

Sixth Circuit Delivers One-Two Punch Knocking Out Transgender Discrimination

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The U.S. Court of Appeals for the Sixth Circuit ruled on March 7 that employer R.G. & G.R. Harris Funeral Homes unlawfully discriminated on the basis of sex when it fired a transgender employee after she informed the company that she would begin presenting consistent with her gender identity. In so doing, the court emphatically rejected the employer's defense invoking religious liberty to discriminate on the basis of sex and other protected minorities. On the heels of the Second Circuit's decision in [Zarda v. Altitude Express](#), this case represents a further affirmation that existing civil rights laws protect LGBTQ employees from both gender identity and sexual orientation discrimination.

EEOC v. R.G. & G.R. Harris Funeral Homes featured the story of Aimee Stephens, a transgender woman who worked as a funeral director in Michigan. After presenting as male since she began employment, she informed her supervisor in 2013 that she had a gender identity disorder and planned to transition so that she could begin expressing consistent with her identity as a woman. The company then terminated her. Her supervisor testified that he terminated Stephens because "he was no longer going to represent himself as a man," and because he believes that gender transition "violat[es] God's commands" because "a person's sex is an immutable God-given fit."

The EEOC sued on Stephens' behalf in federal district court in Michigan, alleging discrimination in violation of Title VII. The district court ruled that the employer had discriminated against Stephens on the basis of sex because it engaged in sex stereotyping, but that her employer asserted a sufficient defense under the Religious Freedom Restoration Act ("RFRA"). According to the lower court, RFRA provides a defense to a private employer that terminates an employee because of a sincerely held religious belief. On appeal, a panel of the Sixth Circuit disagreed.

The Sixth Circuit agreed with the district court that Title VII bars employment discrimination against transgender people, holding that it violated Title VII for two reasons. First, as the panel stated, transgender discrimination amounts to gender stereotyping, which the Supreme Court has held violates Title VII: "[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align." Second, transgender discrimination is inherently sex discrimination. In other words, if an employer fires an employee based on her status as a transgender individual, it is "motivated, at least in part, by the employee's sex."

But, the Sixth Circuit parted ways with the district court on the issue of whether the RFRA permitted the employer's discrimination. As the court noted, RFRA mandates that a "substantial burden" on "religious exercise" must be "in furtherance of a compelling government interest" and "the least restrictive means of furthering" that interest. The employer claimed two substantial burdens in this case: (1) the presence of a transgender employee would cause distractions in the operation of the business because family members of the deceased would not approve, and (2) that it would force the supervisor to leave the company because he asserted that his religious beliefs do not permit him to work with a transgender person.



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The court rejected both of these claims, finding that neither posed a substantial burden on the employer. As to the first, the court reminded the company that employers cannot refuse to comply with Title VII because of customers' "presumed biases." Second, the court found that allowing Stephens to keep her job would not substantially burden the business. "[T]olerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it." Stephens did not ask her employer to endorse her, to help or sponsor her transition, or to change its religious beliefs concerning the immutability of sex; she only sought to remain employed and present consistent with her gender identity as it permits all other employees to do. Allowing her to remain employed did not "substantially burden [the employer's] religious practice."

To further support its analysis, the court went on to rule that RFRA did not trump Title VII under the other essential elements of a RFRA defense - (1) whether the government has a "compelling government interest" and (2) that it is using the "least restrictive means" to further that interest. The court found that preventing employment discrimination on the basis of sex clearly qualifies as a "compelling interest." The court also had no difficulty finding that Title VII's prohibition on sex discrimination represents the "least restrictive means" of forbidding sex discrimination. Were the court to reach the opposite conclusion, it would have cut out the heart of Title VII and provided a license to discriminate against minority populations under the guise of religious liberty.

While the Supreme Court has never expressly endorsed the notion that Title VII protects transgender employees, courts have been unequivocal in their interpretation of Title VII as inclusive of transgender-based discrimination. This case is one more guidepost along that road. Just as we cautioned in our recent posts about the [Second](#) and [Seventh](#) Circuit decisions on sexual orientation discrimination, employers operating in states within the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee) should ensure that their non-discrimination and non-harassment policies and training materials are up to date and that they specifically forbid discrimination against transgender individuals. Employers in other states should be sure to check both the federal case law and applicable state statutes, as a number of states have enacted anti-discrimination statutes explicitly protecting employees from gender identity and gender expression discrimination. Even in states without such laws, protecting employees from gender identity and gender expression discrimination is just good HR practice.

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