

Title VII Prohibits Employment Discrimination Based on Gender Identity - So Says the 6th Circuit

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On March 7, 2018, the Sixth Circuit Court of Appeals held Title VII of the Civil Rights Act of 1964 prohibits “sex” discrimination based on an employee’s gender identity or transitioning between sexes. This decision, *EEOC & Aimee Stephens, Intervenor v. R.G. & G.R. Harris Funeral Homes*, makes the Sixth Circuit the first federal appellate court to squarely hold so. Two other federal circuit courts, the Second Circuit in *Zarda v. Altitude Express, Inc.*, and the Seventh Circuit in *Hively v. Ivy Technical Community College of Indiana*, recently decided a closely connected issue that “sex” discrimination includes discrimination based on “sexual orientation,” on which the *Eleventh Circuit* recently reached the opposite decision. With these multiple recent and split decisions on what Title VII’s definition of “sex” means, the issue is begging for the United States Supreme Court’s review.

In *Stephens*, a funeral director, born biologically male, presented as a man upon starting employment at a funeral home that was unaffiliated with any particular religion. Stephens told the funeral home’s owner and operator that she struggled with gender identity disorder her entire life and she intended to transition from male to female with surgery and present as female at work. The funeral home discharged her from employment shortly after. Stephens filed a charge with the EEOC. The EEOC brought a lawsuit on behalf of Stephens based on her discharge and the funeral home’s gender-specific dress code. The funeral home argued it did not discriminate against Stephens because its sex-specific dress code applied equally to male and female employees and that continuing to employ Stephens would substantially burden its sincerely held religious beliefs under the Religious Freedom Restoration Act (RFRA). The district court sided with the funeral home’s argument that transgender status is not a protected characteristic under Title VII and that RFRA protected the funeral home’s religious exercise.

The Sixth Circuit disagreed, concluding the funeral home engaged in unlawful “sex” discrimination. The Sixth Circuit discussed *Price Waterhouse v. Hopkins*, where the Supreme Court decided in 1989 that discrimination claims under Title VII could be based on “failure to conform to gender norms” and decided Stephens experienced exactly that-discrimination because she was going to dress and present as a female. The Court narrowed the issue to whether Stephens could be discharged from employment simply because she refused to conform to the funeral home’s idea of her sex, even though she intended to comply with her employer’s dress code. The Court stated: “We ... hold that discrimination on the basis of transgender and transitioning status violates Title VII ... 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.” The funeral home’s claimed religious beliefs were no defense under Title VII or RFRA, as “tolerating Stephens’ understanding of her sex and gender identity is not tantamount to supporting it.”

Following this decision, employers in states covered by the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) should note that transgender employees now do not have to rely on only sex stereotyping or gender nonconformity theories when bringing a discrimination case. Employers should also note that the RFRA may not be a defense. All employers should consider contacting legal counsel to review whether their employment policies and procedures comply with current federal, state, and local laws. To speak with a Benesch attorney about reviewing your company's policies and procedures, please contact an attorney in Benesch's [Labor and Employment Practice Group](#).

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