



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

February 9, 2021

MEMORANDUM FOR: Jeanine M. Worden, Acting Assistant Secretary for Fair Housing and Equal Opportunity, E

FROM: 
Damon Y. Smith, Principal Deputy General Counsel, C

SUBJECT: Application to the Fair Housing Act of the Supreme Court's decision in *Bostock v. Clayton County, GA*

On January 20, 2021, the President issued Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. *See* 86 Fed. Reg. 7023 (Jan. 25, 2021). The Executive Order states that laws that prohibit sex discrimination, including the Fair Housing Act and its regulations, also prohibit discrimination because of gender identity or sexual orientation, unless they contain sufficient indications to the contrary. The Executive Order directed the Department to ensure that it is fully implementing this policy. In accordance with the Executive Order, we have evaluated the application of *Bostock v. Clayton Cnty.*, 590 U.S. ___, 140 S. Ct. 1731 (2020) to the Fair Housing Act's ("Act") prohibition on discrimination because of sex. This memorandum explains why the Act's prohibition on sex discrimination includes discrimination because of gender identity and sexual orientation.

This legal conclusion flows from the Supreme Court's holding in *Bostock* that sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") includes discrimination because a person is gay or transgender. The Court reasoned that "homosexuality and transgender status are inextricably bound up with sex... [so] to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex." 140 S. Ct. at 1742. Accordingly, the Court found, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. As a result, the Court held that, based on the plain language of Title VII's statutory text, employment discrimination because of sexual orientation or gender identity is unlawful. *Id.* at 1754.

Application of the Supreme Court's textual analysis and holding in *Bostock* to the Fair Housing Act shows that, like Title VII's, the Fair Housing Act's prohibition on sex discrimination includes discrimination because a person is gay or transgender. The relevant text of Title VII is nearly identical to that of the Act. Moreover, the Supreme Court has recognized that the Act and Title VII share comparably broad purposes, with both intended to "eradicate discriminatory practices within a sector of our Nation's economy." *Texas Dep't. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 525 (2015).

Under Title VII, it is "unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's ... sex.*" 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Similarly, the Act makes it "unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise

make unavailable or deny, a dwelling to any person *because of ... sex*"; "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, *because of ... sex*"; and "to represent to any person *because of ... sex ... that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.*" 42 U.S.C. § 3604(a)-(b), (d) (emphasis added). And the Act bans other discriminatory conduct using comparable relevant language; for example, the Act makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, *because of ... sex.*" 42 U.S.C. § 3605(a) (emphasis added).

In *Bostock*, the Court explained that, if an employer fires an employee based in part on the employee's gender identity or sexual orientation, the employee's sex necessarily "plays an unmistakable and impermissible role in the discharge decision." *Id.* at 1742. And this is true even if other causes are also involved in the decision. *Id.* at 1739. Since the Fair Housing Act also bars discrimination "because of . . . sex," using virtually the same operative language, the Court's analysis in *Bostock* is equally applicable to the Act. Thus, when a housing provider refuses to sell or rent or otherwise makes housing unavailable based in part on a person's sexual orientation or gender identity, the housing provider violates the Act. *See* 42 U.S.C. § 3604(a). Similarly, when a housing provider subjects a resident to different terms or conditions in part because of that resident's sexual orientation or gender identity, the housing provider violates the Act. *See* 42 U.S.C. § 3604(b). And a housing provider "cannot avoid liability just by citing some *other* factor that contributed to its challenged [] decision." *Bostock*, 140 S. Ct. at 1739.

In sum, consistent with Title VII, discrimination against a person because of that person's sexual orientation or gender identity violates the Act. Nothing in the Fair Housing Act's text, purposes, or precedent suggests that sex discrimination under the Act should be construed more narrowly than under Title VII with respect to discrimination because of gender identity or sexual orientation. Going forward, FHEO should accept for investigation and make reasonable cause findings in appropriate cases, based on alleged discrimination because of sexual orientation or gender identity. This Office will file charges of discrimination as appropriate, as well, in cases alleging such discrimination. In doing so, HUD will comply with legal precedent, as established by *Bostock*, and the President's directive in Executive Order 13988.

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