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## Title VII SCOTUS Win Applied to Trans Student's Claim

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## 11th Circuit panel finds discrimination because of sex is discrimination in any setting

BY ARTHUR S. LEONARD

The potential scope of the Supreme Court's June 15 ruling in *Bostock v. Clayton County*, which found that sexual orientation and gender identity employment discrimination claims are covered by Title VII of the 1964 Civil Rights Act, is vast, despite the narrow focus of the Justice Neil Gorsuch's decision.

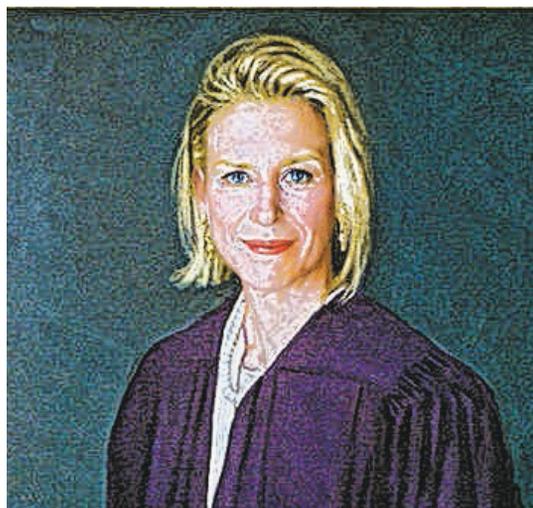
An August 7 decision by the Atlanta-based 11th Circuit Court of Appeals extends the *Bostock* ruling to equal protection claims made under the 14th Amendment and specifically to discrimination claims by students under Title IX of the Education Amendments of 1972.

A three-judge circuit panel ruled 2-1 that the St. Johns County, Florida, school board unlawfully discriminated against a transgender high school student by forbidding him from using the boys' restroom. The majority opinion by Judge Beverly B. Martin invoked the *Bostock* decision in concluding that Drew Adams' claims should be dealt with as sex discrimination claims that receive the court's heightened scrutiny under the Equal Protection Clause and are clearly covered by Title IX.

The Equal Protection Clause says that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Adopted after the Civil War, the amendment was intended to require the states to treat former slaves as equal citizens in all their dealings with the government, and authorized Congress to enforce its requirements through legislation. It was in the 1970s, in cases litigated by Ruth Bader Ginsberg appearing as an attorney for the American Civil Liberties Union, that the Supreme Court began to apply the Equal Protection Clause to sex discrimination claims.

Federal statutes prohibiting discrimination by state and local governments, such as the Title VII employment provisions and Title IX, are specifically grounded in the 14th Amendment. Title IX states. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance."

When Drew Adams first enrolled in the St. Johns County schools, he was still officially living as a girl, as indicated on his birth certificate. During eighth grade, he began to recognize his male identity, eventually coming out to his parents, receiving appropriate health care, and transitioning in most respects to live as a boy by the time he entered Nease High School a year later. Still, under prevailing standards of



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11th Circuit Court Judge Beverly B. Martin.

care, he had not undergone genital surgery.

Adams had new state government-issued documents identifying him as male under his preferred male name, although he hadn't yet obtained a federal passport. Teachers, administrators, and fellow students used his male name and treated him as a boy. For the first several weeks of high school, he used the boys' restrooms without incident.

However, two girls saw him going into a boys' restroom and complained to the administration. Significantly, no boys actually using the bathroom had raised any objections. Still, the school reacted by warning him he was not allowed to use the boys' restroom and threatening disciplinary consequences if he did. He was given "two choices," wrote Judge Martin: "use a single-stall, gender-neutral bathroom in the school office, or use the girls' facilities." Since Adams was living and presenting as a boy, he did not want to use the girls' restroom, which likely would have led to complaints from some girls — who knows, maybe the same ones who complained earlier. The bathroom in the school office was not convenient and using it stigmatized him as well, Adams felt.

Negotiations between Adams' parents and the school proved futile, so he filed suit, represented by Lambda Legal. The school district's position was that a student's sex for purposes of restroom access was based on the documentation presented when they first enrolled in the school district. The school was treating Adams as a boy for all other purposes, but officials would continue to rely on his original birth certificate and his enrollment forms from years before.

This is not a new story. Transgender high school students have been suing schools about restroom access for years now, and have generally been successful, at least at the trial court level, and in some cases in circuit courts. The

federal district court in Florida agreed with those prior court rulings, and the school district appealed to the 11th Circuit, where the case was pending when the Supreme Court decided *Bostock*. In that ruling, the high court coincidentally overruled an 11th Circuit decision that Title VII does not apply to sexual orientation discrimination claims.

The 11th Circuit, however, had several years ago already recognized that gender identity discrimination claims raise constitutional equal protection issues. In 2011, in the case of *Glenn v. Brumby*, the circuit anticipated the Supreme Court by nine years, ruling that a transgender librarian suffered an equal protection violation when she was fired by the Georgia Legislature's research service. There, the appeals court decided that when an employer fires somebody because they are transitioning, they are firing them because of their sex.

Consequently, even without the *Bostock* case as a new precedent, the 11th Circuit panel already was bound by a circuit precedent to require the school district to justify its action, if the court found that its action was discriminatory. That was the big contested point. The school district argued that it was not discriminating against Adams, just requiring him to respect the custom — protected by a Title IX regulation — that requires boys and girls to use separate facilities. The school district's argument, of course, is based on the contention that Adams is a girl for this purpose. The district also argued that its policy was necessary to protect the privacy of boys. Noting that there were more than a dozen trans students known to the district, its attorneys also argued that it was protecting the privacy of girls who did not want "boys" in their restroom.

The school district even pushed a far-fetched "gender fluidity" argument, warning students might claim that they could use any restroom they wanted to at any time they were feeling a particular gender identity. Needless to say, the district offered no evidence that this would happen — but this "scare" argument has been used by other school districts as well.

The court noted a major inconsistency in the district's policy. If Adams had transitioned while enrolled in another school district and then transferred to St. Johns County schools using his new birth certificate, driver's license, or other state-issued ID to register as a boy, he would be entitled to use the boys' restroom. So pinning him down on his gender identity stated when he first enrolled years before was arbitrary and not necessary to achieve an "import-

► TITLE IX, continued on p.20

# Therapy, Hell's Kitchen Fixture, Likely Closed for Good

COVID restrictions does in bar dating to 2003, often host to "RuPaul's Drag Race" divas

BY MATT TRACY

**T**here may never be a last call at Therapy.

The popular bar in Hell's Kitchen, already closed since the onset of the coronavirus pandemic, will likely be forced to shutter for good.

"It's with tears in our eyes that we have to admit it is highly unlikely that Therapy will ever reopen," Therapy noted in a Facebook post on July 19. "Every one of YOU who has ever worked here, performed here, partied here... We love you. And though we cannot be together today, always know you are Therapy's family."

The bar first closed in mid-March when it noted in a March 15 Facebook post that the establishment would be shuttered "until further notice."

But now, months into a pandemic that continues to take a health and economic toll, the bar appears to have been unable to weather the storm.

Co-owner Tom Johnson did not immediately respond to requests for comment on August 3, but he told Eater in July that the owners failed to reach an agreement with the landlord at 348 West 52nd Street between Eighth and Ninth Avenues and he ultimately turned in his keys in April.

Johnson stressed that tourists are necessary for bars like Therapy to thrive, and he opted against pursuing the outdoor dining route because he estimated that the bar would have only recouped 30 to 40 percent of its usual business.

The two-story bar has been known for its



FACEBOOK/THERAPYNYC

After temporarily closing due to the coronavirus pandemic, it is "highly unlikely" Therapy will ever open again.

ties to "RuPaul's Drag Race," often hosting contestants, but it was also a space for queer New Yorkers to simply grab drinks and socialize. More than 80 comments were posted in response to the bar's Facebook post, with many individuals asking if it is too late to launch a GoFundMe page to raise rescue money.

Others reminisced about their years visiting or working at the bar, which first opened in 2003. Some commenters were former staff members, while others were everyday New Yorkers who enjoyed the bar.

In one comment, Jennifer Lameo said she was the only woman on the "original crew" that worked at the bar when it first opened.

"I've worked with and waited on some of the amazing people," Lameo wrote. "We were a FAMILY and I love each and every person who walked through those doors. I love you, Therapy."

International travelers also expressed disappointment in the wake of the bar's announcement. Singapore resident Martin Perez said he visited the bar whenever he visited the Big Apple.

"Always had a great time and met a lot of amazing people," he wrote. "Sad."

It was a rocky year for the bar after it was already forced to close temporarily during Pride Month in 2019 — when unprecedented numbers of queer folks descended on the city for Stonewall 50/ WorldPride — while an unstable neighboring building was being demolished.

Therapy is among many local queer bars facing hardship during the pandemic. Alibi Lounge, a Black-owned gay bar in Harlem, was just starting to regain its footing with an outdoor dining option when it was burglarized late last month. Henrietta Hudson, a lesbian bar in the West Village, has remained closed after owner Lisa Cannistraci said she did not want to reopen until she can do so at 100 percent capacity. Both of those bars, however, have benefitted from generous GoFundMe fundraisers.

Whether Therapy will turn to GoFundMe is not yet clear, but Johnson seems open to such an idea.

"It's great if people want to come together and invest in Therapy at some point," Johnson told Eater. "I want nothing more than for all of this to go away, but I don't see that happening anytime soon."

According to Gorsuch's opinion, it is impossible to discriminate against somebody because of their transgender status without discriminating because of their sex. The 11th Circuit's application of this interpretation to Adams' Title IX claim stands in stark contrast to the failure of the Department of Justice to rescind former Attorney General Jeff Sessions' October 2017 memorandum, which instructed all federal agencies that sexual orientation and gender identity discrimination claims may not be brought under federal sex discrimination statutes.

In fact, as noted elsewhere by Gay City News, Attorney General William Barr has not to date responded to a July letter from LGBTQ legal advocates urging him to replace the Sessions memo with one applying Bostock. Not surprisingly, other federal agencies continue to contend that Bostock does not apply to the laws they are responsible for enforcing. This new 11th Circuit

ruling may carry great weight with other courts now dealing with the Trump Administration's arguments defending policy decisions such as its recently announced regulation denying protection to LGBTQ people under the Affordable Care Act's sex discrimination ban.

In another noteworthy post-Bostock development, state courts in Ohio and West Virginia have recognized that existing precedents relying on federal court interpretations of Title VII should be applied to extend protection to LGBTQ people under those state laws. Since a majority of states still do not expressly ban sexual orientation or gender identity discrimination, but all ban sex discrimination, the Bostock ruling may lead to nationwide protection for the large proportion of private sector employees whose employers do not employ enough people — at least 15 — to come within the coverage of Title VII's federal protections.

► TITLE IX, from p.5

tant" policy goal.

The 11th Circuit majority didn't buy any of the school district's arguments, agreeing with the district court that Adams is a boy entitled to be treated as one in all respects, as a matter both of equal protection and of Title IX. The court actually did not have to rely on Bostock because of its existing precedent, but cited it anyway as further support for the transgender jurisprudence the circuit had already adopted in its earlier ruling.

Perhaps more significantly — given the Trump administration's hostility on this issue — it should be noted that the phrase "because of sex" is used in both Title VII and Title IX to define the grounds of prohibited discrimination. Bostock now offers a definitive Supreme Court interpretation of what that phrase means. Ac-