



CLIENT ALERT

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SIXTH CIRCUIT RESURRECTS EEOC'S TRANSGENDER BIAS CLAIMS AGAINST MICHIGAN FUNERAL HOME

Continuing to Employ a Transitioning Employee Is Not a Substantial Burden on Funeral Home Owner's Exercise of His Religion

Wendy R. Hughes, Esq.

As we reported in our September 2, 2016 Alert, *Will Religious Beliefs Trump Discrimination Protection for LGBT Employees in the Workplace?*, in EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., the United States District Court for the Eastern District of Michigan dismissed the Equal Employment Opportunity Commission's (EEOC) Title VII lawsuit filed against a funeral home on the basis of the Religious Freedom Restoration Act (the RFRA). On March 7, 2018, the United States Court of Appeals for the Sixth Circuit unanimously reversed the lower court's decision and resurrected the EEOC's suit that claimed a funeral home operator violated Title VII's anti-discrimination law by terminating the employment of its funeral director after she informed him that she planned to transition from a male to a female. The Sixth Circuit ruled that the RFRA does not protect the funeral home employer because continuing to employ the transitioning employee would not, as a matter of law, substantially burden the funeral home owner's exercise of his religion. Even if it did, the court ruled that the EEOC showed that enforcement of Title VII under the circumstances was the least restrictive means of furthering the government's interest in preventing discrimination of transgender employees.

Factual Background

The EEOC brought claims against R.G. & G.R. Harris Funeral Homes, Inc. (the Funeral Home), a closely-held corporation operating three funeral homes in Michigan. Thomas Rost (Rost) and his children owned the Funeral Home with Rost owning 94.5% of the entity. Aimee Stephens (Stephens) worked for the Funeral Home as a director/embalmer and presented as a man for nearly six years. In a letter, Stephens advised Rost that she had gender identity disorder, intended to proceed with gender reassignment surgery, and would begin presenting as a female at work following her return from vacation. Stephens also informed Rost that she would adhere to the Funeral Home's dress code for female employees, which required women to dress in a skirt suit. Right before Stephens was to leave for vacation, Rost terminated her stating, "this is not going to work out." Rost admitted that he terminated Stephens's employment due to her failure to adhere to the Funeral Home's dress code for men.

On behalf of Stephens, the EEOC sued the Funeral Home asserting two Title VII claims. The first claim was for wrongful termination because Stephens was

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transgender, was transitioning from male to female, and did not conform to the Funeral Home's sex or gender-based preferences, expectations, or stereotypes. The second claim arose from the Funeral Home's alleged unlawful employment practice of providing work clothes for male, but not female, employees. The Funeral Home raised the RFRA as a defense.

District Court's Decision

On a motion for summary judgment, the district court rejected the Funeral Home's position that its enforcement of a sex-specific dress code could not constitute sex stereotyping in violation of Title VII and found there was direct evidence supporting a claim of employment discrimination on the basis of sex. Addressing the Funeral Home's defense under the RFRA, however, the district court found in favor of the Funeral Home and dismissed Stephens's claims. The court did so finding that the Funeral Home was entitled to protection under the RFRA because it was substantially burdened by the EEOC's position that Stephens, while biologically a man, was entitled to dress as a female at work under Title VII's protections against sex stereotyping. In so holding, the district court focused on Rost's sincerely held belief that it is wrong for a person to deny his "God-given sex."

Further, the district court held that the EEOC failed to show that the burden it sought was the least restrictive means of furthering the government's interest in protecting employees from gender stereotyping in the workplace. The court held that, had the EEOC been truly interested in promoting a gender-neutral

workplace, it could have suggested that Stephens dress in a pantsuit with no tie. Finally, the district court also dismissed Stephens's second claim relating to the Funeral Home's failure to provide a clothing allowance to female employees on a procedural omission. The court instructed the EEOC to file a separate charge on this claim and conduct the requisite investigation of that claim before bringing a Title VII action for this employment practice.

Sixth Circuit's Decision¹

On appeal, the Sixth Circuit reviewed the district court's decision de novo. In a unanimous decision, the Sixth Circuit agreed with the district court's finding that the Funeral Home fired Stephens because she did not conform to sex stereotypes in violation of Title VII. The appellate court explained that the fact that Stephens no longer intended to present as a man, and instead wanted to present and dress like a woman, placed her in a protected class within Title VII's sex discrimination protections under Price Waterhouse and Sixth Circuit precedent. However, the Sixth Circuit then parted ways with the district court in a number of instances.

First, the Sixth Circuit ruled that the district court erred in finding that Stephens could not pursue her claim that the Funeral Home discriminated against her "on the basis of her transgender and transitioning status." Importantly here, the Sixth Circuit held that "[d]iscrimination on the basis of transgender and transitioning status is *necessarily* discrimination on the basis of sex" and the lower court should have allowed the EEOC to prove that the Funeral Home violated Title VII when it fired Stephens due to her

¹ The case number is 16-2424.

transgender status and stated intent to transition from male to female. [emphasis added]. In so doing, the court rejected the Funeral Home's argument that, when enacting Title VII, Congress understood "sex" to mean only a person's physiological sex and reproductive role and not self-assigned gender identities. Instead, the court held that Price Waterhouse and Sixth Circuit precedent prohibit such a narrow view of Title VII.

Second, the Sixth Circuit found that the district court erred in allowing the Funeral Home to raise the RFRA as a defense to liability under the circumstances. The RFRA prohibits the government from enforcing a religiously neutral law against a person, including closely-held corporations, as ruled by the Supreme Court in Hobby Lobby, where that "law substantially burdens the person's religious exercise and is not the least restrictive way to further a compelling government interest." The Funeral Home alleged two ways that Stephens's employment would substantially burden Rost's religious exercise of serving mourners through the Funeral Home. The Sixth Circuit rejected both of them.

Specifically, the Funeral Home argued that Stephens's dressing as a woman would distract mourners from grieving and would force it to violate Rost's faith, thus forcing Rost to leave his ministry of helping grieving people. As for the first argument, the court instructed that it was based on "presumed biases" and a factual premise that was "wholly unsupported" by the record. Significantly, the court went on to hold "as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under [the] RFRA." In fact, Rost had never seen Stephens wear anything at work other than a

suit and tie. As for the Funeral Home's second argument, the court held that Rost's tolerance of Stephens's understanding of her gender identity and sex is not the equivalent of supporting it, and therefore, is not a substantial burden of Rost's religious exercise under the RFRA.

Because the Funeral Home did not establish that compliance with Title VII would place a substantial burden on Rost's religious exercise, the Sixth Circuit did not need to address whether the government pursued the least restrictive means of enforcing Title VII under the circumstances. However, in the interest of a complete record, the Sixth Circuit addressed the third way in which it departed from the lower court's summary judgment ruling. On this issue, the district court held that requiring the Funeral Home to impose a gender-neutral dress code would be a less restrictive means to enforcing Title VII. The Sixth Circuit rejected this ruling, finding that merely changing the workplace dress code would not address the discrimination Stephens was facing due to her broader intent to present as a woman at her job, and remanded the case back to the district court.

Impact of Ruling

This case is important for the LGBT community, particularly on the heels of the Second Circuit's recent opinion in Zarda v. Altitude Express, Inc., which held that Title VII prohibits discrimination in the workplace based on sexual orientation. Harris Funeral Homes is a clear message that Title VII protects all transgender employees and all gender nonconforming employees. It is also a clear message to employers that the RFRA does not justify the firing of employees just because they do not agree with their employees' notions of

gender identity. Employers in similar circumstances will need to strike a balance between their own personal religious beliefs and the needs of their employees in creating good faith accommodations. Tolerating an employee's gender identity in the workplace does not place a substantial burden on the employer under the RFRA, as a matter of law – at least not in the Sixth Circuit.

Wendy R. Hughes, Esq. is admitted to practice in Pennsylvania. She may be reached at 610-408-2013, or at whughes@rubinfortunato.com.

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