

## Guidance from The Kansas Human Rights Commission on Sex Discrimination in Employment, Public Accommodations, and Housing

The Kansas Human Rights Commission [“KHRC” or “Commission”] provides this guidance to state its current approach to and interpretation of law. The KHRC will follow the United States Supreme Court’s holding in *Bostock v. Clayton County*, 590 U.S.\_\_\_\_ (2020) and apply it to the Kansas Act Against Discrimination, K.S.A. 44-1001 *et seq.* [“K AAD”].

*Bostock* analyzed the sex discrimination language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) [“Title VII”], which prohibits discrimination “because of such individual’s ... sex.” *Bostock* held that this language prohibits discrimination on the basis of homosexuality and transgender status, stating (Slip op. at 9):

An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

Based on the *Bostock* analysis of Title VII, and identical wording of the KAAD, the Commission believes the KAAD prohibits sex discrimination due to any individual’s sex, without regard to heterosexual, homosexual, bisexual, transgender, queer or any other subcategory or derivative of the word “sex.” Like the Title VII language analyzed in *Bostock*, the KAAD by its own statutory language prohibits discrimination against any individual “because of...sex.” It states no exceptions or exclusions to the term “sex.” K.S.A. 44-1009(a) (employment); K.S.A. 44-1009(c) (public accommodations); K.S.A. 44-1018 (housing).

The Commission further believes that no new or additional regulations are needed to make this interpretation enforceable law. That is because the statutory language of the KAAD is unambiguous and itself requires this result. Additional explanation and authorities follow. [Note also, as discussed below, that there are some situations that do not fall under this guidance because they are by statute excluded from KAAD coverage.]

### **The Kansas Supreme Court uses the same statutory analysis as was used in *Bostock*:**

As the Kansas Supreme Court stated in *Taylor v. Kobach*, 300 Kan. 731,735-36 (2014):

We have often expressed that the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used. See *Gannon v. State*, 298 Kan. 1107, 1143, 319 P.3d 1196 (2014) (citing *Wright v. Noell*, 16 Kan. 601, 607, 1876 WL 1081 [1876]); *Vontress v. State*, 299 Kan. 607, 611, 325 P.3d 1114 (2014). If the makers’ language is plain and unambiguous, there is no need to use canons of construction or legislative history or other background considerations to construe the legislature’s intent. See *In re A.M.M.-H.*, 300 Kan. 532, 331 P.3d 775, 777-78 (2014).

That is the same statutory interpretation standard the United States Supreme Court used in *Bostock* (slip op. at 24, emphasis in original, citations omitted):

This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting *ambiguous* statutory language. But that has no bearing here.

**Kansas courts follow Title VII caselaw in interpreting the KAAD:**

The Kansas appellate courts have consistently and repeatedly held that analysis of the KAAD is based on and follows the federal courts' analysis and holdings in Title VII cases. An example, is *Garvey Elevators, Inc. v. Kansas Human Rights Commission*, 265 Kan. 484, 493 (1998), where the Kansas Supreme Court stated (regarding the KAAD prohibition on race discrimination):

K.S.A. 44-1009(a)(1) of the Act provides: "It shall be an unlawful employment practice:

"(1) For an employer, because of the race ... of any person to refuse to hire or employ such person, to bar or discharge such person from employment or to otherwise discriminate against such person in compensation or in terms, conditions or privileges of employment."

Title VII of the federal Civil Rights Act of 1964 § 703(a)(1) makes it illegal "to discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a) (1994). **Given the similarity of the language of the state and federal provisions, it is appropriate to look to federal civil rights jurisprudence for general rules of construction.**

(Emphasis added.) Likewise, the federal courts in Kansas and federal Tenth Circuit Court of Appeals (which encompasses Kansas) have also applied Title VII analysis to the KAAD. For example, the Tenth Circuit stated in *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1372 n.4 (10<sup>th</sup> Cir. 1997):

The standards governing sexual harassment claims under the Kansas statute are identical to those under Title VII in any event. *Ulrich v. K-Mart Corp.*, 858 F.Supp. 1087, 1091 n. 4 (D.Kan.1994); see also *Reber v. Mel Falley, Inc.*, 235 Kan. 562, 683 P.2d 1229, 1230-32 (1984).

Likewise, the federal district court for Kansas has held:

Same-sex harassment is recognized under Title VII. Because such claims are analyzed the same under Title VII and the KAAD, the Court's analysis under Title VII applies to Plaintiff's claims under the KAAD, as well.

*Budenz v. Sprint Spectrum, L.P.*, 230 F. Supp.2d 1261, 1272 (D. Kan. 2002).

For further understanding of the reader, a link to the full *Bostock* decision is provided below. Also provided here are key excerpts from the decision that provide more detailed explanations of the court's reasoning and holdings.

**Supreme Court's reasoning in *Bostock*:**

Title VII prohibits employment discrimination against “any individual because of such individual’s .... sex ....” 42 U.S.C. § 2000e-2(a)(1). A “but for” standard is applied, so that a defendant cannot avoid liability just because some other factor also contributed to (or even was more important than sex) in making the adverse employment decision--i.e., “but for” the sex of the individual, the non-hiring, firing, discipline or other employment action would not have occurred. As the Supreme Court explained in *Bostock*:

From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, **if changing the employee’s sex would have yielded a different choice by the employer— a statutory violation has occurred.** Title VII’s message is “simple but momentous”: An individual employee’s sex is “not relevant to the selection, evaluation, or compensation of employees.” *Price Waterhouse v. Hopkins*, 490 U. S. 228, 239 (1989) (plurality opinion).

The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. **Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.** Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.

(Slip op. at 9-10, emphasis added.) Because Title VII explicitly refers to “individuals,” an employer’s comparable treatment of groups of men and groups of women will not prevent liability. As the Supreme Court explained (slip op. at 21, emphasis added):

The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer’s challenged adverse employment action. But both of these premises are mistaken. **Title VII’s plain terms and our precedents don’t care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn’t diminish but doubles its liability.** Just cast a glance back to *Manhart*, where

it was no defense that the employer sought to equalize pension contributions based on life expectancy. Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.

**Link to U.S. Supreme Court's Decision in *Bostock v. Clayton County*:** [Click Here](#)

**KAAD coverage exclusions:** The above guidance does not apply to some employers, some accommodations and some housing situations. The following list is a summary. The KAAD statutes should be referenced for full information and more details on the exceptions.

**Employment:** An employer with fewer than four employees. K.S.A. 44-1002(b) is not covered. An employer that is "a nonprofit fraternal or social association or corporation" is not covered. K.S.A. 44-1002(b). An individual "employed by such individual's parents, spouse or child or in the domestic service of any person" is not covered. K.S.A. 44-1002(c). An employer that is "a religious or private fraternal and benevolent association or corporation" is not covered. K.S.A. 44-1002(i).

**Public accommodations:** Public accommodations do not include a religious or nonprofit fraternal or social association or corporation. K.S.A. 44-1002(h). A public accommodation that is "a religious or nonprofit fraternal or social association or corporation" is not covered. K.S.A. 44-1002(h). *See also* K.S.A. 44-1002(i) (stating that the term "unlawful discriminatory practice" shall not apply to "a religious or private fraternal and benevolent association or corporation.") Note an exception, however: A "nonprofit recreational or social association or corporation" is covered and discrimination is prohibited "if such association or corporation has 100 or more members and: (A) Provides regular meal service; and (B) receives payment for dues, fees, use of space, use of facility, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers. K.S.A. 44-1002(i)(2).

**Housing:** K.S.A. 44-1018 provides detailed exceptions from KAAD housing coverage. These include exceptions for religious organizations that operate non-commercial housing, and for nonprofit private clubs that are in fact not open to the public and operate non-commercial lodging. K.S.A. 44-1018(a). Except for the prohibitions against discriminatory advertising, the KAAD does not apply to the sale or rental of a single-family house by the owner if certain conditions are met; and does not apply to units in buildings that contain living quarters intended to be occupied by no more than four families, if one of the four units is occupied by the owner as the owner's residence. K.S.A. 44-1018(b).

This Guidance from The Kansas Human Rights Commission on Sex Discrimination in Employment, Public Accommodations, and Housing was adopted by the Kansas Human Rights Commission at its regular meeting held on September 18, 2020.

Attested to:

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