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Sixth Circuit Rules in Favor of Terminated Transgender Employee, Holds Title VII Trumps Religious Beliefs

Last week the U.S. Court of Appeals for the Sixth Circuit, covering Michigan, Ohio, Kentucky and Tennessee, ruled that a funeral home unlawfully discriminated against an employee by firing her for being a transgender person. The case, *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, represents an evolution in sex discrimination law.

Plaintiff, who was biologically male, worked for the Defendant Funeral Home as its funeral director. Plaintiff one day presented the owner of the Funeral Home with a letter explaining that Plaintiff was transgender and, upon return from an upcoming vacation, would begin outwardly living and presenting as a woman. The owner terminated Plaintiff a week later, before the vacation was scheduled to begin.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), and the EEOC subsequently filed suit on Plaintiff's behalf against the Funeral Home. During the litigation, the Funeral Home's owner confirmed he terminated Plaintiff because of the owner's religious belief that transgender persons and persons seeking to change their sex were acting against God's will.

The lower court ruled in favor of the Funeral Home, finding that the EEOC had properly stated a discrimination claim based on the Plaintiff's failure to conform to traditional gender stereotypes, but that the Funeral Home had a defense stemming from the Religious Freedom Restoration Act, based on the owner's religious beliefs. The Sixth Circuit reversed, and ruled Plaintiff was unlawfully discriminated against and that the Funeral Home will be liable.

Sex Stereotyping Claim

The Sixth Circuit first agreed with the lower court that the EEOC had properly stated a sex discrimination claim based on Plaintiff's failure to conform to traditional gender stereotypes. This theory of sex discrimination originated in the 1989 U.S. Supreme Court case *Price Waterhouse v. Hopkins*, where the Supreme Court held that a woman claiming she was overlooked for a promotion because she acted and dressed in a more stereotypically aggressive and masculine manner, as opposed to a more traditionally feminine manner, could bring a sex discrimination claim. The Supreme Court confirmed that sex discrimination encompasses more than just the biological differences between the sexes, holding that Title VII requires "gender [to] be irrelevant to employment decisions." Although *Hopkins* did not involve a transgender plaintiff, most courts have by now applied the *Hopkins*' "sex stereotyping" theory to hold that transgender persons living outwardly as a sex different than their biological gender can bring a sex discrimination claim.

Transgender Persons Now a Protected Class Under Title VII

The Sixth Circuit went further, however, and held that not only did Plaintiff have a viable claim based on a sex stereotyping theory, but also had a claim because Title VII prohibits "discrimination on the basis of transgender and transitioning status." Citing to the landmark 2017 Seventh Circuit decision *Hively v. Ivy Tech Community College of Indiana* that held homosexuality is a protected characteristic under Title VII, the Sixth Circuit said "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." This represents a significant evolution in the law, and makes the Sixth Circuit the first federal appellate court to hold that transgender status is a protected class under Title VII's prohibition against sex discrimination. The Court's analysis also signaled a willingness to follow *Hively* and the federal appeals court in New York that have held homosexuality is a protected characteristic, if the Sixth Circuit is given the opportunity.

The Government's Interest in Enforcing Discrimination Laws Trumps Religious Beliefs

Because Plaintiff had viable claims under both a sex stereotyping theory, because she was a member of a protected class, and because the Funeral Home owner admitted he fired Plaintiff for being transgender, the Court ruled Plaintiff should win the lawsuit unless the Funeral Home had some other viable defense. The Funeral Home claimed that the owner's religious beliefs were entitled to deference under the Religious Freedom Restoration Act. Although the lower court had agreed and granted judgment in the Funeral Home's favor on this basis, the Sixth Circuit reversed.

Passed by Congress in 1993, the Religious Freedom Restoration Act (RFRA) forbids the government from enforcing a law against anyone if that law would substantially burden the individual's religious exercise and that law is not the least restrictive way to further a compelling government interest. In other words, if a law would prevent someone from worshipping as they choose, the government cannot enforce that law against the individual without showing that law works to further a significant goal and there is no less burdensome way for the government to achieve that goal. RFRA is only a defense to litigation where the government is a party, but since here the EEOC had filed suit on Plaintiff's behalf, the Funeral Home could invoke RFRA. The lower court had found that the EEOC could have pursued a compromise that would not so burden the Funeral Home owner's beliefs—that the Plaintiff would return to work and the Funeral Home would adopt a gender-neutral dress code so Plaintiff's mode of dress would not offend the owner's religious views.

The Sixth Circuit disagreed. First, the Court held the Funeral Home owner's religious beliefs would not be substantially burdened by being forced to retain a transgender employee, because *tolerating* Plaintiff's status as a transgender person is not tantamount to *endorsing* it. The Court noted that the owner employed people of various faiths, and the mere fact of that employment did not mean the owner endorsed the beliefs of those various faiths. Second, the Court held that enforcement of discrimination laws is, as a matter of

law, the least restrictive means of furthering the government's compelling interest in ending discrimination. In other words, absent a specific statutory exemption, an individual's religious beliefs can never legally justify discrimination.

Conclusion

This decision marks two important evolutions in the law in the Sixth Circuit: (1) transgender persons are now a protected class in this Circuit, and the Court may be willing to add homosexuality as a protected characteristic if given the opportunity; and (2) religious beliefs generally must give way before discrimination laws. This decision provides additional guidance to employers trying to navigate what can sometimes be divisive issues in today's workplace. If you have questions about employment law compliance, please contact [Matthew Wagner](#) or any other member of Frost Brown Todd's [Labor & Employment Practice Group](#).

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