

account the other factors that may affect a client's ability to connect with treatment, such as transportation, housing, substance use, social supports, case management, and the like. A defendant who may be unable to address all of these other factors may struggle to participate fully in the court diversion program. The salient point then becomes understanding how those factors influence "successful" completion of diversion programming and allow for eligibility of dismissal of charges. The diversion bill does not mandate explicitly the provisions for programming needed to adequately address factors that may contribute to or exacerbate mental illness or pose barriers to treatment. These provisions are necessary to ensure that all defendants are given equal opportunities to be successful.

The most concerning dilemma for providers is understanding the burden of responsibility for "satisfactory" completion of treatment. A defendant may lack the resources to resolve treatment barriers adequately and these resources may not be addressed through the court diversion program (which they often are not). Such cases present the question of whether the defendant is responsible for an unsatisfactory treatment program or the system is responsible for failing to provide necessary resources to ensure success. An ethics dilemma emerges in which the clinician responsible for reporting to the court must either determine success by factoring in individual barriers or must use the same standard of successful treatment for all defendants, regardless of circumstance. In this case, the court highlights the cost-savings of providing treatment to defendants versus incarcerating them, but the statute lacks language that guarantees adequate resources to address all components of a defendant's mental illness. It merely specifies that treatment can be court funded or privately funded.

## Sex Discrimination in the Workplace

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### An Employer Who Fires an Individual Merely for Being Gay or Transgender Violates Title VII of the Civil Rights Act of 1964

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In three consolidated cases, under *Bostock v. Clayton County, Board of Commissioners*, 140 S. Ct. 1731 (2020), the U.S. Supreme Court considered the question of sex discrimination in the workplace and held that an employer who fires an individual for being homosexual or transgender effectively violates Title VII of the Civil Rights Act of 1964.

#### Facts of the Cases

In the first case, *Gerald Lynn Bostock v. Clayton County, Georgia*, Gerald Bostock, who had worked as a child welfare advocate for Clayton County, Georgia for a decade and was recognized as a model employee, was fired by the county for conduct "unbecoming a county employee" (*Bostock*, p 1738) soon after joining a gay recreational softball league. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), Donald Zarda, a skydiver instructor with Altitude Express in New York, was fired within days of mentioning that he was gay to a female tandem skydiving client, after she complained about his homosexual status. In *Equal Employment Opportunity Commission (EEOC) v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E. D. Mich. 2016), Aimee Stephens, who was hired and had worked for years as a man, was fired after six years of employment at the company when she notified them she planned to transition to "live and work full-time as a woman" (*Bostock*, p 1738).

Though each employee brought suit under Title VII alleging "unlawful discrimination on the basis of sex" (*Bostock*, p 1738), each case had a different outcome in the lower courts. In *Bostock*, the U.S. District Court for the Northern District of Georgia dismissed the suit, siding with the county that Title VII does not apply to discrimination on the basis of sexual orientation, and the Eleventh Circuit Court of Appeals upheld the decision. In *Zarda*, the U.S.

District Court for the Eastern District of New York granted summary judgment to the employer, but the Second Circuit Court of Appeals reversed the decision, holding that sex discrimination due to sexual orientation in fact does violate Title VII because such discrimination “is a subset of sex discrimination” (*Zarda*, p 116). Finally, in *R.G. & G.R. Harris Funeral Homes Inc.*, the U.S. District Court for the Eastern District of Michigan ruled in favor of the employer, stating that Title VII did not extend to transgender people, but the Sixth Circuit Court of Appeals disagreed and reversed the decision. The cases were appealed and consolidated for consideration by the U.S. Supreme Court.

#### Ruling and Reasoning

In the majority opinion by Justice Gorsuch, the U.S. Supreme Court held that an employer who fires an individual on the basis of sex, namely for being either homosexual or transgender, violates Title VII.

Taking a textualist approach, the Court affirmed its role to interpret the statute in line with the “ordinary public meaning” of its terms and not what might have been the intentions of the legislators at the time of the law’s creation. From the outset of the proceedings, there was dispute over the meaning of “sex.” According to the employers collectively, sex referred to the status of male and female as determined by reproductive biology; for the employees, however, sex went beyond anatomy. The Court later adopted the employers’ definition but noted that the question before the Court was not about what sex meant, but what Title VII says about it.

The Court recalled its previous interpretation of Title VII and reaffirmed that “because of,” as written in the statute, meant “by reason of” or “on account of” (*University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013)). This interpretation thus introduced a “but for” causation standard, i.e., an event would not have happened but for a particular cause. In these cases, as long as the employees’ sex was a “but for” cause for the firing decision, Title VII was violated. The Court said that Congress deliberately did not state that discrimination must be “solely” or “primarily because of” sex, which would have narrowed the meaning to biological sex. On the contrary, Congress broadened the definition in 1991 by stating that plaintiffs needed only to show that a “protected trait like sex was a ‘motivating factor’”

(*Bostock*, p 1739) in their termination to prevail in court.

Acting on their interpretation that termination of employment must show sex discrimination to violate Title VII, the employers asserted that, because the terminations were based upon the plaintiffs’ homosexual or transgender status, groups comprising male and female genders, it did not constitute sex discrimination. The Court disagreed, noting that treatment of a homosexual or transgender individual worse than other similarly situated individuals does violate Title VII because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual on the basis of sex” (*Bostock*, p 1741). In addition, the Court noted that Congress intended Title VII to focus on the affected individual and not on societal subgroups.

The Court said that an employer cannot escape liability from sex-based discrimination simply by stating other factors besides sex as the reason for adverse action against an employee, or by demonstrating that they treat men and women similarly as a group. For example, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), the Court held that Title VII was violated when the company did not hire women with children but hired men with children. The Court concluded that the company discriminated on the basis of female sex and not motherhood as was claimed by the company, because fatherhood was not discriminated against. Likewise, in *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), where women were required to make larger pension fund contributions than men on the grounds that women generally lived longer than men, the Court concluded this was not discrimination on the basis of life expectancy as was claimed by the company, but in fact, discrimination on the basis of sex. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court affirmed that Title VII’s protection against workplace sex discrimination extended to situations where an employee was harassed by members of his own sex.

The Court was not impressed by the employers’ argument that Congress intentionally left out sexual orientation and transgender status on the list of protected characteristics under Title VII. Noting that legislative history of the statute had no bearing on the current case, the Court emphasized that “many, maybe most, applications of Title VII’s sex provision

were ‘unanticipated’ at the time of the law’s adoption” (*Bostock*, p 1752).

#### Dissent

In dissent, Justice Alito (supported by Justice Thomas, and in part by Justice Kavanaugh) stated that Title VII was never meant to include LGBTQ protections because, despite multiple opportunities to do so, Congress has been unwilling or unable to extend the statute to LGBTQ individuals. They argued that the case should have been referred back to Congress for amendment, and that interpretation of a statute should be context- and period-specific, because at the time of the statute’s enactment in 1964, sex would not have included homosexuality and transgender status, an argument undercut by subsequent court filings by gay and transgender individuals soon after the statute’s enactment. They worried that the Court’s decision could impinge on religious convictions and could expand to other workplace topics, including sex-segregated bathrooms, locker rooms, and dress codes.

#### Discussion

The case of *Bostock* raises many points of discussion and implications for psychiatry, law, and social justice. Although the words of the statute have remained unchanged since its passage, the Court’s recent interpretations to include discrimination on the basis of sex appear to reflect society’s (including psychiatry’s) evolving understanding of sex and gender. In 1964, psychiatrists considered homosexuality a form of mental illness classified over the years as a paraphilia or a disorder of sexual orientation, until 1987 when the disorder was discarded altogether (Drescher J: Out of DSM: depathologizing homosexuality. *Behav Sci (Basel)* 5:570–1, 2015). The inclusion of gender dysphoria diagnosis in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, may leave the unfortunate impression, however, that transgender status is a psychiatric condition. This shows that, although psychiatry has evolved in its understanding of sex and sexuality, there is still room for growth and clarity on these topics.

Elimination of homosexuality from the Diagnostic and Statistical Manual of Mental Disorders does not equate to elimination of stigma against LGBTQ and transgender individuals in the practice of psychiatry, especially on inpatient units. Questions about placement in co-ed, biological-gender, or preferred-gender

units; appropriate bathrooms; and payment for transitional medications and surgeries are a few challenges that transgender patients continue to face and that *Bostock* does not address. Without universal consensus on the treatment of transgender persons in institutions, the risk of ongoing discrimination against these individuals in psychiatric hospitals will remain unacceptably high. *Bostock* reminds psychiatrists that we have an ethics obligation to ensure equal treatment and opportunity for all patients regardless of sex.

## Relevance and Reliability in Admitting Forensic Expert Witness Testimony

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### Forensic Expert Testimony Must Not Be Excluded On the Basis of the Experts Opinion Alone

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In *U.S. v. Ray*, 956 F.3d 1154 (9th Cir. 2020), the U.S. Court of Appeals for the Ninth Circuit ruled that the U.S. District Court for the Central District of California had abused its discretion in excluding expert testimony offered as part of an insanity defense. The Ninth Circuit found that the district court erred by focusing on the proposed expert’s opinion rather than considering whether the expert’s testimony would have helped the trier of fact make its own decision.

#### Facts of the Case

In October 2016, Patrick Bacon and Daniel Ray, inmates at the Victorville Federal Prison in California, coordinated an assault of a fellow prison