



Food and Nutrition Service

DATE: May 5, 2022

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Braddock Metro Center

SUBJECT: Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update

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TO: Regional Directors
All Food and Nutrition Service Programs
All Regions

State Directors
All Food and Nutrition Service Programs
All States

Issuing Agency/Office:	FNS/Civil Rights Division
Title of Document:	Application of <i>Bostock v. Clayton County</i> in Program Discrimination Complaint Processing – Policy Update
Document ID:	
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Date of Issuance:	May 5, 2022
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Summary:	This memorandum clarifies prohibitions against discrimination based on sex in all FNS programs found in Title IX of the Education Amendments of 1972; the Food and Nutrition Act of 2008, as amended, Supplemental Nutrition Assistance Program (SNAP), formerly the Food Stamp Program (7 USC § 2011 et seq.); and related implementing regulations that prohibit discrimination on the basis of gender identity and sexual orientation. USDA/FNS issues this memorandum regarding processing discrimination complaints.

The United States Department of Agriculture’s (USDA) Food and Nutrition Service (FNS) Civil Rights Division issues this memorandum to provide direction to State agencies and program operators regarding processing program complaints that allege discrimination on the basis of gender identity and sexual orientation in programs or activities receiving Federal financial assistance from FNS.

Background

FNS enforces prohibitions on sex discrimination found in Title IX of the Education Amendments of 1972 (Title IX); the Food and Nutrition Act of 2008 (Food and Nutrition Act), as amended, Supplemental Nutrition Assistance Program (SNAP), formerly the Food Stamp Program 7 USC § 2011 et seq.; and related regulations. In June 2020, the U.S. Supreme Court held in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ____ (2020), that employment discrimination based on gender identity or sexual orientation constitutes prohibited discrimination based on sex under Title VII of the Civil Rights Act of 1964. In *Bostock*, the Court explained that when an employer

fires an employee for being gay or transgender, the employer fires that person “for traits or actions [the employer] would not have questioned in members of a different sex.” 140 S. Ct. at 1737. This means that “[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Id.* In other words, being gay or transgender is “inextricably bound up with sex.” *Id.* at 1742.

On January 20, 2021, President Biden issued Executive Order (EO) 13988, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” 86 Fed. Reg. 7023. The EO set out the Administration’s policy that all persons are entitled to dignity, respect, and equal treatment under the law, no matter their gender identity or sexual orientation. EO 13988 references the Supreme Court’s holding in *Bostock* and states that *Bostock*’s reasoning applies with equal force to other laws that prohibit sex discrimination “so long as the laws do not contain sufficient indications to the contrary.” EO 13988 directs Federal agencies to review laws and regulations that prohibit sex discrimination to determine whether they prohibit discrimination on the basis of gender identity and sexual orientation.

Processing Discrimination Complaints

USDA/FNS is committed to ensuring consistent and robust enforcement of Title IX and the Food and Nutrition Act, in furtherance of the commitment that every person should be treated with respect and dignity. In light of *Bostock*, FNS has evaluated the statutes it enforces and determined that discrimination based on gender identity and sexual orientation can constitute prohibited sex discrimination under Title IX and the Food and Nutrition Act. This interpretation is based on the Agency’s legal analysis of the statutory text of Title IX, the Title IX *Bostock* interpretations of the Departments of Justice and Education, the statutory text of the Food and Nutrition Act, and the reasoning set forth in *Bostock* and related caselaw.

As to Title IX, FNS concurs with and adopts the Department of Justice’s and Department of Education’s analyses concluding that Title IX’s prohibition on sex discrimination includes a prohibition on discrimination on the basis of gender identity and sexual orientation. *See* Pamela S. Karlan, Memorandum to Federal Agency Civil Rights Directors and General Counsels, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (March 26, 2021); Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

Regarding the Food and Nutrition Act, the text of the Act’s nondiscrimination provision is sufficiently similar to the language in Title VII that the *Bostock* court relied on in reaching its holding. First, the Act provides that “there shall be no discrimination by reason of . . . sex.” 7 U.S.C. § 2020(c)(1). Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of” an individual’s sex. 42 U.S.C. § 2000e-2(a). The phrases “because of” and “by reason of” are used synonymously. *See, e.g., Bostock*, 140 S. Ct. at 1739 (“And, as this Court has previously explained, the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’”) (cleaned up); *cf. Merriam-Webster*, <https://www.merriam-webster.com/dictionary/by%20reason%20of> (last visited Feb. 24, 2022) (defining “by reason of” to mean “because of” or “due to”). Furthermore, in his *Bostock* dissent, Justice Alito listed the Food and Nutrition Act nondiscrimination provision, 7 U.S.C. § 2020(c)(1), among a list of “[o]ver 100 federal statutes [that] prohibit discrimination because of sex” which he anticipated being impacted by the majority decision in *Bostock*. 140 S. Ct. at 1778, 1791 (Alito J. dissenting).

Second, the Food and Nutrition Act, like Title VII, focuses on protecting individuals from discrimination. Title VII expressly protects “any individual” from discrimination. The Food and Nutrition Act also focuses on individual households (“applicant households”), as opposed to program applicants as a whole (“In the certification of applicant households for the supplemental nutrition assistance program, there

shall be no discrimination by reason of . . . sex.”) 7 U.S.C. § 2020(c)(1). As the *Bostock* Court observed, this focus on individuals is significant because it is not a “defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall.” *Id.* at 1741. Similarly, it would not be a defense for a provider to argue that they should not be liable for discriminating against an individual applicant household based on sex because there is data showing that applicants as a whole receive assistance free of sex discrimination.

Thus, FNS concludes the focus on individual households and the prohibition of discrimination “by reason of” sex under the Food and Nutrition Act is sufficiently similar to Title VII such that the *Bostock* analysis applies to the Food and Nutrition Act. This means that the certification of applicant households for SNAP shall be conducted without discrimination on the basis of gender identity and sexual orientation.

State agencies and program operators should expeditiously review their program discrimination complaint procedures and make any changes necessary to ensure complaints alleging discrimination on the basis of gender identity and sexual orientation are processed and evaluated as complaints of discrimination on the basis of sex. State agencies and program operators are advised that the interpretation outlined in this memo does not determine the outcome in any particular case, which will depend on the specific facts and circumstances of that case. Any action taken by USDA in a specific case will take account of all relevant facts and legal requirements, including, where applicable, Title IX’s religious exemption, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb et seq., and any other applicable exemptions.

State agencies are reminded to distribute this memorandum to local agencies, Program Operators and Sponsors, and all other subrecipients of Federal financial assistance. Local agencies, Program Operators and Sponsors, and all other subrecipients should direct questions concerning this memorandum to their State agency. State agencies with questions should contact the appropriate FNS Regional Civil Rights Officer. The FNS Civil Rights Division is available to provide technical assistance as you ensure compliance with Title IX’s and the Food and Nutrition Act’s protections against sex discrimination.

Roberto Contreras
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Civil Rights Division
Food and Nutrition Service

Attachments

- 1/ Bostock Cover Letter
- 2/ Questions and Answers Related to CRD 01-2022 Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing – Policy Update

cc: Deputy Administrators
Regional Administrators
Regional Civil Rights Officers