EEOC and Transgender Employee Win Big In Sixth Circuit

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On March 7th, in a highly anticipated opinion, the Court of Appeals for the Sixth Circuit held that discrimination on the basis of transgender status and gender transitioning violates Title VII of the federal Civil Rights Act of 1964, as amended (Title VII). The court overturned a lower court decision that had found a narrow "religious freedom" exception allowing termination of a transgender employee. *EEOC v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424, 2018 WL 1177669 (6th Cir. March 7, 2018).[1]

The Sixth Circuit held that the funeral home had fired its transgender employee from the position of funeral director in violation of Title VII because of her failure to conform to sex stereotypes. The court based its holding on direct statements by the owner of the funeral home showing that bias against transgenders motivated the employer's decision to terminate the employee transitioning from male to female. Contrary to the lower court, the Sixth Circuit held that an employee could bring a Title VII claim based on transgender and transitioning status and, based on the record before it, granted summary judgment to the Equal Employment Opportunity Commission (EEOC), finding that the employer had unlawfully discriminated under Title VII when it fired the gender-transitioning employee.

The Facts in Brief: In advance of a planned vacation, the transgender employee (Aimee Stephens) provided the owner (Thomas Rost) with a very candid letter, explaining that 1) she had struggled with gender identity disorder all of her life, 2) she had decided upon sex reassignment surgery, and 3) as a first step in gender transition she would "begin to live and work as a woman" for a year when she returned from vacation. Before she could leave on her planned vacation, Rost fired Stephens, after she declined to sign a severance agreement offered on condition that she "[agree] not to say anything or do anything." Rost explained that he had terminated Stephens because "he was no longer going to represent himself as a man. He wanted

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to dress as a woman."

Rost defended his action in part on the bases of his customers' preference and his belief that the Bible teaches that a person's sex is an immutable God-given gift, and that he would violate God's commands if he "permit[ted] one of [the] male funeral directors to wear the uniform for female funeral directors while at work." The court noted, in considering this argument, that the funeral home had not employed a single female funeral director since 1950, when Rost's grandmother retired.

EEOC Charge and Lawsuit: After Rost fired Stephens, she filed an EEOC charge. The EEOC investigated and then issued a reasonable cause determination. Conciliation efforts failed, and the EEOC filed suit. After discovery, the EEOC and the funeral home filed cross-motions for summary judgment. The funeral home won and the EEOC lost in the lower court.

Teachable Moments from the Case: Among other notable "teachable moments," the Sixth Circuit opinion:

- reaffirmed prior case law finding "no reason to exclude Title VII coverage for non-sex stereotypical behavior simply because the person is a transsexual";
- reaffirmed that impermissible sex stereotyping occurs when an employer fires an employee for not conforming to sex stereotypes on how a man or a woman should look and behave;
- reasoned that discriminating against an employee because of transgender status imposes the employer's stereotypical notions of how biological sex and gender identity ought to align;
- concluded that "Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait";
- reaffirmed that the federal Religious Freedom Restoration Act (RFRA) only applies to suits in which the government is a party, so that if Stephens had initiated a private lawsuit under Title VII, the funeral home could not invoke RFRA as a defense;
- held that "a religious claimant cannot rely on customers' presumed biases" to establish that the EEOC's enforcing Title VII's goal of eradicating discrimination in the workplace would constitute a substantial burden under the RFRA;
- held that "tolerating [a transgender's] understanding of her sex and gender identity is not tantamount to supporting it"; and
- rejected the employer's RFRA defense, concluding that 1) enforcing Title VII's purpose of combating and eradicating discrimination in the workplace is a compelling government interest; and 2) eliminating employer sex stereotyping is the least restrictive means of achieving that interest.

Practical Considerations for Employers: Given the *RG & GR Funeral Homes* decision on transgender and gender transitioning status, recent decisions by the federal courts of appeal (governing various states)[2] holding that Title VII forbids discrimination based on sexual orientation, and various state and local ordinances banning such discrimination, employers should revisit whether they have

operations in states or localities subject to such anti-discrimination laws.

Employers should review their employment policies and handbooks to take into account additional protected statuses in their places of operation. They may also consider adjusting their sexual harassment training to reflect those statuses. Public sector employers may also wish to review their Title IX policies and procedures in light of these recent decisions and state and local ordinances.

Employers with issues, concerns or questions about the Sixth Circuit decision, the recent decisions by three other federal appeals courts, their state ordinances, their local laws and the impact of this new legal landscape on their employment policies and practices should contact the authors of this article or any Butzel Long Labor and Employment attorney.

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[1] The Sixth Circuit governs Michigan, Ohio, Kentucky, and Tennessee.

[2] *Hively v. Ivy Tech Comty. College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (governing Illinois, Indiana and Wisconsin); *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018) (employee may bring sex-plus claim where "plus" is sexual orientation status) (governing Maine, Massachusetts, New Hampshire, and Puerto Rico); *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir., 2.26.2018) (governing New York, Connecticut, and Vermont).