

# Sixth Circuit Says Transgender Discrimination is Protected Under Title VII

## Labor & Employment Law Update

on March 15, 2018

Last week, the United States Court of Appeals for the Sixth Circuit held—for the first time—that discrimination based on transgender and transitioning status violates Title VII. Although the court has previously held that discriminating against transgender employees because of gender non-conforming behaviors constitutes gender stereotyping in violation of Title VII, this decision takes it one step further—protecting all transgender and transitioning employees regardless of any outwardly observable behaviors or characteristics.

In *EEOC v. R.G. & G.R. Harris Funeral Homes*, Aimee Stephens was fired by her boss—and owner of the funeral home—after she informed him that she was transitioning from male to female. After investigating Stephens's complaint of sex discrimination, the EEOC filed a lawsuit claiming that the funeral home violated Title VII by terminating Stephens's employment because of her transgender or transitioning status and her refusal to conform to sex-based stereotypes.

The sixth circuit court of appeals reversed the trial court's decision in favor of the employer, holding that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." In reaching this conclusion, the court rejected the funeral home's argument that Title VII's definition of "sex" does not encompass transgender status, finding 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 also cited the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, which held that Title VII requires "gender to be irrelevant in employment decisions." According to the sixth circuit, "Gender (or sex) is not being treated as irrelevant . . . if an employee's attempt or desire to change his or her sex leads to an adverse employment decision."

The court also rejected the Funeral Home's argument that the Religious Freedom Restoration Act (RFRA) precludes the EEOC from enforcing Title VII against it here because doing so would substantially burden its religious exercise. Instead, the court held, as a matter of law, that:

- "[A] religious claimant cannot rely on customers' presumed biases to establish a substantial burden under the RFRA";

- “[T]olerating an employee’s understanding of her sex and gender identity is not tantamount to supporting it”; and
- “[B]are compliance with Title VII—without actually assisting or facilitating Stephens’s transition efforts—does not amount to endorsement of Stephens’s views.”

### Practical Impact

Employers in Michigan, Ohio, Kentucky, and Tennessee should immediately review and—if necessary—revise policies, procedures, application forms, or other documents to ensure that transgender status is referenced as a protected category. Employers should also consider providing training to managers and other supervisory personnel on how to appropriately respond when an employee indicates that they are transgender and/or transitioning.

The decision also has potential ramifications for employers across the United States. It is the third federal appellate court decision in the past 12 months holding that Title VII prohibits discrimination based on an individual’s LGBTQ status. The first came last year when the seventh circuit issued its decision in *Hively v. Ivy Tech Community College of Indiana* (as we previously blogged about), holding that discrimination based on sexual orientation is prohibited by Title VII. The second circuit reached the same conclusion on February 26, 2018, in *Zarda v. Altitude Express*. As courts take a more expansive view of Title VII’s protections, employers everywhere should take proactive measures to ensure they are complying with this evolving area of the law.

## Sixth Circuit Says Transgender Discrimination is Protected Under Title VII