

# Sixth Circuit Joins Other Circuits in Expanding Definition of Sex Discrimination under Title VII

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## Introduction

Several federal circuit courts, including the Second, Fourth, Sixth and Seventh Circuits, have recently expanded the meaning of protection from discrimination based on one's sex, under Title VII of the Civil Rights Act of 1964, relating to sexual orientation and being transgender. These cases represent a shift in the way courts historically viewed discrimination based on sex, and make clear that sex discrimination now includes discrimination based upon sexual orientation and/or being transgender.

Recently, the Sixth Circuit also addressed this question, and whether the Religious Freedom Restoration Act excuses otherwise impermissible gender discrimination against an employee who announces an intention to transition to another gender. This article will explain the Sixth Circuit's ruling on both issues, and discuss best practices for employers in the wake of this and other rulings expanding the definition of sex discrimination under Title VII.

## ***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 2018 U.S. App. LEXIS 5720, \*1 (6th Cir. March 7, 2018)***

Aimee Stephens (formerly known as Anthony Stephens) was hired by R.G. & G.R. Harris Funeral Homes, Inc. ("the funeral home") as an apprentice in October 2007. In April 2008, Stephens was promoted to the position of Funeral Director/Embalmer. Stephens held that job until August 2013. During this time, Stephens lived and presented as a man and was known by her birth name as William Anthony Beasley Stephens.

By way of background, the funeral home is a closely held for-profit corporation that is primarily owned and operated by Thomas Rost. The funeral home "is not affiliated with any church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day including Christian holidays; and it serves clients of all faiths." However, Rost describes himself as a long-practicing Christian and stated that he believes "God has called him to serve grieving people." Rost further stated

that he "sincerely believes that the Bible teaches that a person's sex is an immutable God-given gift," rather than a "changeable social construct."

On July 31, 2013, Ms. Stephens provided Mr. Rost with a letter stating that she had struggled with "a gender identity disorder her entire life" and that she intended to undergo sex reassignment surgery to become a woman. In order to have the surgery, Ms. Stephens explained that she first needed to live and work full-time as a woman for at least a year. Therefore, Ms. Stephens informed Mr. Rost that after an upcoming vacation, she intended to return to work as Aimee Stephens and thereafter dress and present as a woman in the workplace.

Mr. Rost responded by firing Ms. Stephens just before she left on vacation. Rost admitted during his deposition that he fired Ms. Stephens because "he was no longer to represent himself as a man [and because] [h]e wanted to dress as a woman." Mr. Rost offered Ms. Stephens a severance agreement if she "agreed not to say anything or do anything." Ms. Stephens refused, and filed a sex-discrimination complaint with the Equal Employment Opportunity Commission (EEOC).

## ***The EEOC Charge and Determination***

In the course of its investigation, the EEOC learned that the funeral home imposed a dress code for all "public-facing employees." Men were required to wear suits and ties, while women were required to wear skirts and business jackets. The funeral home provided its male employees (including funeral directors) with free suits and ties and would replace suits as needed, at no cost to the employee. The funeral home did not, at that time, provide female employees with any sort of clothing or clothing allowance. (Note: the funeral home began offering female employees a clothing stipend in October 2014, after the EEOC initiated suit against it).

The EEOC determined that the funeral home discharged Ms. Stephens due to her sex and gender identity, in violation of Title VII, and that the funeral home further

discriminated against female employees by providing a clothing allowance to male employees without a similar benefit to female employees. The parties were unable to resolve their dispute through the conciliation process, and the EEOC filed suit against the funeral home in the District Court for the Eastern District of Michigan in September 2014.

## ***The District Court's Ruling in Favor of the Funeral Home***

In response to a motion to dismiss by the funeral home, the district court narrowed the scope of the EEOC's claims. Specifically, the court held that the EEOC could not state a claim for discrimination based on Ms. Stephens's transgender status, because being transgender did not qualify for protection under Title VII. However, the court agreed that the EEOC could pursue a claim against the funeral home for firing Ms. Stephens based on her failure to conform to the funeral home's "sex-or-gender-based preferences, expectations, or stereotypes."

After the parties filed cross-motions for summary judgment, the court determined that the funeral home had terminated Ms. Stephens based on her sex (and failure to conform to gender stereotypes) in violation of Title VII. However, the court went on to hold that the EEOC could not enforce Title VII as to the funeral home under the Religious Freedom Restoration Act, because forcing the funeral home to continue to employ Ms. Stephens as a woman would substantially burden Mr. Rost and/or the funeral home's exercise of religious freedom.

The court further held that the EEOC had failed to demonstrate that enforcing Title VII in regards to the funeral home was the least restrictive means of achieving the EEOC's compelling interest in ensuring that Ms. Stephens was not subjected to discrimination based upon her sex/failure to conform to sex stereotypes.

## ***Sixth Circuit Reverses the District Court***

On appeal, the Sixth Circuit held that the district court correctly determined that Ms. Stephens was terminated based upon

her failure to conform to sex stereotypes, in violation of Title VII. However, the court found that the district court erred in holding that Ms. Stephens could not also assert a discrimination claim based upon her transgender status, stating: “Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the funeral home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.”

In discussing the basis for its opinion, the court expressly rejected the funeral home’s argument that its dress code policy did not violate Title VII because the policy imposed the same burden on male and female employees (i.e. because each sex was required to adhere to a certain dress code.) The central issue was not, the court explained, whether the policy imposed a disparate burden on one sex or another. Rather, “an employer [may engage] in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave.”

Here, Rost admitted that he fired Ms. Stephens because she wished to comply with the funeral home’s dress code for women. The problem arose because Rost viewed Ms. Stephens as a man. Ms. Stephens would obviously have not been fired if she was a [biologically born] woman trying to comply with the dress code for women; thus, sex was obviously a motivating factor in Ms. Stephens’s termination, which is prohibited by Title VII.

In holding that the funeral home violated Title VII by firing Ms. Stephens for her transgender status, the Sixth Circuit joined several other circuit courts who also held in recent years that Title VII’s prohibition against sex discrimination extends to discrimination based on one’s sexual orientation and transgender status.

See e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, (holding that Title VII prohibits discrimination on the basis of sexual orientation and finding in favor of the plaintiff, a self-described lesbian, who was discriminated against for marrying another woman); *Zarda v. Altitude Express, Inc.*, (plurality opinion) (also holding that Title VII prohibits discrimination based on one’s sexual orientation, because it would be impossible to discriminate

against someone based on his or sexual orientation without considering that person’s sex); *Glenn v. Brumby*, (holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Equal Protection Clause following the reasoning of *Price Waterhouse*); *Rosa v. Park W. Bank & Trust Co.*, (holding that a transgender individual could state a claim for sex discrimination under the Equal Credit Opportunity Act based on *Price Waterhouse*); and *Schwenk v. Hartford*, (holding that a transgender individual could state a claim under the Gender Motivated Violence Act under the reasoning of *Price Waterhouse*).

In short, although it seems somewhat ground-breaking, *EEOC v. R.G.* actually reaffirmed long-standing precedent that gender must be completely irrelevant to employment decisions (citing *Price Waterhouse v. Hopkins*). See also, *Zarda*, (“Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular *individual* is discriminated against because of such *individual’s* sex”) (emphasis original) (internal punctuation omitted); and *Hively*, (“The Supreme Court has made it clear that a policy need not affect every woman [or every man] to constitute sex discrimination... A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.”)

### ***The Religious Freedom Restoration Act — An Excuse for Otherwise Impermissible Sex Discrimination?***

The *R.G.* court next addressed the funeral home’s argument that it should not have to comply with Title VII because of the Religious Freedom Restoration Act (RFRA) (which the district court had relied upon to find in the funeral home’s favor), and certain amici briefs which urged the Sixth Circuit to hold that the “ministerial exception” rooted in the First Amendment’s religious protections did not require the funeral home to employ Ms. Stephens against Rost’s religious objections to her transgender status. The court rejected both arguments.

First, the court noted that in order for the ministerial exception to exempt an employer from complying with Title VII’s prohibition against sex discrimination, the employer has to be a religious institution and the employee must be a ministerial

employee (citing *Conlon v. InterVarsity Christian Fellowship/USA*). Here, although the primary owner and operator of the funeral home (Rost) was a devout Christian, the funeral home itself “has virtually no religious characteristics.” The funeral home was not affiliated with any church, its articles of incorporation do not avow any religious purpose, employees are not required to hold any particular religious views, its rooms were not decorated with any religious figures for the purpose of not offending people of different religions, and the funeral home is open on Christian holidays (i.e. Easter).

Similarly, the court rejected the notion that Ms. Stephens was a “ministerial employee.” Ms. Stephens’s title, Funeral Director, conveyed a purely secular function, and her job duties also included mostly secular tasks (making contact with the deceased’s family members, coordinating removal of the deceased’s remains to the funeral home, introducing other staff to the family members, coaching the family through the viewing and greeting of guests, and coordinating the “final farewell”). This, the court explained, was a “far cry” from the employee’s duties at issue in *Conlon*, which included assisting others in building a personal spiritual relationship with God (citing *Conlon*).

Next, the funeral home claimed that enforcement of Title VII would violate the RFRA because having to employ a transgender individual would violate Rost’s sincerely held religious beliefs. By way of background, the RFRA prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individuals’ religious exercise and is not the least restrictive way to further a compelling government interest. Here, the funeral home argued that having a biologically male employee dress and present as a woman would hinder the funeral home’s purpose of assisting grieving family members in the healing process, and/or that it would “pressure Rost to leave the funeral ministry and end his ministry to grieving people.” The Sixth Circuit expressly rejected these arguments as well.

The Sixth Circuit noted that the funeral home’s first argument—that Ms. Stephens would present a distraction to grieving families—was based on presumed biases. There was no evidence in the record as to how Ms. Stephens would look as a woman

in business attire (since Rost admitted that he had never seen Stephens in anything other than traditionally male attire). And, as a matter of law, the court held that an employer cannot justify sex discrimination based on customers' presumed biases (of which there was no actual evidence in the record). ("Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.") (citing *Fernandez v. Wynn Oil Co.*).

Next, the Sixth Circuit rejected the funeral home's argument that employing Stephens as or after she transitioned to female would substantially burden Rost's exercise of his religion. The court explained that "requiring the funeral home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, permits employees to wear Jewish head coverings for Jewish services, and even testified that he is *not* endorsing his employee's religious beliefs by employing them."

In short, the court concluded, "the fact that Rost believes that he is being compelled to make such an endorsement does not make it so." Finally, the court explained that the EEOC's enforcement of Title VII's prohibition against sex discrimination was the least restrictive means of enforcing its compelling government interest and therefore survived strict scrutiny and was an alternative basis upon which to grant summary judgment in favor of the EEOC.

### **Best Practices for Employers Following R.G., Zarda, Hively, and Others**

Unless and until the United States Supreme Court grants certiorari in one of these cases (or one like it), the law appears to be shifting to a clear recognition that both sexual orientation and being transgender are protected under Title VII's prohibition against discrimination based upon an employee's sex. Employers in Kentucky and elsewhere should take note, along with the following steps to affirm that their employment practices are in line with the current law.

First, an employer should draft and distribute clear employment policies prohibiting discrimination based upon any employee's sex, including but not limited to, an employee's sexual orientation and/or status as a transgender employee. This seems basic, but it is a necessary first step to ensure that all employees are on the same page as to the scope of the employer's commitment to prevent discrimination based on any employee's sex. Also, the reviewing of old policies or the drafting of new policies can serve as a good refresher or training opportunity for managers or supervisory employees who may not have had the benefit of such training (or who received training that is now outdated).

Second, the employer should provide anti-discrimination training to managers and supervisors which clearly states that no employee shall be discriminated against on the basis of his or sex, including but not limited to, sexual orientation and/or transgender status. Again, this seems basic but, until recently, there was a good faith dispute as to whether employers could in fact discriminate against an employee based upon his or her sexual orientation/transgender status.

In light of *R.G.* and other similar recent decisions, there no longer appears to be any question that an employer will violate Title VII if it discriminates against an employee on the basis of his or her sexual orientation or transgender status. Far too often, an employer's written policies are not clearly communicated to middle-level management staff, who may be the ones directly involved in the discipline and/or termination of other employees.

Next, an employer's written policies related to sex discrimination should have a clear reporting process, in the event any employee feels he or she has been discriminated against on the basis of sex. The employer should also have clear written guidelines about how sex discrimination complaints will be investigated and addressed, and managers/supervisors should be well-trained on those steps so that all complaints are investigated and addressed in a uniform manner.

Any complaint that an employee has been treated differently because of his or her sex (regardless of whether the complaint involves sexual harassment, discrimination based on sexual orientation, or discrimination based on being transgender) should

be seriously investigated and evaluated so that the employer can address and correct any such discrimination occurring within its workforce.

Finally, it is rare that an employer will be able to justify discrimination based on sex by invoking the RFRA or a "ministerial exception" under the First Amendment. As the *R.G.* court reaffirmed, the ministerial exception is a narrow exception that only applies to religious institutions and employees with ministerial job duties. Moreover, an employer cannot rely upon the RFRA to justify sex discrimination simply because it disagrees with an employee being transgender and/or their sexual orientation. Having an employee who is transgender or homosexual does not substantially burden an employer's right to exercise of religion simply because the employer's religion teaches that homosexuality and/or being transgender is a sin. Instead, that is arguably the very purpose of Title VII's prohibition of sex discrimination—protect individual employees in the face of such beliefs, however sincerely held they may be.

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