in which it stated that, for enforcement purposes under the PHRA, it will treat discrimination on the basis of sexual orientation, transgender identity, gender identity, and gender expression as prohibited discrimination on the basis of sex.

The purpose of the guidance was to provide clarity to all Pennsylvanians regarding their civil right “to obtain employment for which [they are] qualified, and to obtain all the accommodations, advantages, facilities, and privileges of any public accommodation and of any housing accommodation and commercial property without discrimination because of . . . sex” as declared in the PHRA.

In the guidance, the PHRC indicated that, “the prohibition contained in the PHRA and related case law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected class, prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.” The guidance defined each of these terms as follows:

**Sex Assigned at Birth:** The assignment and classification of individuals at birth, including, but not limited to male, female, or intersex and the related physical differences between the sexes, such as pregnancy.

**Sexual Orientation:** An inherent or immutable enduring emotional, romantic, or sexual attraction to other people, including, but not limited to: heterosexual, homosexual and bisexual.

**Gender Identity:** One’s innermost concept of self as male, female, a blend of both or neither. How individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.

**Gender Expression:** External appearance of one’s gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

**Gender Transition:** The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Some people socially transition, whereby they might begin dressing, using names and pronouns and/or be socially recognized as another gender. Others undergo physical transitions in which they modify their bodies through medical interventions.

**Transgender:** An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.

While the PHRC guidance essentially advocated the same definition of sex as that espoused by the majority of the justices of the U.S. Supreme Court in *Bostock*, its breadth is limited. The guidance does not have the force of law. This is why the federal determination is so crucial. Where a majority of Pennsylvania’s legislators have failed to act to protect LGBTQ folks, the federal courts now have.

Nevertheless, there is movement afoot to amend the PHRA and provide statewide protections for LGBTQ Pennsylvanians. The Pennsylvania Fairness Act (PA H.B. 1404) would add gender identity and expression and sexual orientation to the PHRA. This bill would protect LGBTQ Pennsylvanians from being fired, refused housing or other social services due to their gender identity or sexual orientation. The bill encourages public policies, reflecting an open and welcoming environment and ensuring equal opportunity, foster economic growth and prosperity which benefit the inhabitants of this commonwealth. Conversely, the absence of non-discrimination protections hinder efforts to recruit and retain the diversity of talented individuals and successful enterprises required for a thriving economy and strong public sector on which the inhabitants of this Commonwealth depend, per Section 2 of the bill.

On a local level, counties and municipalities throughout the state have enacted non-discrimination ordinances in one form or another prohibiting discrimination because of sexual orientation or gender identity/expression. Three counties out of 67 have an ordinance prohibiting discrimination based on sexual orientation in private employment, housing, and public accommodations. As of December 2019, at least 58 of Pennsylvania’s 2,562 municipalities have passed LGBTQ-inclusive local non-discrimination ordinances. The residents of these municipalities amount to over 33% of Pennsylvania’s overall population (per U.S. Census—2015 Estimates). Pennsylvania now has the most number of LGBTQ-inclusive local nondiscrimination ordinances adopted of any state in the nation (per movement advancement project).

On a very proud note, the list will be growing from 58 to 59 municipalities as Whitpain Township is poised to pass its own nondiscrimination ordinance shortly. In full disclosure, this author is on the board of supervisors in Whitpain. Here is to hoping that this small gesture can have consequences of the type Gorsuch forecasted in *Bostock*.

**Jeffrey Campolongo**, founder of the Law Office of Jeffrey Campolongo, focuses his practice on employment and entertainment law. For over a decade, he has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.