

INSIGHTS FROM TITLE VII TRANSGENDER DISCRIMINATION CASES SINCE *BOSTOCK*

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INTRODUCTION

The ongoing quest for equality and fairness within the American workplace has brought the issue of discrimination against transgender individuals to the forefront. Title VII of the Civil Rights Act of 1964 is a pivotal piece of legislation designed to combat discrimination in the workplace.¹ Title VII's provisions extend crucial protections to employees and applicants, safeguarding them against discrimination based on various grounds, including sex.² The seminal Supreme Court ruling, *Bostock v. Clayton County*, expanded these protections by explicitly recognizing discrimination based on sexual orientation and gender identity within the sex classification of Title VII.³ The extent to which these protections are enforced and upheld varies significantly depending on factors such as jurisdiction, judicial interpretation, and

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¹ Ilona Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 *Calif. L. Rev.* 561, 562 (2007) (discussing the application of sex stereotyping to transgender discrimination under Title VII); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (establishing a legal framework to ensure equal employment opportunities regardless of race, color, religion, sex, or national origin).

² *Id.*

³ *Bostock v. Clayton County*, 590 U.S. 644, 683 (2020) (holding that discrimination based on sexual orientation or gender identity is sex discrimination under Title VII, thereby broadening the scope of protections available to LGBTQ+ individuals in the workplace).

employer compliance.⁴ Therefore, challenges still persist for transgender employees bringing discrimination claims.⁵

Consequently, an analysis of federal cases on the impact of the *Bostock* decision is crucial for assessing the effectiveness of safeguarding the rights of transgender employees and claiming discrimination, a hostile work environment, wrongful termination, or retaliation under Title VII. Such an examination sheds light on disparities in enforcement, identifies what is necessary for a successful claim, and informs advocacy efforts aimed at strengthening protections for transgender employees. By reviewing federal cases of transgender discrimination under Title VII since *Bostock*, this Article explores cases that rule in favor of transgender employees and against transgender employees.⁶

Through these cases, this Article will explore the diverse array of legal issues and challenges faced by transgender individuals in employment settings. These cases highlight the intricacies when interpreting Title VII protections. The cases also shed light on the complexities of proving discrimination, securing remedies, and addressing systemic barriers to equality and inclusion in the workplace. Through a detailed analysis of these cases, this Article seeks to provide a deeper understanding of the legal principles at play, resulting in

⁴ Alex Reed, *Beyond Bostock: Employment Protections for LBGTQ Workers not Covered by Title VII*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 537, 540–42 (2021).

⁵ Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1367 (2012) (“In most circumstances, courts in Title VII cases continue to require that sex discrimination plaintiffs adduce opposite-sex comparators.”).

⁶ Compare *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129–30, 136, 139, 142 (E.D. Pa. 2020) (partially denying the defendant’s motion to dismiss as to the plaintiff’s claims of hostile work environment, discrimination, and retaliatory termination based on gender stereotyping), and *Kosak v. CSX Transp., Inc.*, 2023 U.S. Dist. LEXIS 133299, at *38–39 (W.D.N.Y. Aug. 1, 2023) (holding that a reasonable jury could find Kosak was dismissed for her transgender status to overcome a summary judgment motion), and *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1025 (10th Cir. 2021) (finding in favor of the transgender employee on retaliation and discrimination claims under Title VII), with *Fedder v. Ohio Med. Transp., Inc.*, 2023 U.S. Dist. LEXIS 230229, at *16 (S.D. Ohio Dec. 28, 2023) (overruling Fedder’s objections to the dismissal of Title VII claims), and *Doe v. City of Detroit*, 3 F.4th 294, 305 (6th Cir. 2021) (affirming summary judgment for the city and dismissing plaintiff’s hostile work environment and retaliation claims under Title VII), and *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598 (5th Cir. 2021) (finding plaintiff did not provide sufficient evidence to support an inference of transgender discrimination), and *Ponce v. Fla. Atl. Univ. Bd. of Trs.*, 2023 U.S. Dist. LEXIS 83729, at *12, *19 (S.D. Fla. May 12, 2023) (affirming FAU’s motion to dismiss plaintiff’s sex discrimination claim based on failure to promote), and *Faulkenberry v. U.S. Dep’t of Def.*, 670 F. Supp. 3d 234, 243 (D. Md. 2023) (dismissing plaintiff’s complaint for (1) hostile work environment based on sex and gender and (2) retaliation under Title VII).

different holdings, and identify opportunities for strengthening legal arguments and enhancing enforcement mechanisms to better safeguard the rights of transgender employees.

In addition to Title VII claims, transgender employees concurrently make claims under relevant state laws. State employment protections for transgender individuals vary across the United States, reflecting the diverse legal landscape shaped by state-level legislation and policies.⁷ These protections aim to ensure that transgender employees are not subjected to discrimination or harassment in the workplace based on their gender identity or expression.⁸ While some states have robust laws explicitly prohibiting such discrimination, others offer limited or no protections, leaving transgender individuals vulnerable to mistreatment and inequality.⁹ Understanding the current state of these laws is essential for evaluating the progress made to advance transgender rights and identifying areas for improvement in ensuring equal treatment and opportunities in employment settings. Additionally, these state laws impact employers located in the state and perpetuate employers implementing diversity, equity, and inclusion programs to train employees against discrimination based on gender and sexual orientation.¹⁰

By examining the effectiveness of existing legal frameworks, including state non-discrimination laws, Title VII protections, and applicable cases, this article seeks to examine the status of transgender individuals in the workplace. Part I covers Title VII and its current application to employees. Part II describes *Bostock v. Clayton County* and the application of Title VII to transgender employees. Part III provides the background and rationale for choosing the federal cases analyzed in Parts IV and V. Part IV reviews examples of federal cases since the *Bostock* decision that have ruled in favor of transgender employees. Part V reviews examples of federal cases that have ruled against transgender employees. Lastly, Part VI covers the current

⁷ See *Employment Nondiscrimination by State*, LGBT MOVEMENT ADVANCEMENT PROJECT (Aug. 8, 2024), https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws.

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., *Pumeriega v. Basis Glob. Techs., Inc.*, 2024 U.S. Dist. LEXIS 190747, at *2 (E.D. Ill. Oct. 21, 2024) (discussing an Illinois based company with a diversity, equity, and inclusion department that implemented a mandatory training reviewing: (1) LGBTQ terminology related to sexual orientation, gender identity, and expression, (2) gender expansive pronouns, and (3) ways to ally with transgender employees).

condition of state policy related to transgender employees. Through this comprehensive examination, this Article promotes a deeper understanding of the challenges and opportunities in safeguarding the rights of transgender individuals in the workplace to continue to pave the way for more inclusive and equitable employment practices.

BACKGROUND

I. TITLE VII AND EMPLOYEES

Title VII of the Civil Rights Act of 1964 stands as a cornerstone of federal employment law in the United States, serving to combat discrimination in the workplace on various protected grounds.¹¹ This landmark legislation represented a significant step forward in advancing civil rights and equality in the workplace by establishing a comprehensive framework to address systemic discrimination and promote equal opportunities for all individuals, regardless of their background or characteristics. Title VII prohibits discrimination based on race, color, religion, national origin, and sex in private employment.¹²

One of the primary provisions of Title VII is its prohibition of discriminatory practices in hiring and recruitment processes.¹³ Covered employers who have fifteen or more employees are prohibited from discriminating against job applicants based on race, color, religion, sex, or national origin when making hiring decisions.¹⁴ Additionally, Title VII prohibits employers from using discriminatory criteria or practices in job advertisements, recruitment efforts, or candidate selection procedures.¹⁵ By ensuring equal access to employment opportunities, Title VII helps level the playing field for all job seekers and promotes merit-based hiring practices. Title VII also addresses discrimination in

¹¹ 42 U.S.C. § 2000e-2 (2018) (protecting employees from unjust dismissal based on discriminatory reasons).

¹² Anastasia E. Lacina, *Small Gestures and Unexpected Consequences: Textualist Interpretations of State Antidiscrimination Law After Bostock v. Clayton County*, 90 FORDHAM L. REV. 2393, 2396 (2022) (discussing the history of federal antidiscrimination law).

¹³ See *id.*; 42 U.S.C. § 2000e-2 (2018) (promoting fair treatment and equal opportunities in all aspects of employment).

¹⁴ Reed, *supra* note 4, at 539; 42 U.S.C. § 2000e-2 (2018) (ensuring that hiring practices are based on merit and qualifications rather than discriminatory criteria).

¹⁵ 42 U.S.C. § 2000e-2 (2018) (aiming to prevent systemic barriers to employment for protected groups).

the context of termination or discharge from employment.¹⁶ Covered employers are prohibited from terminating or firing employees based on race, color, religion, sex, or national origin, meaning employers cannot dismiss employees or take adverse employment actions against them solely because of their protected characteristics.¹⁷ Title VII also prohibits discriminatory practices such as demotions, layoffs, or disciplinary actions that are motivated by an employee's race, color, religion, sex, or national origin.¹⁸

Furthermore, the judiciary has extended Title VII protections to other terms and conditions of employment, ensuring that employees are not subjected to discrimination or harassment in the workplace.¹⁹ Covered employers are prohibited from discriminating against employees based on protected characteristics when it comes to compensation, benefits, assignments, training opportunities, and other terms and conditions of employment.²⁰ This means that employers cannot treat employees differently or provide them with inferior benefits or opportunities because of race, color, religion, sex, or national origin.²¹ Title VII also prohibits harassment based on protected characteristics, including unwanted conduct that creates a hostile work environment or interferes with an individual's work performance.²² By addressing discrimination and harassment in all aspects of employment, Title VII aims to provide a fair and inclusive work environment where all employees, theoretically, can thrive.

Prior to 2020, transgender employees made claims under Title VII based on two theories of sex discrimination, including (1) an employer taking an adverse action due to the employee's gender identity and (2) sex stereotyping claims where the employee failed to comply with the employer's subjective gender expectation.²³ Transgender employees making sex discrimination claims under Title VII based on changing

¹⁶ *Id.* (protecting employees from unjust dismissal based on discriminatory reasons).

¹⁷ *Id.*

¹⁸ *Id.* (extending protections to various employment actions to prevent indirect forms of discrimination).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 42 U.S.C. § 2000e-2 (2018).

²² *Michael v. Bravo Brio Rests. LLC*, 2024 U.S. Dist. LEXIS 102504, at *14 (D.N.J. June 10, 2024).

²³ Rose Gilroy et al., *Transgender Rights, and Issues*, 22 GEO. J. GENDER & L. 417, 421 (2021).

their gender identity had conflicting results.²⁴ Transgender employees making sex stereotyping claims under Title VII utilized the theory in the case *Price Waterhouse v. Hopkins*, in which the Supreme Court found that an employee cannot be denied a promotion due to their non-conformity to gender stereotypes.²⁵ Specifically, the employer acted based on gender when they did not promote Plaintiff based on the belief that a woman cannot be aggressive.²⁶ The Equal Employment Opportunity Commission (EEOC) and *Bostock* opened up protections to transgender employees so they were no longer limited to two theories under Title VII.²⁷

The EEOC clarified its position in 2012, holding that sex discrimination claims based on gender identity, change of gender, and transgender status qualify under Title VII.²⁸ The EEOC explained that gender-based discrimination, as well as biological (sex based) discrimination, both fall under Title VII since discrimination based on transgender status is due to gender classification and cannot be separated from sex discrimination.²⁹ The Supreme Court, however, still had not clarified that Title VII prohibited discrimination against transgender people based on their transgender status and sex stereotyping. In 2020, the Supreme Court clarified that employees fired for being transgender are protected under Title VII.³⁰

²⁴ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that discrimination based on changing gender identity does not fall within sex discrimination under Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (holding that a transgender employee who is fired based on changing gender identities does fall within a protected class under Title VII).

²⁵ 490 U.S. 228, 231–32, 250–51 (1989) (reversing the lower court's judgment for the plaintiff, who brought a claim for discrimination on the basis of sex after proposal for partnership was held for reconsideration for a year and then the partners in her office refused to repropose her for partnership at that time because she failed to present evidence that the decision would not have been made in the absence of discrimination).

²⁶ *Id.* at 250–51.

²⁷ *Bostock*, 590 U.S. at 683.

²⁸ *Macy v. Holder*, 2012 EEOPUB LEXIS 1181, at *14 (Apr. 20, 2012).

²⁹ *Id.* at *15.

³⁰ *Bostock*, 590 U.S. at 651–52.

II. *BOSTOCK V. CLAYTON COUNTY*

Following the 2017 verdict of the Eleventh Circuit that Title VII did not apply to or protect against LGBTQ+ discrimination, the Supreme Court took the case of *Bostock v. Clayton County* on appeal.³¹ The Supreme Court addressed three different cases in *Bostock* in which the plaintiffs claimed they were fired for being homosexual or transgender.³²

Gerald Bostock claimed he was fired by the county for unbecoming behavior when he joined a gay recreational softball league.³³ Donald Zarda mentioned that he was gay in the workplace and was fired by Altitude Express.³⁴ Finally, Aimee Stephens was fired by R.G. & G.R. when she told her employer her plans to transition from a man to a woman.³⁵ The plaintiffs in *Bostock* all claimed that sexual orientation and gender identity discrimination are sex discrimination under Title VII.³⁶

Plaintiffs first argued that sexual orientation and gender identity would be included in sex discrimination under Title VII based upon the language of the statute.³⁷ Plaintiffs next argued that sexual orientation and gender identity discrimination is based on sex-based stereotypes and, therefore, should be covered by sex discrimination under Title VII.³⁸ Lastly, plaintiffs argued that sexual orientation constitutes associational discrimination based upon the traits of the employee and who the employee is associated with.³⁹ The Supreme Court was ultimately persuaded by the first argument.⁴⁰ The reasoning was primarily characterized by the argument put forth by Justice Neil Gorsuch, who applied a textualist reading to the word “sex” within Title VII.⁴¹ Justice Gorsuch stated that it is illegal “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex,

³¹ *Id.* at 654.

³² *Id.* at 653–54.

³³ *Id.*

³⁴ *Id.* at 654.

³⁵ *Id.*

³⁶ Reed, *supra* note 4, at 550.

³⁷ *Id.*

³⁸ *Id.* at 551.

³⁹ *Id.* at 552.

⁴⁰ *Id.*

⁴¹ See *Bostock*, 590 U.S. at 654–55.

or national origin.”⁴² He asserted that a textualist interpretation of “sex” within this passage prohibits discrimination against a person’s sexuality.⁴³ Therefore, in 2020, the Supreme Court reversed the decision of the Eleventh Circuit in a 6-3 vote, providing Title VII protections based on gender identity and sexual orientation.⁴⁴

Justice Neil Gorsuch explained the reasoning for the ruling utilizing the definition of sex.⁴⁵ First, it is not possible to consider someone’s sexuality without first considering their “sex” in the first place, meaning that both a man and a woman can be married to a man, but only the man is considered homosexual due to his respective sex (a prior state of biological or transitioned to).⁴⁶ This, therefore, implicates “sex” into the overall rationale behind the firing of *Bostock*.⁴⁷ This is germane to Title VII as it describes that a person’s sex need only be a “but for” reason for the firing, meaning that if sex is at all a consideration in the dismissal, then the person falls under Title VII protection.⁴⁸ Lastly, Justice Gorsuch argued, this legal interpretation does not need to be applied to the LGBTQ+ community but only to that individual who is categorized as LGBTQ+, since “sex” may be an intrinsic factor in discrimination in this specific set of circumstances.⁴⁹

The Supreme Court set precedent to federally protect LGBTQ+ individuals (as well as the broader community).⁵⁰ Therefore, Title VII does not need to be amended to extend this protection, regardless of state or municipal laws that are in dissent of it.⁵¹ The Supremacy Clause of the United States Constitution establishes that the federal Constitution and federal law take precedence over state laws and state constitutions.⁵² This Clause also prohibits states from interfering with the federal government’s exercise of its constitutional powers.⁵³

⁴² *Id.* (quoting Title VII’s prohibitions against employment discrimination).

⁴³ *Id.* at 661–62.

⁴⁴ *Id.* at 684.

⁴⁵ *See id.* at 654–84.

⁴⁶ *Id.* at 668–69.

⁴⁷ *See Bostock*, 590 U.S. at 668–69.

⁴⁸ *Id.* at 670–71.

⁴⁹ *Id.*

⁵⁰ *Id.* at 683.

⁵¹ *See id.*

⁵² U.S. CONST. art. VI, cl. 2.

⁵³ *Id.*

III. FEDERAL CASES POST *BOSTOCK*

Understanding the legal framework surrounding transgender state non-discrimination laws in employment and Title VII protection is crucial in comprehending the current state of employment protections for transgender individuals, but it is essential to delve into real-life scenarios where these laws are tested and applied. By analyzing federal cases, this Article seeks to gain insight into how transgender sex discrimination claims have been interpreted under Title VII since the Supreme Court decided *Bostock* on June 15, 2020. This Article specifically searched for federal cases that included Title VII sex discrimination claims impacting transgender employees decided from 2021 until 2024.⁵⁴ Therefore, this Article excluded Title VII sex discrimination claims focused on sexual orientation. Additionally, the Article excluded federal cases that involved government policy and high schools dealing with minors, to concentrate on cases involving employers of transgender employees. This Article also sought to evaluate the types of claims that transgender employees made under Title VII to analyze the case law and the success of Title VII claims. This Article narrowed down the cases to those that evaluated more than just sex discrimination claims under Title VII.⁵⁵

Based on these specifications, this Article analyzes five cases that ruled in favor of transgender employees claiming not only sex discrimination but also wrongful termination, hostile work environment, and retaliation. The Article also sought to review cases that ruled against transgender employees on Title VII claims to better understand what did not constitute transgender discrimination.⁵⁶ The Article, therefore, also discusses five cases that ruled against transgender employees claiming not only sex discrimination, but also failure to promote, hostile work environment, and retaliation.

First, to prove a *prima facie* case of discrimination under Title VII, an employee must prove that the employee “(1) is a member of a protected class, (2) the employee was qualified for the position, (3) the employee suffered an adverse employment decision, and (4) the employee was treated less favorably than others not included in the

⁵⁴ See, e.g., *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020); *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

⁵⁵ *Id.*

⁵⁶ *Id.*

employee's protected class."⁵⁷ Post *Bostock*, employees who feel they are discriminated against based on sexual orientation or transgender status are now considered a protected class under Title VII.⁵⁸ Plaintiffs, however, must still present suitable comparator evidence to show how they were treated differently from their cisgender counterparts for a sex discrimination claim.⁵⁹

Second, to prove wrongful termination, the plaintiff must prove "that the plaintiff (1) is a member of the protected class, (2) was discharged, (3) was qualified for the job, and (4) was replaced by someone outside the protected class."⁶⁰ A plaintiff proves wrongful termination based on gender stereotyping when the plaintiff is in the protected class as a transgender female, she was qualified for the position, was terminated from the position, and was treated less favorably than others.⁶¹ Similarly, for a failure to promote claim, a plaintiff must show that (1) as a member of a protected class, (2) she was qualified for the promotion, (3) she was rejected despite his qualifications, and (4) the person promoted was not a member of the protected class.⁶² The plaintiff must show that the employer treated other employees outside of the plaintiff's protected class more favorably by specifying the gender of the other employees who were promoted to provide the court with comparator evidence to prove a failure to promote claim.⁶³

Third, to show that there was a hostile work environment, "a plaintiff must show (1) intentional discrimination because of their sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; [and] (4) the discrimination would

⁵⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁵⁸ *Bostock*, 590 U.S. at 683.

⁵⁹ *Fedder v. Ohio Med. Transp., Inc.*, 2:23-CV-627, 2023 U.S. Dist. LEXIS 230229, at *10 (S.D. Ohio Dec. 28, 2023) (*aff'd*, U.S. App. LEXIS 28494 (6th Cir. Nov. 6, 2024)); *see* *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595, 598, 600–01 (5th Cir. 2021) (denying summary judgment on Olivarez's claims because of lack of comparator evidence of treating him differently than other employees); *see also* *Faulkenberry v. U.S. Dep't of Def.*, 670 F. Supp. 3d 234, 243–45, 255–57 (D. Md. 2023) (finding that being reassigned to a new position, being critiqued, and not included in lunches did not rise to the level of severe or pervasive to alter the work environment).

⁶⁰ *Triangle Doughnuts*, 472 F. Supp. 3d at 135.

⁶¹ *Id.* at 135.

⁶² *Ponce v. Fla. Atl. Univ. Bd. of Trs.*, 2023 U.S. Dist. LEXIS 83729, at *8 (S.D. Fla. May 12, 2023) (plaintiff alleged that the university treated other employees outside of his protected class more favorably, but he did not specify the gender of the other employees who were promoted to provide the court with comparator evidence).

⁶³ *Id.* at 11–12.

detrimentally affect a reasonable person of the same sex in that position.”⁶⁴ The unwelcome sexual harassment must consist of more than a handful of inappropriate comments to constitute a hostile work environment.⁶⁵ Specifically, there must be multiple occurrences of harassment in addition to being misgendered, such as being prevented from using the gender specific bathroom, changing work assignments, or inappropriate questions about the employee’s anatomy.⁶⁶ If the supervisor is the harasser, employers may be strictly liable for hostile work environment claims, versus having to prove the lack of reasonable care when a co-worker or a subordinate is the harasser.⁶⁷ An employer will not be held liable for a hostile work environment if the employer took reasonable steps in response to the harassment, such as investigating the harasser, relocating the plaintiff, and installing locks and a camera in the plaintiff’s office.⁶⁸

Finally, to prove a *prima facie* case for retaliation, an employee must show the “(1) employee engaged in protected conduct, (2) employee suffered an adverse employment action, and (3) the adverse employment action was causally linked to the protected conduct.”⁶⁹ A transgender plaintiff can show retaliation if they were mistreated by employees or customers, subsequently assigned to a different position, and then terminated when they called customers and co-workers out on their mistreatment.⁷⁰ The plaintiff must show that the same behavior of other employees did not result in the same adverse employment action of termination.⁷¹ Additionally, the plaintiff needs to establish a causal connection between being treated differently for calling people on mistreatment based on the plaintiff’s transgender status and the subsequent adverse employment actions.⁷²

⁶⁴ *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009) (quoting *Weston v. Pennsylvania*, 251 F.3d 420, 426 (3d Cir. 2001)).

⁶⁵ See *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *8 (*aff’d*, 2024 U.S. App. LEXIS 28494 (6th Cir. Nov. 6, 2024)).

⁶⁶ *Triangle Doughnuts*, 472 F. Supp. 3d at 128–29.

⁶⁷ *Id.* at 129–30 n.15.

⁶⁸ *Doe v. City of Detroit*, 3 F.4th 294, 302–04 (6th Cir. 2021).

⁶⁹ *Jackman v. Fifth Judicial Dist. Dep’t of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013).

⁷⁰ *Triangle Doughnuts*, 472 F. Supp. 3d at 138–39.

⁷¹ See *id.* at 123–24, 138–39.

⁷² *Id.* at 138–39.

ANALYSIS

The following section will examine Title VII discrimination cases with holdings favoring transgender employees since the Supreme Court's ruling in *Bostock*.

IV. FEDERAL CASES POST *BOSTOCK* RULING FOR TRANSGENDER EMPLOYEES FOR TITLE VII CLAIMS

Bostock extended Title VII protection to transgender employees, as illustrated in the cases in this section, in which transgender employees successfully demonstrated sex discrimination.⁷³ Specifically, the following cases illustrate what transgender individuals must prove to claim wrongful termination, hostile work environment, and retaliation.

A. *Doe v. Triangle Doughnuts*

Doe v. Triangle Doughnuts revolved around allegations of discriminatory treatment against a transgender employee, referred to as "Doe," at a popular doughnut franchise, Triangle Doughnuts.⁷⁴ Doe, who had recently transitioned from a man to a woman, claimed that she experienced harassment and unequal treatment from her coworkers and supervisors after coming out as transgender.⁷⁵ Doe alleged that she was subjected to derogatory remarks and offensive jokes about her gender identity, and she was regularly misgendered by her coworkers.⁷⁶ Additionally, Doe had several threatening interactions with her co-workers that became physical at one point.⁷⁷ Furthermore, she claimed that she was held to a stricter dress code than other females and was unfairly denied promotions and opportunities for advancement compared to her cisgender colleagues.⁷⁸

In response to these allegations, Triangle Doughnuts argued that they had not discriminated against Doe and that any unfavorable treatment she experienced was unrelated to her gender identity.⁷⁹

⁷³ See *Bostock*, 590 U.S. at 683.

⁷⁴ *Triangle Doughnuts*, 472 F. Supp. 3d at 121–23.

⁷⁵ *Id.* at 122.

⁷⁶ *Id.*

⁷⁷ *Id.* at 123.

⁷⁸ *Id.* at 122–23.

⁷⁹ *Id.* at 129.

Triangle Doughnuts further argued that the claims must be separated based on whether the treatment was by a co-worker, customer, or supervisor.⁸⁰ The court clarified that if the harasser is a co-worker, then the employer is liable only if the employer was negligent in controlling the working environment for the plaintiff.⁸¹ If the harasser is the supervisor, however, and the plaintiff has a tangible complaint, then the employer is strictly liable.⁸² If there is no tangible employment action, the employer may defend its position by demonstrating it took reasonable care to remedy the harassing behavior and that the plaintiff unreasonably failed to take advantage of the corrective opportunities provided by the employer.⁸³

Three of the eighteen claims that Doe brought were for violations under Title VII, including a hostile work environment, wrongful termination based on gender stereotyping, and retaliatory termination.⁸⁴ The court held that Doe plead facts that were severe or pervasive enough to create a hostile work environment through Doe's examples of being misgendered, not being allowed to use the women's bathroom, her responsibilities being changed to be away from customers, being held to a different dress code, being asked inappropriate questions about her gender, and eventually being terminated.⁸⁵ The court held that Doe plead the prima facie case for wrongful termination based on gender stereotyping since she is in a protected class as a transgender female, she was qualified for the position, she was terminated from the position, and she was treated less favorably than others, as stated in the hostile work environment claim.⁸⁶ Lastly, the court found that Doe plead all the elements of retaliation under Title VII by engaging in the activity of rebuffing her customers and coworkers who misgendered and harassed her and, as a result, was reassigned to a different position and was eventually terminated.⁸⁷

⁸⁰ *Triangle Doughnuts*, 472 F. Supp. 3d at 129 n.15.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 127.

⁸⁵ *Id.* at 129.

⁸⁶ *Triangle Doughnuts*, 472 F. Supp. 3d at 136.

⁸⁷ *Id.* at 139 (explaining a key aspect of the case, interpretation and application of existing state nondiscrimination laws, which prohibited discrimination based on gender identity).

B. *Kosak v. CSX Transportation, Incorporated*

Kosak, who is a transgender woman, was terminated by CSX Transportation after she urinated in the rail yard.⁸⁸ CSX employed Kosak from September 1999 until July 2019.⁸⁹ At the end of 2018, Kosak came out as transgender and began to transition to a woman by taking hormone-suppressing medication, which resulted in her urinating frequently.⁹⁰ Kosak did not request access to use the bathroom more frequently because she believed that she was permitted to urinate in the rail yard as needed.⁹¹ Kosak stopped working to urinate in the rail yard on June 13, 2019, as was the common practice of all employees.⁹² The trainmaster observed this incident on the security camera and informed her supervisor, who instructed the trainmaster to pull Plaintiff off duty.⁹³ Kosak was found guilty at a hearing held by CSX Transportation of violating their policy of respectful and courteous behavior, observing all local, state, and federal laws since public urination is illegal.⁹⁴ Within a month of the hearing, Kosak was dismissed from her job.⁹⁵ An arbitration board, however, ultimately reinstated Kosak without back pay, and portable toilets were subsequently installed in the rail yard.⁹⁶

Kosak filed a complaint alleging sex discrimination in violation of Title VII.⁹⁷ Kosak is part of a protected class as transgender, she was qualified for her job as shown by her twenty-year employment history, and she suffered an adverse employment action when she was fired.⁹⁸ CSX argued that there was no discriminatory intent since Kosak did not show that other employees frequently urinated outside as well.⁹⁹ Kosak, however, alleged that the trainmaster had anti-transgender bias based on comments she had made, and she reported Kosak to her

⁸⁸ *Kosak v. CSX Transp., Inc.*, 2023 U.S. Dist. LEXIS 133299, at *1 (W.D.N.Y. Aug. 1, 2023).

⁸⁹ *Id.* at *2.

⁹⁰ *Id.*

⁹¹ *Id.* at *3.

⁹² *Id.*

⁹³ *Id.* at *4.

⁹⁴ *Kosak*, 2023 U.S. Dist. LEXIS 133299 at *5.

⁹⁵ *Id.* at *6.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at *31.

⁹⁹ *Id.*

supervisor.¹⁰⁰ The court held that a reasonable jury could find that CSX Transportation's reasoning for dismissing Kosak could be a pretext for discrimination using "cat's paw liability," meaning a supervisor was manipulated by a subordinate into making a decision based on the subordinate's discriminatory motive.¹⁰¹ Therefore, CSX's summary judgment motion as to Kodak's Title VII claim was denied.¹⁰²

The events described in the *Kosak* case highlight the potential challenges faced by transgender individuals in the workplace, particularly in environments where supervisors and co-workers may not be adequately trained or educated about transgender issues. Kosak's experience underscores the recommendation for employers to establish inclusive and supportive workplace environments where all employees are treated with dignity and respect, regardless of their gender identity. Specifically, employers should train employees on zero-tolerance harassment policies that specify how employees can report incidents and what the repercussions are for employees who violate the policy.

C. *Tudor v. Southeastern Oklahoma State University*

Tudor is a transgender woman who received her PHD from the University of Oklahoma and began working for Southeastern Oklahoma State University in 2004 as a tenure-track assistant professor.¹⁰³ Dr. Tudor started transitioning from a biological man to a woman over the summer of 2007, and she informed human resources at Southeastern Oklahoma State University of her plans.¹⁰⁴ Dr. Tudor submitted her application for tenure in 2008 and was denied at the initial review by the committee comprised of five faculty members.¹⁰⁵ Dr. Tudor submitted her application for tenure again in 2009 and received favorable recommendations from the first two levels of review, but was then denied tenure by the Dean, Vice President, and President.¹⁰⁶ In 2010, Dr. Tudor filed complaints within the university and to the

¹⁰⁰ *Kosak*, 2023 U.S. Dist. LEXIS 133299 at *4, *36.

¹⁰¹ *Id.* at *37.

¹⁰² *Id.* at *39–40.

¹⁰³ *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1025 (10th Cir. 2021).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1026.

¹⁰⁶ *Id.*

U.S. Department of Education, and her complaint was referred to the EEOC.¹⁰⁷

Dr. Tudor reapplied for tenure in 2010 and received a memorandum informing her that she was not able to reapply once she was denied because it would not be in the best interests of the university.¹⁰⁸ Dr. Tudor only had seven years to receive tenure or else she would be fired from the university. Therefore, she appealed to the appellate committee.¹⁰⁹ The university's president decided that Dr. Tudor could not reapply, and her contract with the university expired. Dr. Tudor left the university in the spring of 2011 and filed a complaint with the EEOC.¹¹⁰

Dr. Tudor filed a complaint in the district court for sex discrimination, retaliation, and a hostile work environment under Title VII.¹¹¹ The jury found the university violated Title VII based on discrimination, retaliation, and a hostile work environment and awarded Dr. Tudor \$1.165 million in damages, including backpay and compensation for physical and mental distress.¹¹² This award was reduced to \$300,000 because of the Title VII cap on compensatory damages.¹¹³ Dr. Tudor also requested front pay and received an amount of \$60,040.77 in addition to the \$300,000.¹¹⁴ Dr. Tudor appealed the damages award cap under Title VII, but the appellate court affirmed the district court's ruling.¹¹⁵ The appellate court, however, remanded the case to the district court to recalculate the front pay award and reinstate Dr. Tudor with backpay.¹¹⁶

The appellate court analyzed whether a productive working relationship between the parties would be possible despite hostility between the plaintiff and defendant and determined that it was.¹¹⁷ The appellate court determined that Dr. Tudor should be entitled to pay

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Tudor*, 13 F.4th at 1027.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1027.

¹¹⁴ *Id.*

¹¹⁵ *Tudor*, 13 F.4th at 1033.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1035.

from the year that she would have been awarded tenure and would have continued working as a tenured professor.¹¹⁸

This case highlights the cap on compensatory damages under Title VII of \$300,000.¹¹⁹ Even though Dr. Tudor had struggled to find work except at a community college for a few years, she would not have been compensated for the front pay by the district court.¹²⁰ The appellate court not only affirmed the compensatory damages and back pay, but also did a thorough analysis of front pay and reinstatement, setting Dr. Tudor back in the position she would have been had she been granted tenure.¹²¹ This case is a huge win for transgender employees, especially in the academic environment where the granting of tenure can be highly subjective. This case is also beneficial to transgender employees in the employment context when considering the negative impact termination has on an employee's career, including preventing transgender employees from being promoted.

D. *Copeland v. Georgia, Department of Corrections*

Tyler Copeland is a transgender man who was employed by the Georgia Department of Corrections for ten years.¹²² Copeland worked at Rogers State Prison and began transitioning to a man through hormone replacement therapy, legally changing his name, and living openly as a man.¹²³ Copeland met with human resources to show his name change and was questioned on whether he had changed his birth certificate and was subsequently questioned on whether he had surgery or was going to have it.¹²⁴ The human resources director met with Copeland to instruct Copeland not to use the men's bathroom and then later met with the staff to inform them of Copeland being transgender and how to address Copeland.¹²⁵

In the year that followed the staff meeting, Copeland claimed he was subject to sexual harassment through daily incidents such as calling

¹¹⁸ *Id.* at 1040.

¹¹⁹ *Id.* at 1027.

¹²⁰ *Id.* at 1045.

¹²¹ *Tudor*, 13 F.4th at 1040–41.

¹²² *Copeland v. Ga. Dep't of Corr.*, 97 F.4th 766, 770 (11th Cir. 2024).

¹²³ *Id.*

¹²⁴ *Id.* at 771.

¹²⁵ *Id.*

Copeland “ma’am,” “baby girl,” “that,” and “it.”¹²⁶ Occasionally, the incidents became more confrontational when colleagues blocked the doorway, stated they could fight, pushed Copeland, or followed him to his car.¹²⁷ In addition to addressing the harassers directly, Copeland reported concerns that he had to his supervisors and human resources.¹²⁸ Copeland also experienced workplace decline with subordinates not listening, being assigned to nightshifts, and not being allowed to leave to attend doctors’ appointments.¹²⁹ Copeland looked for other positions in the Georgia Department of Corrections for over three years, including a promotion, and was continually rejected without being given any reason.¹³⁰

Copeland filed three claims in violation of Title VII, including being subjected to a hostile work environment, not being promoted based on his transgender status, and being retaliated against for opposing sex discrimination.¹³¹ The district court granted summary judgment for the Georgia Department of Corrections on all counts, reasoning that the environment was not severe and pervasive enough to constitute a hostile work environment and that a causal connection was not established between Copeland’s protected activity and his lack of promotion.¹³² When evaluating whether the environment was hostile or abusive, the Eleventh Circuit found the harassment was frequent, severe, physically threatening, and humiliating, and it negatively impacted Copeland’s work performance.¹³³ The court, however, remanded the case to determine whether the Georgia Department of Corrections was responsible for the hostile work environment.¹³⁴ Additionally, the court granted the Georgia Department of Corrections summary judgment for failure to promote and retaliation, stating that Copeland failed to establish a causal connection between Copeland’s protected actions and not being promoted and being retaliated against.¹³⁵

¹²⁶ *Id.*

¹²⁷ *Id.* at 772.

¹²⁸ *Copeland*, 97 F.4th at 772.

¹²⁹ *Id.*

¹³⁰ *Id.* at 773.

¹³¹ *Id.*

¹³² *Id.* at 774.

¹³³ *Id.* at 780.

¹³⁴ *Copeland*, 97 F.4th at 781.

¹³⁵ *Id.* at 783.

This case highlights the struggles of transgender individuals who are transitioning genders while working in the same job, like Aimee Stephens from the *Bostock* case, who was fired when she told her employer her plans to transition from a man to a woman.¹³⁶ Copeland went through the proper channels to change his name and ask to be identified by the proper pronouns, but his requests were not taken seriously.¹³⁷ Additionally, he was repeatedly undermined by employees in the human resources department and his colleagues for several years, and was not able to move positions to remedy the situation.¹³⁸ After satisfying four elements of a hostile work environment, Copeland still had the challenge of proving that the employer was responsible for the hostile work environment to prove his case.¹³⁹ Therefore, transgender employees have the challenge of proving how the organization is responsible for their employees' negative responses to the employee transitioning their gender.¹⁴⁰

E. *Michael v. Bravo Brio Restaurant LLC*

Plaintiff is a transgender female who was employed as a server in the defendant's restaurant.¹⁴¹ Plaintiff filed a complaint alleging sex discrimination, retaliation, and a hostile work environment.¹⁴² Some incidents that Plaintiff cited were her supervisor calling her a derogatory name in Spanish, as well as saying she was a boy in Spanish.¹⁴³ In addition, Plaintiff alleged that her supervisor told others not to use her preferred pronouns, said that she is a boy and should act like a boy, that she had a romantic relationship with a co-worker, and asked her to put her hair up since she is not a girl.¹⁴⁴ Plaintiff reported these issues to human resources, but Plaintiff was informed that she was indefinitely suspended because of concerns, including a bomb threat.¹⁴⁵

¹³⁶ *Bostock*, 590 U.S. at 653–54.

¹³⁷ *Copeland*, 97 F.4th at 771.

¹³⁸ *Id.*

¹³⁹ *Id.* at 774.

¹⁴⁰ *Id.*

¹⁴¹ *Bravo Brio Rests. LLC*, 2024 U.S. Dist. LEXIS 102504 at *1, *3.

¹⁴² *Id.* at *2.

¹⁴³ *Id.* at *4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at *5.

The defendant asked Plaintiff to come back to work, but she received a disciplinary letter that did not address the bomb threat or her complaints against her supervisor.¹⁴⁶ Due to the defendant not addressing her complaints, Plaintiff ended up quitting her job on January 24, 2023.¹⁴⁷ Plaintiff alleged that the defendant violated Title VII and the New Jersey Law Against Discrimination (NJLAD).¹⁴⁸ The only difference in filing sexual harassment claims under Title VII and NJLAD is that the plaintiff has to prove the fifth element of respondent superior.¹⁴⁹ The court found that Plaintiff's sexual harassment claim survived a motion to dismiss because there was intentional discrimination by her supervisor, giving her fewer tables, making inappropriate gender comments, and asking her to put her hair up.¹⁵⁰ The court also found that the defendant's behavior was severe or pervasive since it happened on multiple occasions, and Plaintiff suffered severe emotional distress because of her supervisor.¹⁵¹ Since Plaintiff adequately alleged a hostile work environment under Title VII, the court held that the arbitration agreement that Plaintiff signed was unenforceable.¹⁵²

This case provides an example of what happens if the employee has an arbitration agreement in place with the employer.¹⁵³ The arbitration agreement was clear and unambiguous about the rights of the parties, but the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 makes the pre-dispute arbitration agreement inapplicable to sexual harassment claims.¹⁵⁴ Therefore, the transgender employee may proceed through the litigation process with a sexual harassment claim if the plaintiff provides evidence of all five elements of sexual harassment under Title VII.¹⁵⁵ This case illustrates when an employer can be held liable for the actions of its employees if the

¹⁴⁶ *Id.*

¹⁴⁷ *Bravo Brio Rests, LLC*, 2024 U.S. Dist. LEXIS 102504 at *5.

¹⁴⁸ *Id.* at *1.

¹⁴⁹ *Id.* at *15–16 (regarding where her employer should be liable for acts of her supervisor or co-worker under Title VII).

¹⁵⁰ *Id.* at *17.

¹⁵¹ *Id.* at *14.

¹⁵² *Id.* at *17–18.

¹⁵³ *Bravo Brio Rests, LLC*, 2024 U.S. Dist. LEXIS 102504 at *7.

¹⁵⁴ *Id.* at *7, *17–18.

¹⁵⁵ *Id.* at *18.

plaintiff's supervisor sexually harassed the plaintiff, and the employer did not exercise due care to remedy the situation.¹⁵⁶

These five cases serve as poignant reminders of the challenges faced by transgender individuals in the workplace to bring successful claims for discrimination, hostile work environment, and retaliation under Title VII. In *Triangle Doughnuts*, Plaintiff showed there were multiple occurrences of harassment in addition to being misgendered to illustrate a hostile work environment.¹⁵⁷ Such harassment included being prevented from using the women's bathroom, changing her duties, being subjected to probing questions about her anatomy and gender identity, and being subject to a stricter dress code.¹⁵⁸ Additionally, the court used the same examples to prove that Plaintiff was treated differently from her cisgender counterparts to prove sex discrimination.¹⁵⁹ Lastly, Plaintiff showed that she was retaliated against when she called customers and co-workers out on mistreating her and was reassigned to a different position and subsequently terminated.¹⁶⁰ Similarly, Kosak was treated differently from her cisgender counterparts and could show discriminatory intent when she participated in the same activity of urinating outside and got fired, whereas other employees did not.¹⁶¹

Dr. Tudor was subject to discrimination by being harassed for her transgender status, not making tenure, and eventually getting terminated even when she was qualified to get tenure.¹⁶² In *Copeland*, the court found that the harassment was frequent, severe, physically threatening, and humiliating, and negatively impacted Copeland's work performance to constitute a hostile work environment.¹⁶³ Lastly, *Bravo Brio Restaurants* was held liable for the behavior of its employee because the behavior was severe or pervasive when it happened on multiple occasions, and the plaintiff suffered severe emotional distress because of her supervisor.¹⁶⁴ These cases shed light on what transgender individuals must prove to claim wrongful termination, hostile work

¹⁵⁶ *Id.* at *17.

¹⁵⁷ *Triangle Doughnuts*, 472 F. Supp. 3d at 122.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 129.

¹⁶⁰ *Id.* at 122, 124.

¹⁶¹ *Kosak*, 2023 U.S. Dist. LEXIS 133299 at *1.

¹⁶² *Tudor*, 13 F.4th at 1025.

¹⁶³ *Copeland*, 97 F.4th at 770, 777–80.

¹⁶⁴ *Bravo Brio Rests. LLC*, 2024 U.S. Dist. LEXIS 102504 at *1.

environment, retaliation, and not being promoted based on transgender status.

V. FEDERAL CASES POST *BOSTOCK* RULING AGAINST TRANSGENDER EMPLOYEES FOR TITLE VII CLAIMS

Even though *Bostock* held that Title VII protects employees from being fired for being transgender, employees still must present evidence of all the elements of their claims, not only for sex discrimination, but also for a hostile work environment, failure to promote, and retaliation.¹⁶⁵ Specifically, these cases illustrate that to prove a hostile work environment, transgender employees must show that the employer is liable for the discriminatory actions by their co-workers or their supervisor under Title VII.

A. *Fedder v. Ohio Medical Transportation*

Rayne Fedder, a transgender woman, filed a lawsuit against Ohio Medical Transportation (OMT), alleging sex discrimination and a hostile work environment in violation of Title VII and the Americans with Disabilities Act (ADA).¹⁶⁶ Fedder worked as an emergency medical technician for OMT from March 14, 2022, to May 3, 2022.¹⁶⁷ During pre-employment screening, Fedder disclosed her mental health issues, including depression, anxiety, and PTSD, as well as her transgender status and hormone replacement therapy.¹⁶⁸ Fedder alleged that she faced discrimination and harassment from coworkers and supervisors after disclosing her transgender identity.¹⁶⁹ Specifically, she claimed that coworkers made discriminatory statements about her gender identity, and director of operations James Gruenberg treated her differently from cisgender employees, instructing coworkers to “keep an open mind” about her.¹⁷⁰ Fedder alleged disparate treatment compared to cisgender male coworkers, citing instances where she was disciplined

¹⁶⁵ See generally *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

¹⁶⁶ *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *1–5.

¹⁶⁷ *Id.* at *2.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

for social media posts while a coworker faced no repercussions for displaying a patch referencing an anti-Semitic conspiracy theory.¹⁷¹

Approximately a month into her employment, Fedder was terminated following an incident report filed by staff members at O'Bleness Memorial Hospital.¹⁷² Fedder filed a charge with the EEOC alleging sex and disability discrimination and subsequently filed suit after receiving a right-to-sue letter.¹⁷³ After screening the complaint, a magistrate judge issued a Report and Recommendation recommending the dismissal of Fedder's Title VII claims and allowing her "regarded as" having a mental or behavioral health impairment claim under the ADA to proceed.¹⁷⁴ The district court affirmed the lower court ruling dismissing the hostile work environment claim, reasoning that a handful of inappropriate questions by co-workers in private would not be considered severe or pervasive enough to constitute a hostile work environment.¹⁷⁵ The court also dismissed the plaintiff's disparate treatment claim that she was treated differently than her male co-workers when she got fired because the plaintiff did not show evidence of a suitable comparator to her behavior.¹⁷⁶

This case highlights the challenges that may still be faced by transgender individuals in the workplace after *Bostock* and the importance of protecting employees from discrimination based on gender identity. Fedder's allegations raise legal questions about the application of Title VII protections to transgender employees and the duty of employers to provide a safe and inclusive work environment.¹⁷⁷ The legal questions include determining what factors are included in the evaluation of the totality of the circumstances to constitute a hostile work environment for transgender employees experiencing sexual harassment.¹⁷⁸ Despite the dismissal of Fedder's Title VII claims, the court's decision to allow Fedder's ADA claim to proceed demonstrates the potential for legal remedies in cases of discrimination based on perceived disabilities. The court's rulings underscore the ongoing need for comprehensive legal protections and enforcement mechanisms to

¹⁷¹ *Id.* at *2–3.

¹⁷² *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *3.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *1.

¹⁷⁵ *Id.* at *8.

¹⁷⁶ *Id.* at *10–11.

¹⁷⁷ *See id.* at *8.

¹⁷⁸ *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *8.

ensure equal treatment and opportunities for transgender individuals in the workplace.

B. *Doe v. City of Detroit*

Jane Doe, an employee of the City of Detroit since 2016, transitioned to presenting as a woman during her employment.¹⁷⁹ Doe informed the city of her transition surgery, and the city supported her time off.¹⁸⁰ Upon returning to work, Doe became aware of complaints filed against her for dress code violations, and someone defaced her nameplate by adding “Mr.” in front of her name after a follow-up surgery.¹⁸¹ Doe immediately reported the incidents to her supervisor and human resources.¹⁸² She also reported subsequent incidents, such as when she received a gift bag with a phallic sex toy and a note.¹⁸³ The city interviewed employees, took writing samples from employees, and reminded employees of its zero policy for harassment, but they did not uncover the harasser.¹⁸⁴ Doe received the investigative report and requested a lock on her office door as well as a camera placed in her office to catch the harasser.¹⁸⁵

After five months, Doe started receiving typed written notes, causing her to feel scared for her safety when going into the office.¹⁸⁶ Doe was relocated to a new office and then back to her old office when a lock and camera had been installed.¹⁸⁷ In addition to never identifying her harasser, Doe felt that her supervisor had been treating her differently since the harassment started by complaining about her absences from work, as well as the quality of her work.¹⁸⁸ Doe filed a complaint against her supervisor, causing her supervisor to become increasingly negative towards Doe and her work.¹⁸⁹ When Doe’s

¹⁷⁹ *City of Detroit*, 3 F.4th at 297.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 298.

¹⁸⁵ *City of Detroit*, 3 F.4th at 298.

¹⁸⁶ *Id.* at 298–99.

¹⁸⁷ *Id.* at 299.

¹⁸⁸ *Id.* at 299–300.

¹⁸⁹ *Id.* at 300.

supervisor left the city and was replaced, Doe stated that she was still subjected to a retaliatory hostile work environment.¹⁹⁰

Doe sued the city for a hostile work environment under Title VII and Michigan's Elliott Larsen Civil Rights Act, and the district court granted summary judgment for the City of Detroit.¹⁹¹ Doe argued that she had proved the elements of a hostile work environment and that the district court's holding should be reversed, whereas the City argued that Doe did not prove that the employer should be liable.¹⁹² The appellate court held that the steps the city took in response to the harassing events were reasonable, even though the City was never able to identify the harasser.¹⁹³ The City informed all employees about its zero tolerance for harassment and eventually installed a lock on Doe's office door.¹⁹⁴ Doe's evidence of retaliation was not being promoted into her boss's position when her boss left.¹⁹⁵ Therefore, the appellate court affirmed the district court's grant of summary judgment for the City on Doe's hostile work environment and retaliation claims.¹⁹⁶

Like *Copeland*, the transgender employee must prove not only that she was a member of a protected class, subjected to unwelcome sexual harassment based on sex, which created a hostile work environment, but that the employer is liable for the hostile work environment.¹⁹⁷ In *Doe v. City of Detroit*, the City took action following the reports of harassing behavior, even though the steps did not meet Doe's expectations.¹⁹⁸ In *Copeland*, the transgender employee had to prove that the Georgia Department of Corrections was liable for the hostile work environment.¹⁹⁹ Therefore, transgender employees still have a burden to prove the employer's actions were not reasonable in response to the harassment reports in order to survive summary judgment.²⁰⁰ Employers who have nondiscrimination and no harassment policies

¹⁹⁰ *Id.*

¹⁹¹ *City of Detroit*, 3 F.4th at 300.

¹⁹² *Id.*

¹⁹³ *Id.* at 301–02.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 304.

¹⁹⁶ *Id.* at 305.

¹⁹⁷ *City of Detroit*, 3 F.4th at 300.

¹⁹⁸ *Id.* at 301.

¹⁹⁹ *See generally* *Copeland v. Ga. Dep't of Corr.*, 97 F.4th 766 (11th Cir. 2024).

²⁰⁰ *Id.*

in place that are implemented consistently would be more likely to respond reasonably.

C. *Olivarez v. T-Mobile USA, Incorporated*

Elijah Olivarez was a retail associate at T-Mobile from December 21, 2015, until April 27, 2018.²⁰¹ Olivarez filed a complaint in 2016 with human resources because of comments a supervisor made about Olivarez's transgender status.²⁰² Olivarez claimed that as a result of the complaint, T-Mobile reduced his hours to part-time for the last four months of 2016.²⁰³ In September of 2017, Olivarez stopped coming to work and asked for and received unpaid leave while undergoing egg retrieval and a hysterectomy through November, and then paid leave in December.²⁰⁴ T-Mobile further granted an extension of leave through February 18, 2018, but then denied any further extensions in March 2018.²⁰⁵

Olivarez filed a lawsuit against T-Mobile for discrimination and retaliation under Title VII and discrimination under the ADA.²⁰⁶ The district court dismissed the Title VII claim based on the lack of evidence alleging Olivarez was treated less favorably than other employees outside of the protected class.²⁰⁷ The court also dismissed the ADA claim because there was not enough evidence showing Olivarez was disabled.²⁰⁸ The appellate court made it clear that the plaintiff had to prove that he was discriminated against because of being transgender.²⁰⁹ There was also a two-year delay from when Olivarez said he was retaliated against for complaining about his supervisor's conduct and when he filed a complaint alleging retaliation under Title VII.²¹⁰ Therefore, the appellate court affirmed the judgment of the district court granting T-Mobile's summary judgment.²¹¹

²⁰¹ *Olivarez v. T-Mobile*, 997 F.3d 595, 598 (5th Cir. 2021).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Olivarez*, 997 F.3d at 599.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 600–01.

²¹⁰ *Id.* at 601.

²¹¹ *Id.* at 603.

This case highlights the court's interpretation of the requirements for discrimination under Title VII. Specifically, this court confirmed that transgender discrimination is a form of sex discrimination under Title VII, but the plaintiff must show that the plaintiff was discriminated against because of transgender status and the organization treated the plaintiff differently from other employees when there is circumstantial evidence.²¹² Olivarez's claims did not survive summary judgment because of the lack of comparator evidence of treating him differently from other employees.²¹³ Just because a transgender employee is fired when asking for extended time off work does not mean transgender discrimination is happening. Additionally, the court will consider the length of time the employee waited to file a complaint from the alleged retaliation.²¹⁴

D. *Ponce v. Florida Atlantic University Board of Trustees*

Plaintiff, a transgender male, made claims against the Florida Atlantic University Board of Trustees (FAU) under Title XI and Title VII for sex discrimination.²¹⁵ Plaintiff was employed by FAU as a police detective before he started his transition in April 2017.²¹⁶ Plaintiff informed his supervisor and two other employees about his transition, all of whom stated they supported him.²¹⁷ Subsequently, FAU put up a gender neutral sign on one of the bathrooms and appointed Plaintiff as the LGBTQ liaison.²¹⁸ This role caused Plaintiff anxiety because it was never announced in line with other promotions, and his supervisors never explained to him exactly what this role entailed.²¹⁹

Subsequently, Plaintiff noted events in which he was not recognized for the work he did or did not receive promotions he applied for. For example, Plaintiff solved a case when a student posted that they wanted to kill a professor, but another employee received credit for it.²²⁰ Plaintiff

²¹² *Id.* at 601, 603.

²¹³ *Olivarez*, 997 F.3d at 601.

²¹⁴ *Id.*

²¹⁵ *Ponce v. Fla. Atl. Univ. Bd. of Trs.*, 2023 U.S. Dist. LEXIS 83729, at *1 (S.D. Fla. May 12, 2023).

²¹⁶ *Id.*

²¹⁷ *Id.* at *1–2.

²¹⁸ *Id.* at *2.

²¹⁹ *Id.*

²²⁰ *Id.* at *2–3.

suggested that there was a need for a detective sergeant position that Plaintiff wanted to apply for, but another employee was hired for the position who had less experience than him.²²¹ Plaintiff applied for the special operations sergeant position, but could not attend the exam due to contracting COVID and, therefore, was ineligible.²²² Plaintiff alleged that he was not promoted due to his transgender status even after he passed the sergeant's exam.²²³

Plaintiff needed to prove that as a member of a protected class, he was qualified for the promotion, rejected despite his qualifications, and the person promoted was not a member of the protected class for a failure to promote claim.²²⁴ Plaintiff alleged that FAU treated other employees outside of his protected class more favorably, but he did not specify the gender of the other promoted employees to provide comparator evidence.²²⁵ Also, Plaintiff did not provide enough evidence to connect the lack of recognition for the case he solved to his transgender status.²²⁶ Therefore, the court dismissed the plaintiff's Title VII discrimination claim.²²⁷

E. *Faulkenberry v. U.S. Department of Defense*

Plaintiff is a transgender female who presents as a woman and has served in the U.S. Army for 25 years.²²⁸ After an honorable discharge from the army, Plaintiff started working for U.S. European Command, which is part of the Department of Defense.²²⁹ Plaintiff was transferred to the Defense Information Systems Agency (DISA) and was assigned to work as a tasker workflow manager in Maryland.²³⁰ Before relocating to Fort Meade in Maryland, Plaintiff disclosed to her boss over the phone that she was a transgender female, at which point the supervisor's tone became curt and unhelpful.²³¹ After moving, she requested temporary

²²¹ *Ponce*, 2023 U.S. Dist. LEXIS 83729 at *3–4.

²²² *Id.*

²²³ *Id.* at *5.

²²⁴ *Id.* at *8.

²²⁵ *Id.* at *10–11.

²²⁶ *Id.* at *12.

²²⁷ *Ponce*, 2023 U.S. Dist. LEXIS 83729 at *13.

²²⁸ *Faulkenberry v. U.S. Dep't of Def.*, 670 F. Supp. 3d 234, 243 (D. Md. 2023).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 243–44.

quarter subsistence expenses, which her supervisor denied and said he did not want her there, and subsequently, two other employees denied her request.²³² Two days after beginning work, Plaintiff was reassigned to be an issuance manager, a position with less important tasks and less interaction with leadership.²³³ Plaintiff again requested temporary quarter subsistence expenses and was denied and told that the organization would not be sad if she found another job.²³⁴

Plaintiff reported the treatment she had received to the deputy of personnel and stated that she had not seen other employees treated the way she had been.²³⁵ Soon after, her temporary quarter subsistence expenses were approved.²³⁶ Plaintiff learned of other disparities in treatment, such as her parking assignment, which was a 15-minute walk to work, so she complained and eventually got a parking pass to the garage close by.²³⁷ Plaintiff asked to be included in lunch outings that were planned by her supervisor and was told that “it was a girls thing,” so she would not want to attend.²³⁸ Additionally, Plaintiff’s employer did not celebrate her birthday like other employees, her supervisor rarely spoke to her or invited her into her office, and other employees heard her supervisor refer to her as “it.”²³⁹

In the fall of 2017, Plaintiff met with the executive director about the treatment she had been receiving and requested a transfer to another unit.²⁴⁰ Plaintiff also asked human resources to send her open positions that she could apply to in early 2018.²⁴¹ Plaintiff started receiving unfounded criticism from an editor, claiming she was not making progress on projects.²⁴² Plaintiff complained to an executive officer that her supervisor had created a hostile work environment that impacted her health and that she would like to be reassigned elsewhere.²⁴³ Plaintiff also asked her supervisor to be transferred to

²³² *Id.* at 244.

²³³ *Id.*

²³⁴ *Faulkenberry*, 670 F. Supp. 3d at 244.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 244–45.

²³⁸ *Id.* at 245.

²³⁹ *Id.*

²⁴⁰ *Faulkenberry*, 670 F. Supp. 3d at 245.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

another position after her supervisor alleged to have heard plaintiff complain, but her supervisor ignored the request.²⁴⁴ Plaintiff told other employees that she was going to file an EEOC complaint and also joked that she would take the Keurig machine to see if her colleagues would attack each other due to caffeine withdrawals.²⁴⁵ As a result of these comments, Plaintiff's employer placed her on administrative leave and removed her from the building.²⁴⁶

Plaintiff proceeded to file an EEOC claim alleging discrimination based on gender identity and retaliation while she was on administrative leave for two weeks.²⁴⁷ Plaintiff's supervisor issued a letter of reprimand upon the plaintiff's return to work and stated that she had counseled her about being professional in the workplace environment.²⁴⁸ Management investigated her harassment complaint but did not take any action to remedy the behavior.²⁴⁹ Plaintiff requested an accommodation of reassignment with her medical records attached.²⁵⁰ Her supervisor got access to the records and shared them.²⁵¹ Plaintiff filed a complaint for discrimination based on a hostile work environment and retaliation under Title VII.²⁵²

The court found Plaintiff failed to allege conduct that rose to the level of severe or pervasive to alter the conditions of employment and to create an abusive environment.²⁵³ Additionally, the court found she failed to establish retaliation under Title VII, given the lack of causal connection between the protected activity and the employment action, and given the minimal information relayed to the defendant that led to

²⁴⁴ *Id.* at 245–46.

²⁴⁵ *Id.* at 246.

²⁴⁶ *Faulkenberry*, 670 F. Supp. 3d at 246.

²⁴⁷ *Id.* at 246–47.

²⁴⁸ *Id.* at 247.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Faulkenberry*, 670 F. Supp. 3d at 243.

²⁵³ *Id.* at 254 (finding that the following isolated incidents were sporadic incidents and did not rise to the level of extremely serious: (1) denial of a parking permit and relocation benefits freely given to other employees, (2) a change of job duties early on in Plaintiff's employment, in part to seclude Plaintiff from leadership, (3) negative comments from management regarding Plaintiff's work attire, (4) misgendering Plaintiff, (5) Ms. Ontiveros referring to Plaintiff—a fellow human being and co-worker—as “it,” (6) excluding Plaintiff from girls' lunch and ignoring Plaintiff's birthday, and (7) escorting Plaintiff from the work premises for a perceived threat of violence).

Plaintiff being placed on administrative leave.²⁵⁴ The court, however, found that the defendant disclosed medical documents without Plaintiff's permission under the Rehabilitation Act.²⁵⁵

These cases show that transgender employees still face numerous challenges when proving their claims under Title VII. Since *Bostock*, plaintiffs must present suitable comparator evidence to show how they are treated differently from their cisgender counterparts for a sex discrimination claim.²⁵⁶ As shown in *Fedder*, a handful of inappropriate comments is not enough to constitute a hostile work environment.²⁵⁷ *Doe v. City of Detroit* illustrated that an employer will not be held liable for a hostile work environment if the steps the employer took in response to the harassing events were reasonable, such as investigating the harasser, relocating the plaintiff, and installing locks and a camera in the plaintiff's office.²⁵⁸ For a failure to promote claim, a plaintiff must show that as a member of a protected class, he was qualified for the promotion, he was rejected despite his qualifications, and the person promoted was not a member of the protected class.²⁵⁹ Finally, to prove a retaliation claim, the plaintiff must establish the causal connection between the protected activity and the employment action.²⁶⁰

VI. THE CURRENT CONDITION OF STATE POLICY

A significant number of states have taken proactive measures to extend explicit protections to transgender employees under their employment nondiscrimination laws, which enable transgender

²⁵⁴ *Id.* at 258.

²⁵⁵ *Id.* at 262.

²⁵⁶ *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *1; see *Olivarez*, 997 F.3d at 598 (holding that Olivarez's claims did not survive summary judgment because of lack of comparator evidence of treating him differently than other employees); see also *Faulkenberry*, 670 F. Supp. 3d at 243 (finding that being reassigned to a new position, being critiqued, and not included in lunches did not rise to the level of severe or pervasive to alter the work environment).

²⁵⁷ *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *8.

²⁵⁸ *City of Detroit*, 3 F.4th at 297.

²⁵⁹ *Ponce*, 2023 U.S. Dist. LEXIS 83729 at *8 (explaining plaintiff's allegation that FAU treated other employees outside of his protected class more favorably, but he did not specify the gender of the other employees who were promoted to provide the court with comparator evidence).

²⁶⁰ *Faulkenberry*, 670 F. Supp. 3d at 259 (explaining that the causal link for a retaliation claim was not established because of the lack of information relayed to the defendant that led to the plaintiff being placed on administrative leave).

employees to bring claims under state law in addition to Title VII.²⁶¹ Currently, twenty-three states, along with the District of Columbia and three territories, have codified explicit prohibitions against employment discrimination based on sexual orientation and gender identity.²⁶² States have enacted these laws across several decades, with Minnesota being the earliest to explicitly include both sexual orientation and gender identity in its state statute in 1993.²⁶³ Additionally, ten other states explicitly interpret existing prohibitions on sex discrimination to include sex discrimination and or gender identity.²⁶⁴ By enshrining such protections in state legislation, these jurisdictions provide transgender employees with clear avenues for recourse for workplace discrimination, promoting fairness and equality in employment practices.

Despite progress in many states, the legislative landscape surrounding transgender protections remains complex, with variations in the scope and implementation of these laws. For instance, while some states offer comprehensive protections covering various aspects of employment, others provide limited safeguards or carve-outs that may undermine the effectiveness of these laws.²⁶⁵ Additionally, religious exemptions in certain states introduce complexities and tensions between non-discrimination policies and claims of religious freedom.²⁶⁶ Notably, some states have adopted innovative approaches to address emerging issues, such as ensuring access to gender-affirming healthcare and accommodations for transgender employees.²⁶⁷ These diverse approaches underscore the ongoing challenges and debates surrounding transgender rights in the workplace and highlight the

²⁶¹ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps>.

²⁶² *Id.* (including Washington, Oregon, Nevada, California, Utah, Colorado, New Mexico, Minnesota, Iowa, Wisconsin, Illinois, Michigan, Virginia, New York, Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and the District of Columbia); *see also Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT (Aug. 8, 2024), https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws (prohibiting discrimination based on sexual orientation in Wisconsin).

²⁶³ *See* Minn. Stat. § 363A.03 (2024) (demonstrating an early commitment to inclusivity and protection of LGBTQ+ rights in the workplace).

²⁶⁴ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps> (including Arkansas, Arizona, Florida, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Pennsylvania, and Texas).

²⁶⁵ Elaina Rahrig, *Transgender and Nonbinary Persons' Rights and Issues*, 24 GEO. J. GENDER & L. 855, 857 (2023).

²⁶⁶ Gilroy et al., *supra* note 23, at 448.

²⁶⁷ *See* Rahrig, *supra* note 265, at 857.

need for continued advocacy and vigilance to uphold the principles of equality and justice for all individuals, regardless of gender identity or expression.

The landscape of transgender employment protections in the United States extends beyond state laws to include interpretations by state agencies tasked with enforcing existing anti-discrimination statutes. While some states may lack laws explicitly addressing discrimination against transgender individuals in the workplace, state employment discrimination agencies have stepped in to interpret existing protections to encompass gender identity and expression.²⁶⁸ This proactive approach reflects a commitment to upholding the principles of equality and non-discrimination, ensuring that transgender employees are afforded legal protections against workplace discrimination regardless of their state's legal protections.

Currently, ten states lack specific laws prohibiting employment discrimination based on gender identity or expression, but state agencies in these states have interpreted existing state anti-discrimination statutes to include transgender individuals within the scope of protected classes.²⁶⁹ By recognizing gender identity and expression as protected characteristics under existing laws, these state agencies provide transgender employees with avenues for recourse in cases of workplace discrimination, promoting fairness and inclusivity in employment practices.²⁷⁰ Challenges remain, however, including variations in enforcement practices and awareness among employers and employees about transgender rights.²⁷¹ Additionally, the absence of specific legal protections may leave transgender individuals vulnerable to discrimination, namely in the twenty-seven states and four territories where there is no law providing LGBTQ inclusive insurance protections, highlighting the need for comprehensive legislative action to ensure

²⁶⁸ *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT (Aug. 8, 2024), https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws.

²⁶⁹ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps> (including states such as Texas, Idaho, Arizona, Wyoming, Nebraska, Kansas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, and Pennsylvania).

²⁷⁰ See Reed, *supra* note 4, at 540 (clarifying how states' antidiscrimination statutes are particularly important for transgender employees who work at employers with 15 or more employees).

²⁷¹ *Id.*

consistent and robust protections for all employees under state laws.²⁷² Moving forward, continued advocacy and education efforts by state agencies are essential to promote understanding and acceptance of transgender individuals in the workplace. These efforts will help foster environments where all employees can work free from discrimination and harassment based on gender identity or expression by employers who implement no harassment policies.

While federal nondiscrimination law offers protection across the nation, a considerable number of states still lack explicit state-level protections against discrimination based on sexual orientation or gender identity. Sixteen states do not have specific anti-discrimination employment statutes regarding sexual orientation and gender identity.²⁷³ While these states may not currently offer explicit protections, federal law fills this gap and, in an attempt to reinforce the principle that equality under the law is a reality under Title VII. Many members of the LGBTQ community, however, are currently unable to bring a state-level claim in these states due to the absence of specific protections against discrimination based on sexual orientation or gender identity. In summary, while federal law provides nationwide protection against discrimination, the lack of explicit state-level safeguards in many states leaves members of the LGBTQ community disadvantaged. State agencies, which interpret the law for transgender individuals in states without specific laws on transgender discrimination, may not consistently enforce the protections for transgender employees. Therefore, there is a need for consistent legislation in all fifty states to protect employees from discrimination based on sexual orientation and gender identity.

CONCLUSION

In conclusion, the legal landscape surrounding workplace protections for transgender individuals has undoubtedly seen significant progress, with various federal and state laws offering crucial safeguards

²⁷² See Rahrig, *supra* note 265, at 865 (discussing the exclusion of transgender individuals from health care coverage); see also *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/C2P5-UQ8U> (last visited Dec. 24, 2024).

²⁷³ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps> (including Idaho, Utah, Arizona, Wyoming, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Wisconsin, Mississippi, Alabama, Georgia, Florida, Virginia, and Pennsylvania).

against discrimination and harassment. Title VII of the Civil Rights Act of 1964, coupled with the landmark Supreme Court decision *Bostock v. Clayton County*, has expanded protections for transgender employees by explicitly recognizing discrimination based on gender identity as a form of sex discrimination.²⁷⁴ Additionally, many states have implemented their own non-discrimination laws, further bolstering protections for transgender individuals in the workplace.²⁷⁵ The state non-discrimination laws serve as essential tools in combating discrimination and fostering inclusive work environments where all employees can thrive. By prohibiting discrimination based on gender identity and expression, these laws send a clear message that discrimination against transgender individuals will not be tolerated and that everyone deserves equal opportunities in the workplace. State legislation, however, must be put in place for consistent interpretation of anti-discrimination laws by the judiciary at the state level.

Examining federal case law since *Bostock* illustrates the evolution of the judiciary's evaluation of the objective requirements to prove transgender discrimination under Title VII, which still appears to result in subjective outcomes. First, for a hostile work environment claim, plaintiffs must show multiple specific incidents of mistreatment, beyond being misgendered, including questions by co-workers, reassignment of duties, and not being allowed to use the bathroom.²⁷⁶ Specifically, more than ten incidents in two months would be considered frequent, but five incidents over eleven months would be considered infrequent. It is not clear if the number of incidents is somewhere in between.²⁷⁷ The court also looks at the severity of the treatment despite the plaintiff's objections and when the harassment involves a supervisor rather than peers or subordinates.²⁷⁸ A plaintiff's claim under Title VII may be

²⁷⁴ *Bostock*, 590 U.S. at 683.

²⁷⁵ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps>.

²⁷⁶ *Triangle Doughnuts*, 472 F. Supp. 3d at 129; see also *Faulkenberry*, 670 F. Supp. 3d at 254 (assessing the frequency and severity of the conduct, whether it was physically threatening or humiliating, and whether it interferes with the employee's work performance when evaluated a hostile work environment claim).

²⁷⁷ *Copeland*, 97 F.4th at 776; see also *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *8 (explaining that Plaintiff only cited a handful of instances of inappropriate questions and comments which the plaintiff did not report).

²⁷⁸ *Copeland*, 97 F.4th at 777; *City of Detroit*, 3 F.4th at 303 (dismissing the plaintiff's harassment claim because the employer conducted a reasonable investigation into the harassment claims even though the harasser was never identified).

subject to a \$300,000 cap for compensatory damages awarded for emotional pain and suffering and mental anguish, depending on the size of the organization that the plaintiff is making the claim against.²⁷⁹ Finally, a hostile work environment claim need not be sexual in nature or mention sexual harassment or sexual assault.²⁸⁰

Second, employers may be held strictly liable for hostile work environment claims when the plaintiff's supervisor is the harasser, which is an easier standard to meet than when a co-worker or a subordinate is the harasser.²⁸¹ These cases also demonstrate that employers may be held liable for sex discrimination if a co-worker who caused the transgender employee's firing had discriminatory intent. This falls under the "cat's paw liability," in which a supervisor is manipulated by the co-worker based on the co-worker's discriminatory motive.²⁸² An employer may also be liable for a hostile work environment created by the plaintiff's co-workers if the employer was negligent in controlling the work environment.²⁸³ Therefore, employers should implement procedures in which employees may report harassment or discriminatory behavior as well as policies for human resources to investigate the incidents, offer corrective opportunities to the victim, and impose repercussions on the harasser.

Third, plaintiffs must have a suitable comparator to prove a discrimination claim, which would include another employee who has the same supervisor, was subject to the same standards, and engaged in the same behavior but was treated differently.²⁸⁴ The transgender plaintiff must specifically allege the gender of the employees similarly situated to plead sex discrimination.²⁸⁵ Similarly, for a retaliation claim, the plaintiff must show that the same behavior of other employees did not result in the same adverse employment action.²⁸⁶ Additionally,

²⁷⁹ *Tudor*, 13 F.4th at 1045.

²⁸⁰ *Bravo Brio Rests. LLC*, 2024 U.S. Dist. LEXIS 102504 at *17.

²⁸¹ *Id.* at 15–16.

²⁸² *Kosak*, 2023 U.S. Dist. LEXIS 133299 at *36–37.

²⁸³ *Triangle Doughnuts*, 472 F. Supp. 3d at 131.

²⁸⁴ *Fedder*, 2023 U.S. Dist. LEXIS 230229 at *10; *Olivarez*, 997 F.3d at 600 (explaining that there was no allegation that a non-transgender employee with a similar job and supervisor and who engaged in the same conduct as Plaintiff was treated differently).

²⁸⁵ *Ponce*, 2023 U.S. Dist. LEXIS 83729 at *12.

²⁸⁶ *Faulkenberry*, 670 F. Supp. 3d at 260 (explaining that other employees not being escorted off the premises when they made threats of violence like Plaintiff were not similarly situated with Plaintiff's same combat experience and background).

plaintiffs need to establish a causal connection between the adverse employment action and the filing of a discriminatory action to prove retaliation.²⁸⁷

Despite these judicial interpretations of transgender employees' rights, challenges remain. Enforcement of existing nondiscrimination laws can vary widely; not all employers may be aware of their obligations or be willing to comply, and the judicial application of sex discrimination to transgender employees under Title VII is still evolving. Moreover, gaps in coverage still exist in sixteen states and two territories where explicit protections for transgender individuals are lacking.²⁸⁸ Additionally, transgender individuals continue to face disproportionate rates of discrimination, harassment, and violence in the workplace, highlighting the need for continued advocacy and vigilance.²⁸⁹

²⁸⁷ *City of Detroit*, 3 F.4th at 304.

²⁸⁸ *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN FOUND. (Nov. 14, 2024), <https://www.hrc.org/resources/state-maps> (including Idaho, Utah, Arizona, Wyoming, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Wisconsin, Mississippi, Alabama, Georgia, Florida, Virginia, and Pennsylvania).

²⁸⁹ See *Uniform Crime Report: Hate Crime Statistics, 2015*, FED. BUREAU OF INVESTIGATION, <https://perma.cc/NM83-2MCU> (last visited Aug. 19, 2024).

