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May 1, 2024

OFFICIAL OPINION 2024-03

The Honorable Mike Speedy
Indiana House of Representatives
200 W. Washington Street, Third Floor
Indianapolis, Indiana 46204

RE: Use of preferred pronouns in the workplace

Dear Rep. Speedy:

You requested an opinion from the Indiana Office of the Attorney General ("OAG") regarding the use of preferred pronouns in the workplace.

QUESTIONS PRESENTED

1. Does state or federal law require a co-worker to refer to a coworker by their preferred pronouns and new name?

2. Is an employer liable to an employee if a co-worker or customer/client of the employer refuses to refer to the employee by their preferred pronouns and new name?

BRIEF ANSWER

Neither state law nor federal law require a coworker to use the preferred pronouns and name of a fellow employee, and therefore, an employer is likely not liable for such conduct *if* a reasonable person would not find the work environment to be objectively hostile. *Bostock*'s holding was limited solely to the question of whether an employer may fire an employee based on the employee's sexual orientation or transgender *status*; it did not address the legality of related *conduct*. EEOC Guidance issued in 2021 on the matter has been found by two federal district courts to be an improper expansion of *Bostock* that places unenforceable duties on employers. No federal court has found occasional misuse of pronouns alone, even if intentional, to be actionable discrimination or create a hostile work environment under Title VII. However, repeated, continuous, intentional misuse could create such an environment under the right circumstances, and each case is looked at on an individual basis. Therefore, although not a violation of Title VII's

prohibition on sex discrimination, one should be mindful of whether such conduct could create a hostile working environment which would also give rise to an action under Title VII.

BACKGROUND

***Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020)**

In June 2020, the Supreme Court held that firing an individual for being homosexual or being a transgender person violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020). The Court found that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of'" and "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1739, 1741. When the dissent, the employers, and others worried that the ruling would be expanded "beyond Title VII to other federal or state laws that prohibit sex discrimination," the court responded:

> The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "discriminate against" refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id. at 1753. The Court specifically stated the holding was a narrow one—limited only to the instant practice of firing an individual because they are homosexual or transgender. It expressly declined to extend the holding beyond such instances as in the three cases before it.

Relevant Laws

Federal law

Title VII (42 U.S.C.A. § 2000e) of the Civil Rights Act of 1964:
Unlawful employment practices (42 U.S.C.A. § 2000e-2) reads, in relevant part:

> (a) Employer practices.
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

his status as an employee, because of such individual's race, color, religion, sex, or national origin. […]

<u>State law</u>

Indiana Code – Civil Rights Act (Ind. Code ch. 22-9-1 *et seq*.)

Ind. Code § 22-9-1-2 reads, in relevant part:

(a) It is the public policy of the state to provide all of its citizens equal opportunity for education, employment…and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

(b) The practice of denying these rights to properly qualified persons by reason of the…sex…of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices. The promotion of equal opportunity without regard to…sex…through reasonable methods is the purpose of this chapter.

(g) This chapter shall be construed broadly to effectuate its purpose.

Ind. Code § 22-9-1-3 reads, in relevant part:

(l) "Discriminatory practice" means:

(1) the exclusion of a person from equal opportunities because of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran;

(2) a system that excludes persons from equal opportunities because of race, religion, color, sex, disability, national origin, ancestry, or status as a veteran; […]

(q) "Sex" as it applies to segregation or separation in this chapter applies to all types of employment, education, public accommodations, and housing. However:

(1) it shall not be a discriminatory practice to maintain separate restrooms; […]

ANALYSIS

Employment Discrimination Claims under Title VII of the Civil Rights Act

Scope

Title VII bars discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. Title VII prohibits an employer from refusing to hire, depriving an individual of "employment opportunities or otherwise adversely affect[ing] his status as an employee, or otherwise discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment" because of the individual's color, race, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a).

Title VII protects job applicants, current employees (including full-time, part-time, seasonal, and temporary employees), and former employees; however, it does not generally apply to independent contractors. *See* 42 U.S.C.A. § 2000e(b). Title VII applies to both private-sector and state and local government employers with fifteen (15) or more employees, and to the federal government as an employer. *Id.* Title VII also applies to unions and employment agencies. Employers with fewer than fifteen (15) total employees are not covered by Title VII. Because it is a federal law, Title VII applies to eligible employers and protects covered employees regardless of state law or local ordinance.

An employer may be vicariously liable for actionable discrimination caused by a supervisor, but such conduct must be extreme to amount to a change in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Additionally, an employer may have an affirmative defense looking to the reasonableness of both the employer's conduct and the plaintiff. *Id.* Damages in a discrimination case can include compensatory and punitive damages, with certain limits based on the size of the employer, although age and wage-based sex-discrimination claimed are not eligible for compensatory or punitive damages but may be entitled to liquidated damages.[1] Actions can also be taken against the employer to make it stop the discriminatory practices, such as an injunction or agreement.[2]

Types of Title VII claims

Title VII sex discrimination claims can be alleged either through alleging discrimination "because of sex" or by alleging that conditions of employment created a hostile work environment.

Discrimination

> Title VII liability for discrimination "because of" sex is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women; instead, the law makes each instance of

[1] U.S. Equal Employment Opportunity Commission ("EEOC"), *Remedies for Employment Discrimination*, https://www.eeoc.gov/remedies-employment-discrimination (last accessed Feb. 12, 2024).
[2] *Id.*

> discriminating against an individual employee because of that individual's sex an independent violation of Title VII.

Bostock, 140 S. Ct. at 1742.

A plaintiff must carry the initial burden in a discrimination case. A complainant can establish a prima facie case by demonstrating that (1) they are a member of a protected group; (2) they suffered an adverse employment action; (3) the performance of their job duties met the employer's legitimate expectations at the time of such action; and (4) the position remained open or was filled by similarly qualified applicants outside of the protected class. *Membreno v. Atlanta Restaurant Partners, LLC*, 517 F.Supp.3d 425, 436 (D. Mary., 2021). However, if the fourth prong "does not shed any light on whether the employer treated the plaintiff adversely on account of discriminatory animus, the plaintiff is relieved of such burden." *Id*.

The *Membreno* court found that when a plaintiff raises allegations of discrimination based on their transgender status, "the elements of the sex and gender identity discrimination claims are the same," and the plaintiff must demonstrate they were fired because of their transgender status. *Id*. If the plaintiff successfully establishes a prima facia case, the defendant must offer a legitimate, non-discriminatory reason for plaintiff's termination. If the defendant can do so, then the plaintiff must produce sufficient evidence to raise a "genuine issue of fact as to whether Defendants' rationale is pretextual." *Id*. To demonstrate pretext, a plaintiff must offer evidence both that the defendant employer's reason was false, *and* that discrimination was the real reason for the adverse employment action. *Id.*

Hostile Work Environment

Another type of Title VII Claim is that the employer's actions created an atmosphere so severe or pervasive that such conduct, based on the employee's sex (including transgender status) created a work environment that a reasonable person would consider intimidating, hostile, or offensive.

A hostile work environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Id.* at 436-37. To establish a hostile work environment claim, the plaintiff must demonstrate that they experienced unwelcome misconduct based on sex or gender identity that was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere and is imputable to" the employer. *Id.* at 436. For conduct to violate Title VII, such severe or pervasive conduct must "alter the conditions of [the victim's] employment and create an abusive working environment'." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Determining whether a workplace is hostile or abusive will be fact-specific and will require "looking at all the circumstances," including the frequency and severity of the alleged discriminatory conduct; whether such conduct is "physically threatening or humiliating," or a "mere offensive utterance"; and whether the conduct "unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); *see also Teeter v. Loomis Armored US, LLC*, Not Reported in Fed. Supp. (E.D. N.C. 2021), 2021 WL 6200506 at *13.

In the same vein, Title VII does not establish a "general civility code." *Teeter*, 2021 WL 6200506 at *12. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Membreno*, 517 F.Supp.3d at 436-37; *see also Meritor*, 477 U.S. at 67 ("mere utterances" of an epithet is offensive but not severe enough to establish a hostile work environment claim (internal citations omitted)). In other words, a reasonable person in the plaintiff's position would have had to find the working environment "objectively hostile" in addition to the plaintiff's subjective opinion that the environment was hostile or abusive. *Teeter*, 2021 WL 6200506 at *12; *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). An offensive remark "generally will not create a hostile environment without significant repetition or an escalation in the harassment's intensity." *Id*.

<u>Bostock's holding was narrow and specific</u>

As noted, *supra*, *Bostock* held that an employer violates Title VII by firing an individual for being homosexual or being a transgender person, because such conduct is discriminating against an individual "because of" the individual's sex:

> …we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female. […] Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"

Bostock, 140 S. Ct. at 1739. The Court acknowledged that "homosexuality and transgender status are distinct concepts from sex," but further explained that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Id.* at 1746-47. While stating that "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them," the Court also was clear that *Bostock*'s holding was limited "to the question before" it: whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." *Id.* at 1746-47, 1753. The Court expressly declined to opine upon "sex-segregated bathrooms, locker rooms, and dress codes," astutely noting that "none of these other laws are before" it and it did not have "the benefit of adversarial testing about the meaning of their terms," before declining to "prejudge any such question" in *Bostock*'s holding. *Id.* at 1753.

> Firing employees because of a statutorily protected trait surely counts [as "'discriminating against'" an employee based on "distinctions or differences in treatment that injure protected individuals."]. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Id.

<u>Indiana's civil rights law does not include transgender as a protected class or in the definition of "sex"</u>

As a United States Supreme Court ruling, *Bostock* is binding on all states, including Indiana. The Court held that gender identity, including one's transgender status, is a protected characteristic under Title VII to the extent that firing an individual based on such status is a violation of Title VII's prohibition on sex discrimination. However, states may have additional, more stringent laws that provide additional protection to certain individuals.

Indiana's Civil Rights Act ("ICRA") can be found at Ind. Code ch. 22-9-1. The ICRA declares that the public policy of the state is to have an equal opportunity without regard to sex and other named immutable characteristics. Ind. Code § 22-9-1-2. In its plainest sense, "[e]very employment decision involves discrimination. An employer, when deciding whom to hire, whom to promote, or whom to fire, must discriminate among employees." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 838 (Ind. 2009). There are permissible bases for discrimination, including prohibited employee conduct (e.g., time clock fraud, attendance problems, workplace violence). *Id.* Unlawful discrimination is the unfavorable treatment of an individual based on certain classifications, including sex. *Id; see also* Ind. Code § 22-9-1-3(l) (defining "discriminatory practice"). Therefore, the basis for the employer's discrimination is the critical question in an employment discrimination case. *Id.* at 838-39. In construing the ICRA our courts have often looked to federal law for guidance. *Id.* at 839.

The ICRA, as applied to sex, "applies to all types of employment, education, public accommodations, and housing." Ind. Code § 22-9-1-3(q). However, there are exclusions, including that it is not "a discriminatory practice to maintain separate restrooms." Ind. Code § 22-9-1-3(q)(1). The ICRA's definition of "sex" does not include sexual orientation, gender identity, or transgender status as protected characteristics. *See generally* Ind. Code § 22-9-1-3. Likewise, the ICRA makes no reference to any of those characteristics as a protected class under the Act.

Therefore, while *Bostock*'s limited holding applies to Indiana and its employers covered under Title VII, the ICRA does not provide any additional protection to individuals based on gender identity or transgender status.

<u>June 15, 2021, EEOC Guidance</u>

On June 15, 2021, the EEOC issued its *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* ("Guidance"), a fact sheet explaining the "established legal positions on LGBTQ+-related matters, as voted by the Commission."[3] The Guidance "provides examples of employer conduct that would constitute discrimination under *Bostock* through a series of questions and answers. Specifically, the Technical Assistance Document purports to explain employers' obligations with respect to dress codes, bathrooms, locker rooms, showers, and use of preferred pronouns or names." *Tennessee v. U.S. Dep't of Educ.*

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[3] U.S. EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021), available at: https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender (last accessed Feb. 13, 2024).

et al., 615 F.Supp.3d 807, 818 (E.D. Tenn. 2022).[4] As the EEOC is responsible for the administration and enforcement of Title VII and other federal anti-discrimination laws impacting the workplace, employers and employees may consider the Guidance to be a proper interpretation of the current laws and feel compelled to abide by the Guidance. However, such reliance on the Guidance is in error as it does not possess the force of law and is not an accurate interpretation of the law under *Bostock*. Accordingly, it would be imprudent to allow specious Guidance to further national discourse on this issue, or to utilize the document to shape employment policies and practices in organizations.

Agency guidance is not legally binding on individuals to whom it applies or the courts

Although the EEOC states that the Guidance "explains the EEOC's established legal positions," guidance issued by a federal agency does not have the force of law. It does not bind a court "as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). However, courts do recognize the agency's "specialized experience" and acknowledge that such guidance provides the "policy which will guide applications for enforcement by injunction on behalf of the Government." *Id.* at 139-40. While "not controlling," courts generally recognize that agency guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (discussing EEOC Guidelines on sexual harassment as a form of sex discrimination under Title VII); *see also Skidmore*, 323 U.S. at 139-40. As discussed in more detail *infra*, however, the Guidance itself is questionable and is legally tenuous by advancing unsupportable—and unlawful—theories and conclusions.

Validity of June 15, 2021, Guidance is questionable

Even though the Guidance purports to explain "what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country," the EEOC even acknowledges, this "publication in itself does not have the force and effect of law and is not meant to bind the public in any way. It is intended only to provide clarity to the public regarding existing requirements under the law."[5] This statement certainly can be confusing to an employee or employer who also sees that the same Guidance states it is the established legal position of the agency.

Concern over the effect of the Guidance on affected employers and the States caused several states to bring legal challenges to the Guidance after it was issued, a fact acknowledged within the Guidance itself.[6] In July 2022, a federal district court preliminarily enjoined the EEOC from implementing the Guidance as to the plaintiffs—including Indiana—in the *Tennessee case*, and in October 2022, a federal district court vacated it in *Texas v. EEOC et al.*[7] *The Tennessee district court noted that* the Guidance "purports to define the legal obligations of those subject to Titles VII and IX" and that "private litigants are relying on Defendants' guidance to challenge Plaintiffs' state laws." *Tennessee*, 615 F.Supp.3d at 828-29. This left the Plaintiff States in an

[4] Indiana was a plaintiff State in this action.
[5] *Supra*, note 3.
[6] *Id.*
[7] The other Defendants in this case were the Health and Human Services' ("HHS") Office of Civil Rights.

untenable position, to "either forgo the enforcement of their conflicting state laws to comply with the allegedly unlawful guidance or violate the guidance and risk significant legal consequences—an enforcement action, civil penalties, and the loss of federal funding." *Id.*

The *Tennessee* court found that "Defendants' guidance documents advance *new* interpretations of Titles VII and IX and impose *new* legal obligations on regulated entities." *Tennessee*, 615 F.Supp.3d at 833. Similarly, the *Texas* court found that "[t]he Guidances and Defendants misread *Bostock* by melding 'status' and 'conduct' into one catchall protected class covering all conduct correlating to 'sexual orientation' and 'gender identity.' Justice Gorsuch expressly did not do that." *Texas v. EEOC et al.*, 633 F.Supp.3d 824, 831 (N.D. Texas, 2022). The court further pointed out that the central question to the case was whether *Bostock*'s holding was limited to "homosexuality and transgender *status*" or extended to "correlated *conduct* — specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices." *Id.* at 829-30. The court found that the Guidance overreached by improperly expanding *Bostock*'s holding to conduct rather than just status and invalidated them. *Id.* at 847.

Based on these two cases, especially the *Tennessee* case where Indiana was a plaintiff State, it is clear the Guidance does not have the force of law and was an impermissible overstep of agency authority for the EEOC to issue it. Therefore, although it is generally wise to follow agency guidance, in this case, at least two courts have found that the Guidance is unlawful and is thereby useless. Because it is not in compliance with the current state of the law, the Guidance is not an authoritative document that an employer or employee should look to for compliance with Title VII under *Bostock*.

Referring to someone by a non-preferred pronoun is not expressly prohibited by the ICRA or Bostock's holding

As established *supra*, *Bostock*'s holding was limited to the narrow question of whether an employer can fire an employee for being homosexual or transgender; the answer is no, as that is a violation of Title VII's prohibition on "discrimination on the basis of sex." Moreover, the EEOC's Guidance has been held to be an improper interpretation of *Bostock* and, therefore, not authoritative guidance. Additionally, the ICRA does not cover gender nonconforming individuals as a protected class. Therefore, it is unlikely that mere use of a non-preferred pronoun will rise to the level of actionable discrimination under Title VII.

Even though referring to someone by non-preferred pronouns or a non-preferred name is not a form of discrimination under Title VII or the ICRA, an employer should still be aware of whether such references could give rise to a hostile work environment claim as set forth, *supra*. There are no examples in case law where the (mis)use of an employee's pronouns alone has been held to have created a hostile work environment pursuant to Title VII. However, many of these cases at least imply that repeated use of non-preferred pronouns and names could result in such an outcome, if the conduct is "severe or pervasive enough." Although not binding on courts, the EEOC acknowledges in guidance (separate from the invalidated June 2021 Guidance) that, "Although accidental misuse of a transgender employee's preferred name and pronouns does not

violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment."[8]

As noted *supra*, to establish a hostile environment claim, the conduct must be "severe or pervasive enough" such that "a reasonable person would find hostile or abusive"; conduct that does not create "an objectively hostile or abusive work environment…is beyond Title VII's purview." *Harris*, 510 U.S. at 21-22 (1993) (quoting *Meritor*). "Rude treatment" by fellow employees is not sufficient to be an actionable Title VII claim. *Faulkenberry v. U.S. Dept. of Defense*, --- F.Supp.3d ---- (D. Mary. 2023), 2023 WL 3074639 at *10. However, being "regularly misgendered" combined with other conduct *may* give rise to a hostile environment claim. *See Doe v. Triangle Doughnuts, LLC*, 472 F.Supp.3d 115 (E.D. Penn. 2020) (Plaintiff's colleagues, supervisors, and customers "regularly misgendered" her with a male name and pronouns despite her requests; she was prohibited from using the women's restroom; her job duties were changed so she was not in view of customers; she was subject to a stricter dress code than other employees; and she was terminated.).

Contrast *Doe* to *Faulkenberry*, where "offhand comments[ ] and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment…Rather, a hostile work environment is one that is permeated with discriminatory intimidation, ridicule, and insult." *Faulkenberry*, 2023 WL 3074639 at *10. The Faulkenberry court pointed out that "a mere handful of incidents, none [of which] are physically threatening although she was offended by her co-worker's references to 'him' or 'he' rather than 'her' or 'she,'" do not give rise to conduct that is "severe or pervasive enough to plausibly describe a hostile work environment." *Id.* at *11 (internal citations omitted). Sporadic misgendering does not "meet the "extremely serious" standard described" to establish a hostile work environment claim. *Id.*

"Title VII provides redress only to those whose working conditions are 'so out of the ordinary as to meet the severe or pervasive criterion,'" and a handful of "uses of feminine pronouns and single profane insult" do not "approach the severity or frequency of harassment" required to be actionable under Title VII, nor does "approximately ten such comments spread over three-to-four months…alter the conditions of employment and create an abusive working environment." *Teeter*, 2021 WL 6200506 at *13, 14. Therefore, a court will look at the frequency and severity of the misuse of pronouns and preferred name, as well as other surrounding circumstances related to the employee's job duties and performance, to analyze whether the employee has established a Title VII claim. So, while the use of non-preferred pronouns and names are not discriminatory per se, repeated and continued use may be a basis on which to establish a hostile work environment claim under Title VII.

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[8] EEOC, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, available at: https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination (last accessed Feb. 13, 2024). The EEOC issued additional guidance on Apr. 29, 2024, with additional comments and examples on discrimination based on sexual orientation and gender identity (EEOC, *Enforcement Guidance on Harassment in the Workplace*, available at: https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftn42; last accessed Apr. 29, 2024); however, this guidance and the examples therein do not substantively alter the analysis in this Opinion that thus far, case law has not found that misgendering, standing alone, establishes a hostile work environment, but implies that if the conduct is severe or pervasive enough, a complainant potentially could establish such claim.

CONCLUSION

Neither state law nor federal law require a coworker to use the preferred pronouns and name of a fellow employee, so it is unlikely an employer would be liable for such conduct, provided a reasonable person would not find the work environment to be objectively hostile. *Bostock*'s holding was limited to whether an employer may fire an employee based on the employee's sexual orientation or transgender status and did not address conduct or behavior apart from termination. Currently, two federal district courts have invalidated or enjoined the EEOC's guidance on the matter because they found the EEOC improperly issued the Guidance and it was an unlawful expansion of *Bostock*'s holding, thereby overstepping the regulatory authority of the agency. Courts have not found the occasional misuse of pronouns alone, even if intentional, to be actionable discrimination or to create a hostile work environment under Title VII. However, each case is looked at on an individual basis, so it is possible that there may be a situation where such misgendering could create a hostile work environment. Thus, although refusing to use preferred pronouns and name is not a violation of Title VII's prohibition on sex discrimination, one should be mindful of whether such conduct could create a hostile working environment which could be actionable.

Sincerely,

Todd Rokita
Attorney General of Indiana

William H. Anthony, Chief Counsel, Advisory
Christopher M. Anderson, Asst. Chief Counsel
Hilari A. Sautbine, Supervising Dep. Attorney General