

## Publications

### **Labor and Employment Alert: Sixth Circuit Holds That Title VII Protects Transgendered Status**

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The Sixth Circuit Court of Appeals (with jurisdiction over Kentucky, Michigan, Ohio and Tennessee) recently held that Title VII of the Civil Rights Act protects transgendered (or transitioning) status. In earlier cases, the Court had held that transgendered individuals are protected by Title VII to the extent they did not conform to gender stereotypes. Now, in *EEOC v. R.G. & G.R. Harris Funeral Homes*, the Court has expressly held that transgendered and transitioning status are themselves protected characteristics. Aimee Stephens was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes in Michigan. She was terminated shortly after informing the owner that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens then filed a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC sued the Funeral Home in part for terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes in violation of Title VII. The district court found in favor of the Funeral Home, but the Court of Appeals reversed.

The Court held that Stephens was fired because of her failure to conform to sex stereotypes, which is a violation of Title VII. Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The Funeral Home's decision to fire Stephens because she was "no longer going to represent himself as a man" and "wanted to dress as a woman," "falls squarely within the ambit of sex-based discrimination."

The Court then explained the district court had erred in finding that Stephens could not assert a discrimination claim on the basis of her transgender and transitioning status. "Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." Therefore, "discrimination on the basis of transgender and transitioning status violates Title VII." The Court gave two reasons

for this.

First, according to the Court, “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.” For this proposition, the Court cited to the Seventh Circuit’s 2017 opinion in *Hively v. Ivy Tech Cmty. Coll. of Ind.*, which held that Title VII prohibits discrimination on the basis of sexual orientation. The evidence showed that the Funeral Home terminated Stephens at least in part on her desire to change her sex.

Second, “discrimination against transgender persons necessarily implicates Title VII’s proscriptions against sex stereotyping.” This is because, the Court said, “an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.” The Court rejected the argument that Congress did not have transgendered status in mind when it drafted Title VII, noting that “the drafters’ failure to anticipate that Title VII would cover transgender status is of little interpretive value.”

The Court also rejected the Funeral Home’s claim that Religious Freedom Restoration Act shielded it from liability because its sincerely held religious beliefs prevented it from employing a transgendered employee. In short, the Court concluded the Funeral Home’s religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes. “As a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens’s transition efforts—does not amount to an endorsement of Stephens’s views.” Further, the EEOC had a compelling interest in ensuring the Funeral Home complies with Title VII, and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest.

For employers in Kentucky, Michigan, Ohio and Tennessee, “discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.” The Sixth Circuit has previously held that sexual orientation in and of itself is not protected under Title VII. The reasoning in *Harris Funeral Homes* could indicate the Court’s willingness to reconsider that position and recognize sexual orientation as a protected status as well. Contact your Vorys lawyer if you have questions about protections under federal, state, and local civil rights laws.