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Federal Appellate Court Finds That Title VII Bans Gender Identity Discrimination

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Summary

The US Court of Appeals for the Sixth Circuit ruled on March 7, 2018, that workplace discrimination on the basis of gender identity and gender expression violates Title VII of the Civil Rights Act of 1964. The language of Title VII does not expressly prohibit discrimination on the basis of gender identity. However, the US EEOC has taken a broad approach to enforcing Title VII's prohibition on sex discrimination, arguing that it includes both gender identity and sexual orientation.

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Civil Rights
Labor & Employment
Litigation / Trial Practice
6th Circuit (incl. bankruptcy)

In Depth

On March 7, 2018, the US Court of Appeals for the Sixth Circuit (covering Kentucky, Michigan, Ohio and Tennessee) ruled that workplace discrimination on the basis of gender identity and gender expression violates Title VII of the Civil Rights Act of 1964 (Title VII).

The language of Title VII does not expressly prohibit discrimination on the basis of gender identity. However, the US Equal Employment Opportunity Commission (EEOC) has taken a broad approach to enforcing Title VII's prohibition on sex discrimination, arguing that it includes both gender identity and sexual orientation. The 6th Circuit previously ruled in 2004 that gender identity discrimination violates Title VII as a form of prohibited sex stereotyping in *Smith v. City of Salem*. The 10th Circuit later held that gender identity discrimination is not prohibited sex discrimination in the 2007 case *Etsitty v. Utah Transit Authority*.

The 6th Circuit's recent decision in *EEOC v. RG and GR Harris Funeral Homes, Inc.* expands its previous decision by allowing plaintiffs to bring claims of discrimination on gender identity alone, without making arguments about gender stereotyping, and sets up a more direct circuit split with the 10th Circuit. The 6th Circuit reasoned that any discrimination on the basis of gender identity was inherently based on impermissible gender stereotyping.

The plaintiff in the case, a funeral home director who was born male, was terminated after informing her employer that she suffered from gender dysphoria and would begin transitioning by dressing and presenting as a woman. The employer admitted that he fired the plaintiff because of her gender identity, but argued that Title VII should not be enforced against the funeral home because it would constitute an unjustified substantial burden upon the employer's sincerely held religious beliefs in violation of the Religious Freedom Restoration Act (RFRA). The 6th Circuit rejected this argument, reasoning that the employer's religious exercise would not be substantially burdened by continuing to employ the plaintiff without discriminating against her on the basis of her gender identity.

The *Harris* decision follows a current trend of appellate courts that have broadly construed the meaning of "sex" discrimination to protect against classes outside of the traditional male or female context. Indeed, the 2nd Circuit (in *Zarda v. Altitude Express, Inc.*) and the 7th Circuit (in *Hively v. Ivy Tech Cmty. Coll. of Indiana*) both recently held that Title VII prohibits sexual orientation discrimination.

As a result of these decisions, employers may see increased litigation in the area of gender identity and sexual orientation discrimination. To protect against potential lawsuits, employers should consider updating their

nondiscrimination policies to prohibit discrimination on the basis of sexual orientation, gender identity and gender expression. In addition, employers should perform gender identity and sexual orientation harassment training for employees and managers.

The *Harris* decision also raises potential issues for employee benefit plans. Although the Employee Retirement Income Security Act of 1974, as amended (ERISA) generally preempts state laws that relate to employee benefit plans, ERISA does not preempt other federal laws, including Title VII. Employers should consider whether any of their employee benefit plans discriminate against transgender or transitioning employees (*e.g.*, broadly excluding gender transition treatments from coverage under a self-funded medical plan). Such distinctions may be ripe for legal action as a result of the decision and the EEOC's ongoing enforcement efforts.