



EMPLOYMENT LAW ALERT

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WILL RELIGIOUS BELIEFS TRUMP DISCRIMINATION PROTECTION FOR LGBT EMPLOYEES IN THE WORKPLACE? Court Dismisses EEOC's Title VII Suit Filed on Behalf of Transgender Employee on Basis of Religious Freedom Restoration Act

Wendy R. Hughes, Esq.

On September 25, 2014, the Equal Employment Opportunity Commission (the EEOC) filed its first two transgender Title VII discrimination cases in federal court. Through these cases, the EEOC hoped to establish federal court precedent supporting its position that the "sex" characteristic of Title VII extends to protect employees against discrimination based on their gender identity. Title VII makes it illegal to discriminate against a job applicant or an employee because of a person's race, color, religion, national origin or sex. Notably, gender identity is not listed as an expressly protected characteristic.

In addition to other federal laws, the EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964, which applies to all federal, state, and local government agencies as employers and to all private employers with at least 15 employees. Before any aggrieved employee can file a lawsuit alleging Title VII discrimination, the

employee must first file a charge of discrimination with the EEOC. The EEOC can decide to bring an action in court, on behalf of the charging employee, and does so in select cases, or it can issue a Notice of Right to Sue permitting the employee to file a lawsuit in court.

Prior to filing these two landmark actions in federal court on behalf of transgender employees, the EEOC had issued an historic administrative decision in Macy v. Department of Justice (April 2012), in which it ruled that discrimination based on transgender status is sex discrimination in violation of Title VII. The EEOC relied heavily on the U.S. Supreme Court's opinion in Price Waterhouse v. Hopkins (1989), and its progeny, to find that Title VII bars discrimination on the basis of gender stereotyping, not just biological sex.

In Price Waterhouse, the Supreme Court recognized that employment discrimination based on

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assumptions or beliefs about how an employee of a certain gender should dress or act is prohibited under Title VII. Since that time, the EEOC has been aggressively litigating its position that Title VII protection extends to employment discrimination based on sexual orientation and gender identity ([See our March 4, 2016 article *Got Title VII Straight?*](#)), and according to the EEOC, many federal courts have followed the reasoning in Price Waterhouse in decisions supporting discrimination protection for sexual orientation and gender identity. The EEOC's website provides a list of some of these and other decisions supporting Title VII coverage of LGBT-related discrimination.

The EEOC's attempt to resolve the issue in the federal courts through the two 2014 actions has had mixed results. One of those cases, EEOC v. Lakeland Eye Clinic, P.A. (M.D. Fla.), settled with the employer entering into a two-year consent decree, including injunctive relief and \$150,000 in monetary damages. In the other discrimination case, EEOC v. R.G. & G.R. Harris Funeral Homes Inc. (E.D. Mich.), the transgender employee did not fare nearly as well. In that case, the EEOC asserted two Title VII claims against the employer, R.G. & G.R. Harris Funeral Homes, Inc. (the Funeral Home). The first claim, wrongful termination, alleged that the Funeral Home fired Aimee Stephens (Stephens) because she was transgender, she was transitioning from male to female, and she did not conform to her employer's sex or gender-based preferences, expectations, or stereotypes. The other claim alleged that the Funeral Home engaged in unlawful employment practices because it provided work clothes to male, but not female, employees.

In an August decision, the District Court for the Eastern District of Michigan granted summary judgment in favor of the Funeral Home on the basis that it was entitled to an exemption under the Religious Freedom Restoration Act (the RFRA) from the Title VII protections being asserted by the EEOC, namely that Stephens should be permitted to dress at work in accordance with her gender, not biological, identity. Previously, the court had denied the Funeral Home's motion to dismiss on the basis "that the EEOC's complaint stated a Price Waterhouse sex/gender-stereotyping claim under Title VII." The court would not go so far as to adopt the EEOC's position that discrimination based on transgender status or gender identity alone is sex discrimination in violation of Title VII. In dismissing the action on summary judgment though, the court again recognized the Price Waterhouse precedent but found the Funeral Home was entitled to protection under the RFRA because the EEOC had failed to show that the burden it sought to impose on the Funeral Home was the least restrictive means of furthering the government's interest in protecting employees from gender stereotyping in the workplace.

Factual Background

The Funeral Home is a closely-held, for profit corporation with majority ownership (94.5%) held by Thomas Rost (Rost). Rost's children own the remaining interest in the business. The Funeral Home is not affiliated with any church and its articles of incorporation do not affirm any religious values or purpose. Rost has been the owner and President of the Funeral Home for 30 and 35 years, respectively, and is the sole officer of the corporation.

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Stephens had been employed by the Funeral Home since 2007 and served as a funeral director/embalmer for nearly six years. During all times of her employment, Stephens presented as a man, and adhered to the Funeral Home's dress code for male employees, requiring a suit, white shirt, and tie. On July 31, 2013, Stephens hand-delivered a letter to Rost stating that after nearly four years of therapy and a lifetime of internal struggle, she was diagnosed as having gender identity disorder and intended to proceed with gender reassignment surgery. First though, Stephens advised Rost that she would live and work as a full-time woman for one year and return from her August vacation wearing appropriate business attire, meaning that she would dress as a woman in accordance with the Funeral Home's dress code for female employees. That code required women to dress in a skirt suit.

Prior to Stephens leaving for vacation, Rost advised Stephens that "this was not going to work out. And that your services would no longer be needed here." Rost admitted that he terminated Stephens' employment on the basis of Stephens' failure to adhere to the Funeral Home's dress code for men. In deposition testimony, Rost claimed that had Stephens dressed as a man at work and a woman outside of work, he would not have fired Stephens.

Decision

Referring to this record, the court indicated that while it did "not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here." The court rejected the Funeral Home's argument that its enforcement of a sex-specific dress code cannot constitute sex stereotyping in violation of Title VII.

The Funeral Home cited Sixth Circuit cases permitting different grooming and dress codes based on sex, but the court noted that those cases pre-dated Price Waterhouse. The court also refused to follow post-Price Waterhouse cases outside of the Sixth Circuit because they were non-binding and because the Sixth Circuit had not yet addressed the specific issue at hand after Price Waterhouse. Based on a Sixth Circuit case after Price Waterhouse, establishing that a transgender person could have an actionable claim under Title VII, the court concluded that the Sixth Circuit would not likely allow an employer to avoid Title VII liability for sex-stereotyping by simply reducing its gender-based stereotypes to a formal written policy.

Addressing the Funeral Home's defense under the RFRA, the court noted that to successfully invoke this defense, the Funeral Home must first show that the government is substantially burdening "a person's" exercise of religion. If such a burden is shown to exist, the government must then show that the burden is in furtherance of a compelling interest and is the least restrictive means of furthering that interest. Based on the U. S. Supreme Court's ruling in Burwell v. Hobby Lobby Stores, Inc., the court readily found that, as a closely-held corporation, the Funeral Home is a "person" for purposes of the RFRA. Certainly too, the RFRA applies to a federal agency, like the EEOC, and the EEOC did not argue otherwise.

The court then found that the Funeral Home's ability to "conduct business in accordance with its religious beliefs" was substantially burdened by the EEOC's position that Stephens, while biologically a male, was entitled to dress as a female at work in accordance with Title VII protections against sex-

stereotyping. The court focused on Rost’s sincerely-held belief that a person’s biological sex is an “immutable God-given gift and that it is wrong for a person to deny his or her God-given sex.” Allowing Stephens to dress as a woman would violate God’s commands according to Rost’s religious beliefs. The court also noted that Rost had been a Christian for more than 65 years and the Funeral Home’s published mission statement included honoring “God in all that we do as a company and as individuals.” The court rejected the EEOC’s contention that the RFRA protects only specific religious activities, not beliefs, finding that the Hobby Lobby majority opinion does not support the EEOC’s view.

The court then went on to assume, without deciding, that the EEOC met its burden that protecting employees from workplace sex-stereotyping is a compelling government interest. However, the court held that the EEOC failed to meet its burden that allowing Stephens to dress as a woman at work is the least restrictive means of furthering the government’s interest in protecting employees from gender stereotyping in the workplace. The least-restrictive standard is exceptionally demanding and requires the government to show that there is no other means of achieving its desired goal without imposing a substantial burden on the objecting party’s exercise of religion.

Here, the court stated the EEOC wholly failed to address how allowing Stephens to dress as a woman is “the least restrictive means of eliminating clothing gender stereotypes at the Funeral Home” or to indicate in its briefs that it considered other solutions or potential accommodations that could work in the “unique facts and circumstances

presented here.” The court stated that had the EEOC been truly interested in promoting a gender neutral workplace it could have suggested that Stephens dress in a pants suit with no tie, as some female employees had in other business locations without any objections by Rost. Instead, the EEOC took the position that the only acceptable resolution was that Stephens be permitted to dress in a stereotypical female fashion to express her gender identity. This contention, the court said, failed to meet the RFRA’s exacting standards.

As for its second claim, the EEOC alleged that the Funeral Home engaged in improper employment practices in violation of Title VII by providing a clothing allowance to male, but not to female, employees. The court dismissed this claim without prejudice because it was not raised by Stephens and Stephens was not affected by the employment practice. The court instructed that the EEOC must file a separate charge on this claim and conduct a full investigation of that new claim before a Title VII action could be brought.

Impact of the Ruling

The impact of this ruling on the current fluid landscape of discrimination protection on the basis of sexual orientation and gender identity is not yet entirely certain. However, this recent ruling, while a setback for the EEOC’s enforcement of Title VII protections on behalf of transgender employees as a protected class, was issued under unique facts and circumstances (as noted by the court). Some of these circumstances relate to the specific composition of the litigants in this case and others relate to the arguments asserted by the EEOC as it focused on its enforcement priorities.

In some federal circuits, including the Sixth, the RFRA does not apply to litigation between private parties. As a result, it provides no relief where the plaintiff is a private individual, and not a federal agency like the EEOC. If Stephens had brought the lawsuit against the Funeral Home on her own, the RFRA would not have applied. As noted by the court, the vast majority of Title VII employment discrimination cases are brought by the charging employee, not the EEOC.

Also, an employer who does not fall under the Hobby Lobby definition of a “person” would not be able to avail itself of the RFRA’s protections. Currently, under the limited scope of Hobby Lobby, these protections seem to be available only to sole proprietorships and entities with relatively few owners. However, the Supreme Court’s majority left the door open for broader interpretation.

In addition, where the RFRA may apply, the EEOC can decide to either forego bringing an action in federal court on an employee’s behalf, although this could have a chilling effect on the EEOC’s enforcement capabilities. Alternatively, the EEOC will have to tailor its enforcement/litigation strategy to address the least restrictive means test where the RFRA is implicated. In this case, the EEOC wholly failed to take this burden into account.

Please contact Wendy Hughes at 610.408.2013 or whughes@rubinfortunato.com for more information on this article or to discuss your policies or practices regarding transgender employees.

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