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The LGBT Employment Rights Tipping Point (EEOC v. R.G & G.R. Harris Funeral Homes, Part 1)

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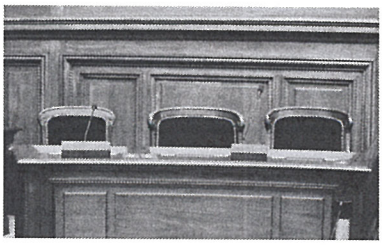
by Katie Eyer, Associate Professor at Rutgers Law School



Professor Eyer's Issue Brief on this subject,* **Sex Discrimination Law and LGBT Equality *is available on the ACS website. A separate blog post by Professor Eyer addresses the Sixth Circuit's analysis of the RFRA defense raised by the employer in this case, and is available* ***here****.*

Almost 15 years ago, the Sixth Circuit became the first Circuit Court in the country to find that discrimination against a transgender employee was sex discrimination in violation of Title VII. In remarkably straightforward reasoning for its time, the Court observed that:

> After *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.
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> *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004)

On Wednesday of this week, in the case of *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Sixth Circuit again showed itself to be a leader in the area of LGBT employment rights. Rejecting arguments that *Smith* should be narrowly confined—and that anti-transgender discrimination was not itself sex discrimination—the Court concluded that, to the contrary "discrimination on the basis of transgender and transitioning status" is, categorically, sex discrimination. Noting that "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 Court found that "[t]his in and of itself" confirms that discrimination based on transgender status is a form of sex discrimination. The Court also observed that the same result would be required by analogy to Title VII's prohibition on religious conversion discrimination (so too discrimination based on a "change in....sex" is prohibited), as well as by Title VII's gender stereotyping proscriptions (since "transgender or transitioning status constitutes an inherently gender non-conforming trait").

Remarkably, the Court in *Funeral Homes* not only solidified its protections for transgender employees, but also laid the groundwork for the abandonment of the Sixth Circuit's case-law rejecting the claims of *gay* employees for protections under Title VII. Unlike the Sixth Circuit's early recognition that anti-transgender discrimination was a form of sex discrimination, the Circuit's initial response to the sex discrimination claims of gay employees was to reject such claims as simply attempts to "bootstrap" protections for gay employees into Title VII. *See Vickers v. Fairfield Medical Center*, 435 F.3d 757 (6th Cir. 2006). *Funeral Homes*, responding to arguments of the employer that *Vickers* should be applied to limit the scope of *Smith*, noted that, under circuit precedent, *Vickers* need not be followed if it was inconsistent with the earlier decision in *Smith* (and another similar gender identity case decided before *Vickers*, *Barnes v. City of Cincinnati*). Concluding that *Vickers* was inconsistent with these earlier precedents, the Court held expressly in *Funeral Homes* that "[t]he *Vickers* court's efforts to develop a narrower rule are...not binding in this circuit"—essentially inviting the overruling of *Vickers*, without the need for *en banc* proceedings.

Funeral Homes is important in its own right, for the progress it brings to LGBT employment equality in the Sixth Circuit. But perhaps what is most significant and striking about *R.G. & G.R. Harris Funeral Homes* is just how different the legal landscape looks today as compared to when the Sixth Circuit broke new ground in *Smith v. City of Salem* in 2004. In the last year alone, there have been four major circuit decisions, two of them *en banc*, finding sexual orientation and gender identity to be categorically a form of sex discrimination prohibited by the federal civil rights laws. *See* **here**, **here**, **here**, and **here**; *see also Franchina v. City of Providence*, 881 F.3d 32, 54 n.19 (1st Cir. 2018) (acknowledging that the "tide may be turning" with respect to sex discrimination protections for LGBT employees). There have been no circuit decisions reaching the opposite conclusion

based on reasoned analysis—rather, the only circuit decisions to come out the other way have simply found themselves bound by circuit precedent (and two of the three were later overturned *en banc*).

The moment that we stand at vis-à-vis employment rights for the LGBT community has thus begun to look quite a lot like the tipping point for marriage equality in the years leading up to *Obergefell v. Hodges*. As the "common sense" assumptions of the correctness of LGBT inequality have been stripped away, the logic of LGBT legal claims to equality have made the outcomes of such cases increasingly inexorable. It has always been impossible to discriminate based on sexual orientation or gender identity without also discriminating based on sex. In an era when Courts can no longer dismiss such sex discrimination arguments out of hand, it is unsurprising that the legal recognition of this obvious truth has increasingly come to seem inevitable.

Federal Appeals Court Rules for Transgender Funeral Director in Title VII Discrimination Suit

Posted on: March 11th, 2018 by Art Leonard No Comments

A unanimous three-judge panel of the U.S. Court of Appeals for the 6th Circuit ruled on March 7 in Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 2018 WL 1177669, 2018 U.S. App. LEXIS 5720, that a Michigan funeral home violated federal anti-discrimination law by terminating a funeral director who announced that she would be transitioning during her summer vacation and would return to work as a woman. The 6th Circuit has appellate jurisdiction over federal cases from Michigan, Ohio, Kentucky and Tennessee.

Rejecting a ruling by U.S. District Judge Sean F. Cox that the funeral home's action was protected by the federal Religious Freedom Restoration Act (RFRA), Circuit Judge Karen Nelson Moore wrote for the court that the government's "compelling interest" to eradicate employment discrimination because of sex took priority over the religious beliefs of the funeral home's owner.

This is the first time that any federal appeals court has ruled that RFRA would not shelter an employer from a gender identity discrimination claim by a transgender plaintiff. Although the 6th Circuit has allowed Title VII claims by transgender plaintiffs in the past under a "gender stereotype" theory, this is also the first time that the 6th Circuit has explicitly endorsed the Equal Employment Opportunity Commission's conclusion that gender identity discrimination is a form of sex discrimination, directly prohibited by Title VII. Judge Moore drew a direct comparison to a Title VII decision by the 7th Circuit in Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017), which held similarly that sexual orientation discrimination is a form of sex discrimination, thus potentially joining in the widening split of federal appellate courts over a broad construction of Title VII to extend to both kinds of claims.

Alliance Defending Freedom's involvement as volunteer counsel for the funeral home makes it highly likely that the Supreme Court will be asked to review this ruling.

The lawsuit was filed by the EEOC, which sued after investigating Aimee Stephens' administrative charge that she had been unlawfully terminated by the Michigan funeral home. After the district court ruled in favor of the funeral home, the EEOC appealed to the 6th Circuit and Stephens, represented by the ACLU, was granted standing to intervene as co-plaintiff in the appeal.

"While living and presenting as a man," wrote Judge Moore, "she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc., a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work."

Rost identifies himself as a Christian who espouses the religious belief that "the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if he were to permit one of the Funeral Home's funeral directors to deny their sex while acting as a representative of the organization" or if he were to "permit one of the Funeral Home's male funeral directors to wear the uniform for female funeral directors while at work."

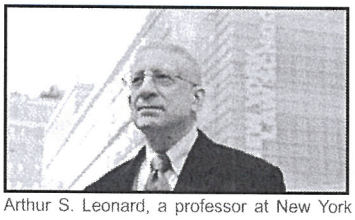
"In particular," related Judge Moore, "Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit 'in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.'"

As such, Rost claimed that his company's obligation to comply with Title VII should be excused in this case because of the later-enacted Religious Freedom Restoration Act (RFRA), which provides that the federal government may not substantially burden a person's free exercise of religion unless it has a compelling justification for doing so, and that the rule the government seeks to apply is narrowly tailored to burden religious practice no more than is necessary to achieve the government's goal.

The funeral home moved to dismiss the case, arguing that Title VII does not ban discrimination against a person because they are transgender or transitioning, that the funeral home could reasonably require compliance with its dress code, and that requiring the funeral home to allow a "man dressed as a woman" to serve as a funeral director would substantially burden the funeral home's free exercise of religion, as defined by Rost, and violate its rights under RFRA.

Prior to the Supreme Court's 2014 decision, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, there was no Supreme Court authority for the proposition that a funeral home, or any other for-profit business, could claim to "exercise religion," but in that case the Court ruled that because business corporations are defined as "persons" in the U.S. Code, they enjoy the same protection as natural persons under RFRA. At least in the case of a closely-held corporation such as Hobby Lobby, with a small group of shareholders who held the same religious beliefs on the issue in question – a federal regulation requiring that employer health plans cover various forms of contraception to which Hobby Lobby's owners took exception on religious grounds – the corporation was entitled to protection under RFRA based on the religious views of its owners. The Harris Funeral Home is analogous to Hobby Lobby Stores, albeit operating on a smaller scale, so Rost's religious views on gender identity and transitioning can be attributed to the corporation for purposes of RFRA.

Interestingly, this would not have been an issue in the case had Stephens brought the lawsuit on her own behalf, without the EEOC as a plaintiff. The 6th Circuit has interpreted RFRA to impose its restriction on the federal



government but not on private plaintiffs suing to enforce their rights under federal statutes. Since EEOC is the plaintiff, however, this is a case of the government seeking to impose a burden on the free exercise of religion by a business corporation, and RFRA is implicated.

District Judge Cox, bound by 6th Circuit precedent to find that Stephens had a potentially valid discrimination claim under Title VII (see Smith v. City of Salem, Ohio, 378 F. 3d 566 (2004)), nonetheless concluded that ordering a remedy for Stephens would substantially impair the Funeral Home's rights under RFRA, granting summary judgment to the funeral home. In another contested issue in the case, Judge Cox ruled that the EEOC could not pursue in this lawsuit a claim that the Funeral Home's policy of paying for male employees' uniforms but not for female employees' uniforms violated Title VII's sex discrimination provision. Cox held that this claim did not grow naturally out of the investigation of Stephens' discrimination charge, and so must be litigated separately.

The 6th Circuit reversed on both points. As to the uniform issue, the Court found that the EEOC's investigation of Stephens' discrimination claim naturally led to investigating the company's uniform policy, since the question of which uniform Stephens could wear was directly involved in Rost's decision to terminate her. The court reversed the summary judgment and remanded the question back to the district court to determine whether the uniform policy, which the funeral home has since modified to provide some subsidy for the cost of women's uniforms, violates Title VII.

More significantly, the court found that Judge Cox erred on several key points in his analysis of the company's summary judgment motion.

Cox had determined that the 6th Circuit does not recognize gender identity claims under Title VII, as such, but in rejecting a prior motion to dismiss the case had concluded that Stephens could proceed on the theory that she was fired for failing to conform to her employer's stereotype about how men are supposed to present themselves and dress in the workplace. Rost stated in his deposition that he objected to men dressing as women – which is how he views Stephens in light of his religious belief that gender identity is just a social construct that violates God's plan and not a reality.

After reviewing the court's prior transgender discrimination decisions, Judge Moore concluded that the EEOC's view of the statute to cover gender identity discrimination directly, without reference to sex stereotypes, is correct. "First," she wrote, "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."

She referred to the 7th Circuit's Hively decision, a sexual orientation case, which employed the same reasoning to find that Title VII covers sexual orientation claims. "Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens' sex impermissibly affected Rost's decision to fire Stephens."

The court also referred to a landmark ruling by the U.S. District Court in the District of Columbia, Schroer v. Billington, 577 F. Supp. 2nd 293 (D.D.C. 2008), which allowed a transgender discrimination claim against the Library of Congress, which had withdrawn an employment offer when informed that the applicant was transitioning.

And, of course, the court noted the Supreme Court's Price Waterhouse v. Hopkins ruling (490 U.S. 228 (1989)), stating that Title VII requires "gender" to be "irrelevant to employment decisions." Moore wrote, "Gender (or sex) is not being treated as 'irrelevant to employment decisions' if an employee's attempt or desire to change his or her sex leads to an adverse employment decision."

Of course, Moore noted, transgender discrimination implicates the sex stereotype theory as well. Referring to Smith v. City of Salem, she wrote, "We did not expressly hold in Smith that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much – both by this circuit and others," and then proceeded to say as much! "Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait."

In light of this holding, the funeral home had to be found in violation of the statute unless it was entitled to some exception or some affirmative defense. One argument made in an amicus brief in support of the funeral home suggested that a person employed as a funeral director could be covered by the constitutionally-mandated ministerial exception recognized by the Supreme Court in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012). The Supreme Court said that it is a component of free exercise of religion that if somebody is being employed to perform religious functions, the government could not dictate the hiring decision. The court rejected this defense, noting that the funeral home has conceded that it is not a "religious organization" and was not claiming the "ministerial exception" for any of its employees. Furthermore, even if the funeral home tried to claim the exception, the court found it would not apply to the position of a funeral director in a for-profit funeral home business. Stephen was not employed to serve a religious function, and the duties of a funeral directly only incidentally involved any religious function in the way of facilitating participation of religious funeral celebrants.

Turning to the RFRA defense, the court first dispensed with the argument that as Stephens had intervened as a co-plaintiff, RFRA had been rendered irrelevant because this was no longer purely a government enforcement case. The EEOC remains the principal appellant in the case, and the court would not dismiss the RFRA concern on that basis.

However, the court found, significantly, that requiring the funeral home to employ Stephens after her transition would not impose a "substantial" burden within the meaning of RFRA. The funeral home argued that the "very operation of the Funeral Home constitutes protected religious exercise because Rost feels compelled by his faith to serve grieving people through the funeral home, and thus requiring the Funeral Home to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with – and thus impose a substantial burden on – the Funeral Home's ability to carry out Rost's religious exercise of caring for the grieving."

Rost suggested two ways this would impose a substantial burden. First, he suggested, letting Stephens dress as a woman "would often create distractions for the deceased's loved ones and thereby hinder their healing process (and the Funeral Home's ministry)," and second, "forcing the Funeral Home to violate Rost's faith would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." The court did not accept either of these as "substantial within the meaning of RFRA."

For one thing, a basic tenet of anti-discrimination law is that businesses may not rely on customer preferences or biases as an excuse to refuse to employ people for a reason forbidden by Title VII. Courts have ruled that even if it is

documented that employing somebody will alienate some customers, that cannot be raised as a defense to a valid discrimination claim. "We hold as a matter of law," wrote Moore, "that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."

The court rejected Rost's argument that the EEOC's position put him to the choice of violating his religious beliefs by, for example, paying for a women's uniform for Stephens to wear, or otherwise quitting the funeral business. The court pointed out that there is no legal requirement for Rost to pay for uniforms for his staff. This is distinguishable from the Hobby Lobby case, where the issue was a regulation requiring employers to bear the cost of contraceptive coverage. Further, wrote Moore, "simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA," because "as a matter of law, tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it."

Since the court found no substantial burden, it did not necessarily have to tackle the question of the government's justification for imposing any burden at all. But with an eye to a likely appeal of this case, the court went ahead to determine whether, if it is wrong about this and the Supreme Court were to find that this application of Title VII to Rost's business does impose a substantial burden, it passes the strict scrutiny test established by RFRA.

As to this, the court reached perhaps its most significant new ruling in the case: Having identified gender identity claims as coming within the ambit of sex discrimination claims, the court had to determine whether the government has a compelling interest and that enforcing Title VII is the least intrusive way of achieving that interest. Even the Funeral Home was willing to concede that on a general level the government has a compelling interest, expressed through Title VII, in eradicating sex discrimination in the workplace, but the Funeral Home argued that interest did not justify this particular case, compelling it to let a man dress as a woman while working as a funeral director. "The Funeral Home's construction of the compelling-interest test is off-base," wrote Moore. "Rather than focusing on the EEOC's claim – that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior – the Funeral Home's test focuses instead on its defense that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies." The question, according to the court's interpretation of Supreme Court precedents, is whether "the interests generally served by a given government policy or statute would not be 'compromised' by granting an exemption to a particular individual or group."

"Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person – Stephens – to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce." And, continued Moore, "here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex."

The court specifically rejected the Funeral Home's argument that its religious free exercise rights should take priority as being derived from the 1st Amendment, because that would go directly against Supreme Court precedent, which has rejected the idea that individuals and businesses generally enjoy a 1st Amendment right to refuse to comply with laws because of their religious objections. Congress did not have authority, in the first version of RFRA that it passed and that was invalidated by the Supreme Court, to overrule a Supreme Court decision. What RFRA does is to create a statutory right, not to channel a constitutional right, and the statutory right is circumscribed to cases where a federal law imposes a substantial burden on free exercise without having a compelling justification for doing so. This does, not, according to the 6th Circuit, elevate a business's free exercise rights above an individual's statutory protection against discrimination. (Indeed, Justice Samuel Alito said as much in his Hobby Lobby opinion for the Supreme Court, albeit in the context of race discrimination.)

Finally, as required by RFRA, the court found that requiring compliance with Title VII was the least restrictive means available for the government to achieve its compelling interest in eradicating employment discrimination because of sex. The district court had suggested that the EEOC could pursue a less restrictive alternative by getting the parties to agree to a gender-neutral uniform for the workplace, thus removing Rost's objection to a "man dressed as a woman." "The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire," wrote Judge Moore. "Though Rost does repeatedly say that he terminated Stephens because she 'wanted to dress as a woman' and 'would no longer dress as a man,' the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation." It was not just about the uniforms.

The court could have reversed the summary judgment and sent the case back to the district court to reconsider its holding and determine whether a trial was needed, but in fact there are no material facts in dispute once one treats the 6th Circuit's opinion as presenting the law of the case on interpreting Title VII and RFRA. With no material facts to be resolved at this stage, the 6th Circuit directly granted summary judgment to the EEOC on its claim that the Funeral Home violated Title VII and is not entitled to a defense under RFRA. Stephens won on the merits, unless the Funeral Home is successful in getting the Supreme Court to take the case and reverse the 6th Circuit's decision.

The appeal was argued for the EEOC by Anne Noel Occhialinio, and for Stephens by ACLU attorney John A. Knight. Douglas G. Wardlow of Alliance Defending Freedom argued on behalf of the Funeral Home. The case attracted amicus briefs from Lambda Legal, Americans United for Separation of Church and State, Cleveland-Marshall College of Law, Private Rights/Public Conscience Project (New York) and various law firms offering pro bono assistance to amici on briefs.

Judge Moore was appointed to the court by President Bill Clinton. The other judges on the unanimous panel were Helene N. White, appointed by President George W. Bush, and Bernice W. Donald, appointed by President Barack Obama. Showing a recent trend in diversifying the federal bench, the panel was, unusually, made up entirely of female circuit judges. As a result of several appointments by President Obama, half of the active judges on the 6th Circuit are women, the only federal appellate court yet to achieve gender parity.

Tags: ACLU Foundation, Aimee Stephens, anti-transgender discrimination, Circuit Judge Karen Nelson Moore, discrimination because of gender identity, District Judge Sean Cox, Equal Employment Opportunity Commission,